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# Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage

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MAKING MARITAL RAPE VISIBLE: A HISTORY OF AMERICAN LEGAL AND  
SOCIAL MOVEMENTS CRIMINALIZING RAPE IN MARRIAGE

by

Joann M. Ross

A DISSERTATION

Presented to the Faculty of  
The Graduate College at the University of Nebraska  
In Partial Fulfillment of Requirements  
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Major: History

Under the Supervision of Professor Margaret Jacobs

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MAKING MARITAL RAPE VISIBLE: A HISTORY OF AMERICAN LEGAL AND  
SOCIAL MOVEMENTS CRIMINALIZING RAPE IN MARRIAGE

Joann M. Ross, Ph.D.

University of Nebraska, 2015

Advisor: Margaret Jacobs

This study examines the history of marital rape and related topics in the United States within the broader context of women's legal and political rights. The project demonstrates the interplay between women's activists, legislators, the criminal justice system, and an involved public necessary to change both societal and legal views on spousal rape, and eventually its criminalization in all fifty states.

Chief Justice Matthew Hale first announced the legal impossibility of rape in marriage in a seventeenth-century treatise in which he established the irrevocable consent theory, which argued that men had an absolute right to sexual relations within the bonds of marriage, and provided the foundation for a marital rape exemption. While modern case law and legal commentary questioned the veracity of Hale's presumption, it remained the basis for successful arguments against spousal rape laws for centuries in both Great Britain and the United States.

Concentrating on approaches to criminalizing marital rape in three of the fifty states, this dissertation provides a reasonable representation of the existence of the marital rape exemption in America, arguments used to maintain the exemption, and various methods used to end this form of gendered violence and gender discrimination accepted in this country until the 1970s. It explores key issues relevant to the social and

legal history of spousal rape in the United States: the rise of domestic violence and sexual assault movements that began in the late 1970s and the promulgation of rape shield laws, which provided evidentiary protections for rape victims during trial.

Ultimately, this project demonstrates several of the important victories that women made in areas of personal autonomy over their bodies, which led to the criminalization of rape in marriage. Over the course of nearly one hundred and fifty years, social and legal attitudes toward spousal rape – actually, sexual assault in general – resulted in greater legal protection for the rights of married women. The elimination of the marital rape exemption, better trained law enforcement, increased services provided by advocates, and a more informed public all contributed to increased visibility about the existence of marital rape and active responses to that crime.

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When beginning the initial work on this project, I heard repeatedly that writing a dissertation is a solitary endeavor. Those endless hours of isolation, however, were tempered by the endless encouragement and guidance provided by others. I am indebted to Dr. Margaret Jacobs, who saw the viability of my topic long before I did and was willing to take me on as an advisee, despite the many miles that separated us during much of this project. I wish to thank the other members of my committee – Drs. Katrina Jagodinsky, Jeannette Jones, and Susan Poser – for generously giving of their time and insightful feedback to help me see this through to completion. Dr. John Wunder graciously taught me that one could pursue a J.D. and Ph.D. without feeling as if one has more education than good sense. Drs. Ann Tschetter and Tonia Compton have shown me how to focus on teaching, while still pursuing my own scholarship.

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Over the last eight years, I have had the opportunity to work in two amazing environments with co-workers who inspired and supported my academic aspirations.

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On a final note, I would like to acknowledge my mother, Linda Stockton, who set a wonderful example for being a lifelong learner. She was a voracious reader through my childhood, instilling in me a love of books. Her undying love and support provided the daily encouragement I needed to complete this project.

## A NOTE ABOUT LEGAL TERMS

Because state law governs crimes related to sexual assault, each state has the authority to select the phraseology it will use to describe those criminal offenses. Throughout this dissertation, seemingly different terms may appear to describe similar offenses. For instance, California uses the term “spousal rape,” while South Carolina uses “spousal sexual battery.” While there might be a slight variation in the elements of those crimes, they refer to virtually the same offense. Three times, the phrase “forcible rape” appears. In those instances, I follow the definition provided by the FBI’s Uniform Crime Reporting (UCR) Program: “the carnal knowledge of a female forcibly and against her will.” Attempts or assaults to commit rape by force or threat of force are also included within this definition; however, statutory rape (without force) and other sex offenses are not. Finally, some states use the term marital rape, while other states use spousal rape to describe criminalized sexual actions between married partners. I use the terms interchangeably.

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**INTRODUCTION**  
**“LEGITIMIZING” MARITAL RAPE: CHANGING SOCIAL AND LEGAL**  
**ATTITUDES ABOUT SEXUAL ASSAULT IN MARRIAGE**

On October 10, 1978, Greta Rideout called the Salem Women’s Crisis Service of Salem, Oregon, to report that her husband, John, had raped her. The crisis worker advised Greta to call the police. When the police arrived, Greta reiterated her claim that her husband had raped her. On October 18, the State charged John with violating Oregon’s recently revised rape law, which did not provide an exemption for men accused of raping their wives. In 1978, Oregon was one of only three states whose rape laws did not include the common law exemption for husbands accused of raping their wives. The resulting trial was the first in the United States in which a husband faced charges of raping his wife while the couple was still living together. Held in December 1978, the trial lasted only six days; deliberations by the jury took only two-and-a-half hours. The jury of eight women and four men acquitted John Rideout because they did not feel that there was adequate evidence to support a verdict of “guilty beyond a reasonable doubt.”<sup>1</sup>

Despite the verdict, the Rideout case holds a unique position in the history of marital rape in America. Irene Frieze explained that prior to *Rideout*, “there was little discussion of marital rape by the general public or by researchers and counselors skilled in dealing with other types of rape cases.”<sup>2</sup> The Rideout trial changed that. The media paid significant attention to the Rideout case because of the novel issue it presented: was rape in marriage a legitimate crime? The case received national news coverage in print and on television. Walter Cronkite, the avuncular news anchor hailed as “the most trusted

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<sup>1</sup> Melissa Anne Bazhaw, “For Better or for Worse? Media Coverage of Marital Rape in the 1978 Rideout Trial,” Master’s thesis, Georgia State University (2008), 2-3.

<sup>2</sup> Irene Hanson Frieze, “Investigating the Causes and Consequences of Marital Rape,” *Signs* 8, no. 3 (1983), 532.

man in America,” discussed the trial on *The CBS Evening News*. National newspaper coverage included the *New York Times*, the *Chicago Tribune*, the *Washington Post*, and the *Los Angeles Times*.<sup>3</sup>

While many articles mentioned Oregon’s revised rape law, very few addressed the legal reasoning undergirding it. For example, *Rideout* revolved around such legal issues as equal protection, and yet media coverage rarely explained that equal protection for wives required the elimination of the marital rape exemption.<sup>4</sup> One article, purportedly offering to explain the “background” to the trial, made only brief reference to the underlying statute, noting that the original bill included a spousal exemption, but that legislators amended it to allow prosecution of husbands. The article, however, did quote State Senator Vern Cook, who had voted against the bill.<sup>5</sup> According to Cook, his main objection to the bill was that it absolved women of “their responsibility to avoid a situation . . . by moving out of the house” and that resulting trials would amount to nothing more than “a swearing contest between husband and wife” that would be difficult for a court to resolve.<sup>6</sup> Such arguments engaged in victim blaming and suggested that rape in marriage was nothing more than a squabble between husband and wife that did not require intervention by the criminal justice system.

Media coverage generally focused on witness testimony regarding Greta’s character, rather than offering legal commentary. Even before the trial began, headlines referenced her sexual history, her motivations for bringing the charge, and her

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<sup>3</sup> Bazhaw, “For Better or for Worse,” 3, 50.

<sup>4</sup> Lisa M. Cuklanz, *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change* (Philadelphia, PA: University of Pennsylvania Press, 1996), 53, 56.

<sup>5</sup> Robert Vernon “Vern” Cook served in the Oregon House of Representatives from 1956 until 1960 when voters elected him to the Oregon Senate. He remained in the Senate until he was defeated in the 1980 election.

<sup>6</sup> Cuklanz, *Rape on Trial*, 56.

“propensity” for lying. The trial followed a similar path. District Attorney Gary Gortmaker described the harsh reality of many rape cases: despite the perception that the defendant is on trial, “we’re going to try the victim first, the law second, and the defendant third.”<sup>7</sup> Demonstrating the attitude of many prosecutors at the time, Gortmaker openly expressed his lack of sympathy with victims of spousal rape. At the beginning of the trial, Gortmaker stated: “if it had happened in the bedroom and he didn’t beat her up, I’d agree with the other side.”<sup>8</sup> The transparency of Gortmaker’s statement illustrated the ongoing argument of domestic violence and sexual assault advocates: simply passing a law against marital rape did not instantaneously change public opinion about the wrongfulness of forced sex in marriage. Additionally, it reflected a widespread belief that to constitute rape, the victim must suffer physical injury that is observable.

As Franklin E. Zimring noted: “More than novelty made the Rideout trial . . . one of the premier media events of its time. Public reaction was heightened by the prospect of forcible sex in marriage being treated as forcible rape because the majority of the population [did] not accept the moral equivalence of the two behaviors.”<sup>9</sup> The jury’s verdict underscored the incongruity between public perception of rape and spousal rape. Editorials following the verdict attempted to explain the jury’s decision. One author stated: “The idea that marriage implies or requires perpetual consent, under all circumstances, to sex is grotesque. And a partner in a marriage must have recourse [sic] to the law when the other partner resorts to violence.”<sup>10</sup> At the same time, he and others

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<sup>7</sup> *Ibid.*, 53.

<sup>8</sup> Susan Barry, “Spousal Rape: The Uncommon Law,” *American Bar Association Journal* 66, no. 9 (1980), 1091.

<sup>9</sup> Franklin E. Zimring, “Legal Perspectives on Family Violence,” *California Law Review* 75, no. 1 (1987), 537.

<sup>10</sup> Bazhaw, “For Better or for Worse,” 63-64; G. F. Will, “When Custom Doesn’t Work Anymore,” *Washington Post* (December 28, 1978).

recognized that John Rideout faced up to 20 years behind bars if the jury found him guilty and questioned the appropriateness of such a sentence. The conflict was evident: recognizing the immorality of spousal rape, how does one determine what punishment is appropriate? Evidently, the jurors believed that a twenty-year sentence was too severe for the crime of spousal rape.<sup>11</sup> Another journalist took a varied, but related, approach, suggesting that a charge of assault and battery would have netted a very different result. She reasoned that a jury would be more likely to convict if they knew the defendant was facing six months rather than twenty years.<sup>12</sup> By focusing on relative sentencing for rape and assault and battery, both articles allude to a perception that spousal rape was not as damaging as stranger rape. Further analysis by scholar Lisa Kivett concluded: “The reluctance to punish spousal rape with penalties commensurate with other types of rape showed the continuing uncertainty that rape was, in law, even possible between husband and wife.”<sup>13</sup> Thus, members of the jury, and by extension the community at large, acknowledged the possibility of forced intimacy in marriage, but were uncertain whether it was an appropriate matter to bring before the court.

During the trial, journalists rarely approached feminist reformers for their opinions on violence in marriage. While publications on domestic violence and rape in marriage were available in the years leading up to *Rideout*, the mainstream had not accepted the arguments raised by those texts as a way to understand the dynamics of

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<sup>11</sup> The jury was not in a position to consider a sentence less than twenty years. All that they knew was that the “judge called for an acquittal or a minimum conviction of first-degree rape, with a 20-year sentence, without instructing the jury how much of the sentence the defendant would actually serve.” Barry, “Spousal Rape: The Uncommon Law,” 1091.

<sup>12</sup> Bazhaw, “For Better or for Worse,” 64; Judy Mann, “Jury in Oregon Ducked Constitutional Questions,” *Washington Post* (December 29, 1978).

<sup>13</sup> Lisa Kivett, “Sexual Assault: The Case for Removing the Spousal Exemption from Texas Law,” *Baylor Law Review* 38 (1986), 1047.

family violence. However, when given the opportunity, feminists expressed views on violence, within marriage, including rape. One woman presented an equal protection argument, explain that prior to the 1977 adoption of Oregon's revised rape statute, the law presented a problem for married women since only women separated from their husbands could bring a charge of [marital] rape. Another noted the importance of the Rideout trial: "We women have been taught that we have no choice, that [sexual submission] is our role in life, what we're supposed to do. . . . This trial is so important to make women aware they're not property, that they have choices" – the choice to say no to unwanted intimacy with their husbands, and the choice to seek legal recourse if their refusal is overcome.<sup>14</sup>

The Rideout story did not end with John's acquittal. The couple briefly reconciled, but divorced in 1979. As is common in cases of domestic violence, John's attention to Greta did not cease when their marriage legally ended. Later that year, he pled guilty to criminal trespass for breaking into Greta's home and the court sentenced John to probation. The court eventually revoked his probation, finding that John had repeatedly violated the terms that strictly prohibited further threatening communications with his ex-wife.<sup>15</sup>

Despite John Rideout's acquittal, his trial raised several issues that persisted in subsequent marital rape trials. As states passed laws that eliminated the spousal exemption to rape, legislators had to overcome the argument that current assault and battery statutes were sufficient to address cases of marital rape. When Oregon revised its

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<sup>14</sup> Cuklanz, *Rape on Trial*, 63. See, Diana Russell, *The Politics of Rape: The Victim's Perspective* (New York: Stein and Day, 1975); Del Martin, *Battered Wives* (San Francisco: Glide Publications, 1976).

<sup>15</sup> Barry, "Spousal Rape: The Uncommon Law," 1091.

rape law in 1977, it faced opposition within and outside of the legislature. The original bill would have allowed prosecution when married couples lived apart or when unmarried couples lived together; however, “the Senate Judiciary Committee amended the proposed bill to allow prosecutions regardless of marital or residential status.”<sup>16</sup> This change caused a few of the bill’s original supporters to vote against it. One state senator explained his opposition: “We don’t need another law to make assault and battery a crime. They’re confusing assault and battery with rape.”<sup>17</sup> Charles Burt, defense attorney for John Rideout, was one of the most outspoken opponents to Oregon’s rape statute. Burt addressed the issue of marital privacy when he argued that it was “a waste of the criminal court’s time to get into [the] area of [marital intimacy].” In an inflammatory remark, Burt insisted: “a woman who’s still in a marriage is presumably consenting to sex. . . . Maybe this is the risk of being married, you know?”<sup>18</sup> The Oregon legal community was quite familiar with Burt’s opposition to marital rape laws. At a dinner for the State Bar Board of Governors, attendees presented Burt with a T-shirt that read “Rapists Need Love Too.”<sup>19</sup>

As noted above, Greta’s sexual history was a primary concern throughout the trial. At the time of the Rideout trial, it was common for defense attorneys to use the victim’s sexual history to attack her credibility and the truthfulness of her claim. As a result, many victims were reluctant to report the crime or to take the case to trial. *Rideout* was no exception. The judge ruled that the defense could introduce evidence of Greta’s

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<sup>16</sup> Bazhaw, “For Better or for Worse,” 52.

<sup>17</sup> *Ibid.*, 52-53.

<sup>18</sup> Barry, “Spousal Rape: The Uncommon Law,” 1090.

<sup>19</sup> *Ibid.*

dishonesty and sexual history during the trial.<sup>20</sup> Thus, the jury heard that Greta Rideout had “sexual problems,” a topic of great interest reported by the media. The defense focused on Greta’s past abortions and a previous accusation of rape that she later recanted. The jury also heard that Greta told John that she was sexually interested in other women, although she later explained that talk of a lesbian fantasy was just to get a rise out of her husband. Burt used Greta’s recanting of the prior rape claim and the lesbian fantasy incident to challenge Greta’s truthfulness, suggesting that she was dishonest and was lying about her husband raping her.<sup>21</sup>

Because rape by a husband did not fit the cultural image of a stranger in a dark alley assaulting and raping a woman, *Rideout* also emphasized the question of whether forced sex in marriage constituted “real rape.” Perceptions of marital rape have been the subject of many studies, which gauge participant attitudes about the severity of marital rape. Many have shown that the doubts about appropriate sentencing as seen in the Rideout trial were common. A study conducted in 1999 found that eighty percent of the general population believed that husbands used force often or somewhat often to have sex with their wives, yet significantly fewer categorized such action as rape. Researchers attributed this cultural invalidation to the participants being less likely to categorize behavior as rape when there was greater evidence of prior sexual intimacy between the victim and the accused. One of the first studies used to evaluate the perceived seriousness of marital rape asked participants to evaluate the severity of a variety of crimes. Overall, participants ranked forcible rape by a former spouse as nearly equivalent to blackmail

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<sup>20</sup> Bazhaw, “For Better or for Worse,” 39.

<sup>21</sup> Bazhaw, “For Better or for Worse,” 38.

and the use of LSD, once again suggesting the perception that rape by a current or former intimate partner was not as traumatizing as stranger rape.<sup>22</sup>

Lisa Cuklanz, professor of Communication Studies at Boston College, has closely evaluated the Rideout trial and has provided commentary on why the acquittal was the only verdict that the public could have reasonably expected. To reach another verdict would have required the court, jury, and mainstream culture to move beyond traditional beliefs about rape and marriage. According to Cuklanz: “they would have had to believe that wife battering syndrome existed, that there was no significant motivation for a wife to concoct a false story of rape, that juries were no less able to decide who was telling the truth in a rape case than any other case, and that rapists were not only violent strangers but also ‘loving’ husbands.”<sup>23</sup> Evidently, the media, jury, and public at large were not willing to accept these assertions in 1978 when the Rideout case went to trial in an Oregon courtroom and, via the media, in the court of public opinion.

In 2015, debates still exist about what actions constitute “legitimate” rape and whether circumstances exist which should insulate a man from charges of raping his wife. In recent years, two politicians in Missouri found themselves in the national spotlight for comments made about “legitimate rape.” In 2012, then United States Representative Todd Akin sabotaged his bid for a seat in the Senate when he used the term “legitimate rape” in a discussion about abortion laws, specifically whether he believed that abortion was justified in the case of a rape resulting in pregnancy. Akin demonstrated his

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<sup>22</sup> The early study ranking the severity of crimes occurred in 1974, prior to the criminalization of marital rape. Therefore, participants ranked rape by a former rather than a current spouse. Jennifer A. Bennice and Patricia A. Resick, “Marital Rape: History, Research, and Practice,” *Trauma, Violence, & Abuse* 4, no. 3 (2003), 323.

<sup>23</sup> Cuklanz, *Rape on Trial*, 55.

ignorance of the female reproductive system when he suggested that a woman cannot get pregnant after being raped because “women’s bodies can tell when rape has occurred and ‘shut the whole thing down,’” thereby preventing conception. Akin’s comments raised alarms for those who interpreted his statement as victim-blaming.<sup>24</sup> Two years later, the concept of legitimate rape was still alive and well in the Show-Me State. State Representative Rick Brattin introduced a bill that would require a woman seeking an abortion to first get written permission from the father unless the pregnancy was the result of “legitimate rape.” While Brattin argued that he was not using the term in the same vein as Akin, his statement illustrated his limited understanding of rape victim behavior. *Mother Jones* was the first to quote Brattin as saying: “If there was a legitimate rape, you’re going to make a police report, just as if you were robbed. . . . That’s just common sense.” Brattin’s view of “common sense” fails to acknowledge the various reasons that women fail to report rape, which include a fear of not being believed, concern about retribution from an abuser, and public notoriety if the case proceeds to trial.<sup>25</sup> The examples above demonstrate a continuing lack of consensus within the United States about what acts constitute “legitimate rape” and whether that view of “legitimacy” is broad enough to include sexual assault within the union of matrimony.

This dissertation examines the history of marital rape and related topics in the United States, placing it in the broader context of women’s legal and political rights. With origins in the 1960s, there is today a growing body of literature that focuses on the

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<sup>24</sup> Lori Moore, “The Statement and the Reaction,” *New York Times*, August 21, 2012; Charlotte Alter, “Todd Akin Still Doesn’t Get What’s Wrong With Saying ‘Legitimate Rape,’” *Time*, July 17, 2014.

<sup>25</sup> Molly Redden, “This GOP Lawmaker Wants a Woman to Get Permission From the Father Before Having an Abortion Unless it was ‘Legitimate Rape,’” *Mother Jones*, December 17, 2014, accessed June 21, 2015, <http://www.motherjones.com/politics/2014/12/repUBLICan-wants-women-get-permission-father-having-abortion>.

legal and political rights of women in America. Similarly, since the 1970s, there has been an increase in scholarship that addresses women's rights to bodily autonomy, dealing with domestic abuse and rape. By the late 1980s and 1990s, academics began to focus on the confluence of these issues: rape in marriage. As states began to address marital rape, legislators, jurists, law enforcement, prosecutors and defense attorneys, special interest groups, and individual parties of interest engaged in sometimes-tempestuous dialogues about the meaning of marriage, power and authority within such unions, equal protection of the law, bodily integrity, and human rights. Using three states as case studies, this project will evaluate the interaction of community actors, legislators, and the judiciary to explore three different paths by which states have addressed the marital rape exemption amid shifting social attitudes about women's right to bodily autonomy.

There is a significant and growing body of literature available today on marriage, domestic violence, and rape. Less common, but no less important, is a hybrid of these issues: scholarship that addresses the history of rape within the bonds of marriage. Much of this literature has come from the disciplines of sociology, social work, and psychology. Additionally, the marital rape exemption has been the topic of narrowly focused law review articles that highlight a particular state law or court decision. What is absent from this scholarship, however, is a manuscript-length work that moves from the historical underpinnings of the marital rape exemption to a modern, multi-state review of legislative history, campaigns by women's groups, judicial activism, and public reaction.

Recent publications addressing rape have not discussed marital rape with any detail. Danielle McGuire's award winning *At the Dark End of the Street* (2011) interprets anew underpinnings of the civil rights movement. McGuire masterfully argues that the

sexual assault of African American women by white men, often not prosecuted in a court of law, motivated the activism of Rosa Parks long before the iconic day in which she refused to give up her seat on a Montgomery bus. As an investigator for the NAACP, Parks was responsible for looking into cases involving the rape of African American women. Given the focus of *At the Dark End of the Street*, marital rape did not have a place in McGuire's argument.<sup>26</sup> In 2013, Estelle Freedman's *Redefining Rape* addressed the fluidity of the term rape in America. Her narrative focused on the period from the 1870s until the 1930s, a time in which racial segregation, lynching, and the women's suffrage movement coexisted. Freedman demonstrated how white and African American activists challenged the traditional view of rape: "a brutal attack on a chaste white woman by a male stranger, usually an African American."<sup>27</sup> They sought a broader and more realistic definition of the term. Ultimately, Freedman concluded that contemporary definitions of rape are reliant upon political power and social privilege. In the closing pages of *Redefining Rape*, Freedman draws her arguments about rape to the present. In that discussion, she devotes two paragraphs to the criminalization of marital rape that began in the 1970s. The upcoming release of Sarah Deer's *The Beginning and End of Rape: Confronting Sexual Violence in Native America* will provide scholars another lens through which to evaluate the gendered and political nature of rape in American society. According to advance material, Deer's critique of federal law argues that the destruction of tribal legal systems has drastically limited the possibility of legal redress for Native

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<sup>26</sup> Danielle L. McGuire, *At the Dark End of the Street: Black Women, Rape, and Resistance – a New History of the Civil Rights Movement from Rosa Parks to the Rise of Black Power* (New York: Alfred A. Knopf, 2010).

<sup>27</sup> Estelle B. Freedman, *Redefining Rape: Sexual Violence in The Era of Suffrage and Segregation* (Cambridge, MA: Harvard University Press, 2013).

American rape victims. Her solutions call for the intersectionality of tribal law and feminist advocacy to address this inequality in policies regarding sexual assault.<sup>28</sup>

Although concentrating on only three of the fifty states – Nebraska, California, and South Carolina – this dissertation will provide a reasonable representation of the existence of the marital rape exemption in America, the arguments used to maintain the exemption, and the various methods used to end this form of gender discrimination accepted in this country for over two centuries. Additionally, it will explore key issues to understanding the social, political, and legal history of rape in marriage in the United States.

In order to understand the evolution of Western and American law on the matter of marital rape, it is necessary to reflect on global historical patterns of gendered sexuality, specifically male interests in female bodies. In her discussion of women's bodies, Rose Weitz, Professor of Women and Gender Studies at Arizona State University, proposed that since the time of Babylonian Code of Hammurabi (c. 1754 B.C.) and nearly to the present, "western law typically has defined women's bodies as men's property. In ancient societies, women who were not slaves belonged to their fathers before marriage and to their husbands thereafter. For this reason, Babylonian law, for example, treated rape as a form of property damage, requiring a rapist to pay a fine to the husband or father of the raped woman, but nothing to the woman herself."<sup>29</sup>

In discussing men as being sexually proprietary, Margo Wilson and Martin Daly have noted, "Men exhibit a tendency to think of women as sexual and reproductive

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<sup>28</sup> Sara Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015).

<sup>29</sup> Rose Weitz, "A History of Women's Bodies," in Rose Weitz, ed. *The Politics of Women's Bodies: Sexuality, Appearance, and Behavior*, Third Edition (Oxford University Press, 2010), 4.

‘property’ that they can own and exchange. . . . [In this context], proprietariness implies a more encompassing mind-set [than sexual jealousy], referring not just to the emotional force of one’s own feelings of entitlement but to a more pervasive attitude toward social relationships.” As such, Wilson and Daly explained: “Proprietary entitlements in people have been conceived and institutionalized as identical to proprietary entitlements to land, chattels, and other economic resources. Historically and cross-culturally, the owners of slaves, servants, wives, and children have been entitled to enjoy the benefits of ownership without interference, to modify their property, and to buy and sell, while the property had little or no legal or political status in ‘its’ own right.”<sup>30</sup> This absolute privilege of (white) men to control their “property” with virtually no oversight from outside authority promoted a culture in which men had unrestricted sexual access to their wives and slaves without the fear of legal intervention. In Anglo-American countries, the implications of this culture would be felt for centuries to come until marital rape was politicized in the 1970s.

Evidence of men’s proprietary view of female sexuality is pervasive in Western cultural practices. For instance:

Anglo-American law is replete with examples of men’s proprietary entitlement over the sexuality and reproductive capacity of wives and daughters. Since before the time of William the Conqueror there has been a continual elaboration of legal devices enabling men to seek monetary redress for the theft or damage of their women’s sexuality and reproductive capacity. These torts, all of which have been sexually asymmetrical until very recently, include “loss of consortium,” “enticement,” “criminal conversation,” “alienation of affection,” “seduction,” and

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<sup>30</sup> Margo Wilson and Martin Daly, “Till Death Us Do Part,” in Rose Weitz, ed. *The Politics of Women’s Bodies: Sexuality, Appearance, and Behavior*, Third Edition (Oxford University Press, 2010), 331-332. See also, Rebecca E. Dobash and Russell P. Dobash, *Violence against Wives: The Case against Patriarchy* (New York: Free Press, 1979); Diana E. H. Russell, *Rape in Marriage* (New York: MacMillan, 1982); and A. Sachs and J. H. Wilson, *Sexism and the Law* (Oxford: Martin Robertson, 1978).

“abduction.” In all of these tort actions the person entitled to seek redress was the owner of the woman, whose virtue or chastity was fundamental.<sup>31</sup>

This gender-based entitlement to redress persisted in medieval English criminal courts, tempered only moderately in cases of rape.

Courts accorded a woman a strong legal voice in only two types of cases: a case involving the murder of her husband and a lawsuit involving her own rape. In both cases, she was able to narrate the events of the case and name the alleged perpetrator. Yet, history bears out the fact that rape cases were not evenly balanced in the search for justice. Not all women stood equally before the law. The men responsible for making the law believed that true felony rape, punishable by “life and member,” was an appropriate charge only when a virgin had been the victim.<sup>32</sup> A man convicted of raping a married woman or a widow was only subject to corporal punishment. Further complicating this system was the inaccurate medical belief, still apparently held by Todd Akin in 2012, that a woman could not conceive if she did not consent to intercourse. Thus, if a child resulted from the union, the law would not view the rape as a felonious action.<sup>33</sup> A further

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<sup>31</sup> Wilson and Daly, “Till Death Us Do Part,” 332. For more on the cultural and legal structures supporting male proprietary entitlement over women’s bodies in Western tradition, see F. L. Attenborough, *The Laws of the Earliest English Kings* (New York: Russell and Russell, 1963); C. Backhouse, “The Tort of Seduction: Fathers and Daughters in Nineteenth-Century Canada,” *Dalhousie Law Journal* 10 (1986), 45-80; P. Brett, “Consortium and Servitium: A History and Some Proposals,” *Australian Law Journal* 29 (1955), 321-28, 389-397, 428-434; M. B. W. Sinclair, “Seduction and the Myth of the Ideal Woman,” *Law and Inequality* 3 (1987), 33-102; Margo Wilson, “Impacts of the Uncertainty of Paternity on Family Law,” *University of Toronto Faculty of Law Review* 45 (1987), 216-242; and Margo Wilson and Martin Daly, “The Man Who Mistook His Wife for Chattel,” in J. Barkow, L. Cosmides, and J. Tooby, ed. *The Adapted Mind: Evolutionary Psychology and the Generation of Culture* (Oxford: Oxford University Press, 1992), 289-321.

<sup>32</sup> As noted in the Oxford English Dictionary, as early as 1275, “life and member,” or the more commonly known “life and limb,” described actions that would put one’s life in mortal danger. In the case of felony rape, as used here, the term referred to a possible sentence of death for a conviction.

<sup>33</sup> The belief that a woman could not become pregnant unless she consented to an act of sexual intimacy spanned beyond medieval England, as demonstrated by Else L. Hambleton in her discussion of rape in seventeenth-century Massachusetts. Else L. Hambleton, “‘Playing the Rogue’: Rape and the Issue of Consent in Seventeenth-Century Massachusetts,” in Merril D. Smith, *Sex without Consent: Rape and Sexual Coercion in America* (New York: New York University Press, 2001), 28. The twenty-first century

inequity was the fact that trials generally followed formal procedures strictly rather than adapting to the substance of each case. In this sense, a woman who failed to use appropriate language in petitions and testimony risked having the case dismissed and she herself held liable for bringing a false claim.<sup>34</sup>

Another quagmire for women was rape in marriage. Upon marriage, a man acquired the right to exercise control over his wife's sexuality, which generally meant that he retained sexual access for himself. As noted by Wilson and Daly, "Not only have husbands been entitled to exclusive sexual access to their wives, but they have been entitled to use force to get it. The criminalization of rape within marriage, and hence the wife's legal entitlement to refuse sex, has been established only recently."<sup>35</sup> Lord Chief Justice Matthew Hale (1609-1676) gave legal precedence to this idea in a seventeenth-century treatise. Published posthumously in 1736, *History of the Pleas of the Crown* argued the impossibility of spousal rape.<sup>36</sup> The marital rape exemption that he presented stated that a "husband cannot be guilty of rape committed by himself upon his lawful

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examples presented in the introduction demonstrate that distorted views of women's sexuality, consent, and rape continue to permeate social consciousness.

<sup>34</sup> For further information regarding the law of rape in medieval England, see Barbara Hanawalt, *Of Good and Ill Repute: Gender and Social Control in Medieval England* (New York: Oxford University Press, 1998), 124-141.

<sup>35</sup> Wilson and Daly, "Till Death Us Do Part," 332. See also, S. S. M. Edwards, *Female Sexuality and the Law* (Oxford: Martin Robertson, 1981).

<sup>36</sup> Matthew Hale was one of the greatest scholars on the history of the English common law, having read and written extensively on the subject. As a jurist, Hale had a reputation characterized by the highest integrity and impartiality. The year 1660 saw Hale knighted and appointed Chief Baron of the Exchequer. Then in 1671, Hale was elevated to the position of Chief Justice of the King's Bench. Perhaps the two slight blemishes on his reputation, as observed by twentieth-century scholars, surround his positions on witchcraft and rape, both of which earned him the label of misogynist. No doubt influenced by his Puritan background, Hale once allowed the execution of two women accused of witchcraft. It was his suspicion of the veracity of rape accusation, however, that has left the most enduring stain on his reputation. Referring to rape, Hale expressed that "it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent," which modern scholars have variously interpreted as a reflection of the criminal justice's distrust of women or simply a concern for according defendants a presumption of innocence. See, Laurie Edelstein, "An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth-Century England," *The American Journal of Legal History* 42, no. 4 (1998), 351-390.

wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract.”<sup>37</sup> While modern case law and legal commentary question the veracity of this statement, it would remain the basis for successful arguments against spousal rape laws for centuries to come in both Great Britain and the United States. For example, in the United States, Massachusetts was the first state to invoke Hale’s view, doing so in the 1857 case *Commonwealth v. Fogerty*; Massachusetts, joined by the other forty-nine states, adhered to the irrevocable consent theory until the 1970s.<sup>38</sup>

Notably, Hale was writing at a time when marriage irrevocably bound a wife to her husband as his property. Over a period of centuries, English jurists established the legal fiction of marital unity, which asserted that at marriage, husband and wife became one legal entity in the eyes of the law, and that entity took the form of the husband. The common law tradition, as transferred to the American colonies in the seventeenth and eighteenth centuries, perpetuated this legal fiction as a convenient term by which to understand the relationship of the couple to the outside world, their families, and each other. As a direct result, a woman came to be legally under the protection of her husband in a legal status known as coverture.<sup>39</sup> Coverture was the system of law that transferred a woman’s legal and “civic identity to her husband, giving him use and direction of her

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<sup>37</sup> Susan Estrich, *Real Rape* (Cambridge: Harvard University Press, 1987), 72.

<sup>38</sup> Estrich, *Real Rape*, 72-73; *Commonwealth v. Fogerty*, 77 Mass. 489 (1857), was the first case in the United States to recognize the existence of a spousal rape exemption. In that case, the Massachusetts Supreme Judicial Court recognized that marriage to the victim would be a defense to rape. Morgan Lee Woolley, “Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues,” *Hastings Women’s Law Journal* 18 (2007), 278-79; Amber Bailey, “Redefining Marriage: How the Institution of Marriage has Changed to Make Room for Same-Sex Couples,” *Wisconsin Journal of Law, Gender & Society* 27 (2012), 320.

<sup>39</sup> Norma Basch, “Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America,” *Feminist Studies* 5, no. 2 (1979): 347. See, Shammas, Carole, “Re-Assessing the Married Women’s Property Acts,” *Journal of Women’s History* 6, no. 1 (1994), 9-30.

property throughout the marriage.”<sup>40</sup> In this condition of dependency, she could neither sue or be sued in her own right, nor could she enter into contracts or make a will.<sup>41</sup> Such legal invisibility was, of course, incompatible with the ideology of the revolutionary period and the early republic. There were exceptions to the rule of marital unity; however, they were limited and applied capriciously, resulting in a class-based and race-based system that favored the wealthy and legally sophisticated.<sup>42</sup>

Contemporary law often wrote of the unity of marriage, in which the husband was supreme and the wife invisible. At that time, married women could not own property or enter into contracts in their own right. If this legal incapacity was the justification for the marital rape exemption, it should not have survived outside the nineteenth century when legislation in both England and America established Married Women’s Property Acts. Gradually, these statutes gave married women, like single women, control over their individual real and personal property. Such property in time would be considered separate, immune from their husbands’ debts. Married women also eventually gained control of all their wages earned outside of the home, were able to enter into legally binding contracts, and could sue and be sued in courts of law.<sup>43</sup> Nevertheless, rape – specifically the debate surrounding rape in marriage – prevailed into the late twentieth century as an issue that was both within and influenced by the larger elements of the women’s rights movement in Anglo-American culture.

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<sup>40</sup> Linda Kerber, *Toward an Intellectual History of Women* (Chapel Hill, NC: University of North Carolina Press, 1997), 264-265.

<sup>41</sup> Ellen Dannin, “Marriage and Law Reform: Lessons from the Nineteenth-Century Michigan Married Women’s Property Acts,” *Texas Journal of Women and the Law* 20, no. 1 (2010), 3. See also Nancy Cott, “Marriage and Women’s Citizenship in the United States, 1830-1934,” *American Historical Review* 130 (1998), 1440-1474; Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, NY: Cornell University Press, 1982).

<sup>42</sup> Basch, “Invisible Women,” 348-349.

<sup>43</sup> Shammass, “Re-Assessing the Married Women’s Property Acts,” 16.

As the following chapters will demonstrate, women's activism led to changes in both societal and legal views on spousal rape. Chapter One, "'All Men *and Women* are Created Equal': The Long Journey toward Personal Autonomy for Married Women in America," chronicles women's activism from the nineteenth-century women's rights movement to the feminist efforts at the end of the twentieth century. Particular attention is given to women's activism surrounding marital property laws; bodily integrity, including voluntary motherhood; and changing awareness about rape and domestic violence.

Chapters two through four will illustrate the independence that each state maintains when deciding issues relating to marital relations and criminal laws and sanctions. Each study will critically analyze the interplay between lawmakers, jurists, prosecutors and defense attorneys, women's interest groups, and the public at large during the period in which the states reevaluated and rescinded the marital rape exemption. Due to the discretion that each state possesses, change did not happen at the same rate or even in the same manner in these three states. These examples present a representative picture of the arguments made by supporters and opponents of the exemption across the United States, the use of legislation and common law to bring about change, the importance of interest groups in calling for change, and the value of having support from both law enforcement and the judicial system in ensuring that new laws are enforced.

Collectively, these chapters present three distinct approaches that states across the country employed to address the marital rape exemption. They provide especially rich examples of case law and legislative history that illustrate the intricacies of changing

social and legal attitudes toward spousal rape. They also provide critical insight about social issues related to sexual assault: the rise of domestic violence and sexual assault movements and the promulgation of rape shield laws. While the states are geographically removed from one another, their stories provide a representation not of regional differences, but rather differences in methods utilized to address rape in marriage.

Chapter Two, “Invading the Domestic Forum and Going behind the Curtain’: Nebraska’s Elimination of the Marital Rape Exemption and the Development of Coordinated Victim’s Services,” serves two purposes. Initially, it assesses the decision by Nebraska’s unicameral legislature to lead the nation by eliminating spousal immunity for the crime of rape. A 1975 bill revised Nebraska’s rape statute, providing a more inclusive definition of sexual assault and eliminating legal protection for husbands accused of raping their wives. A single legal challenge in 1986 solidified the constitutionality of Nebraska’s elimination of the spousal rape exemption. Building on this approach, the latter half of the chapter discusses the rise of the domestic violence and sexual assault movements and how those movements responded to changing legal attitudes about rape in marriage. Activism in Nebraska serves as an illustration of coordinated response efforts to sexual assault beginning in the late 1970s.

The ease by which Nebraska addressed marital rape stands in stark contrast to the complexity legislators faced in California. Chapter Three, “The Burden of Married Women in the Golden State: California’s Struggle with Spousal Rape Laws, 1979-2006” analyzes legislative efforts in the twenty-seven years between California’s promulgation of its first spousal rape law in 1979 and the 2006 amendment which brought that law into alignment with the state’s general rape statute. The discussion recounts periods when

amendments were unopposed, as well as those plagued by dissension both within the state assembly and from interest groups within the state.

Despite early efforts by some states to follow the examples set by Nebraska or California, others were reluctant to disregard the common law exemption. The final chapter, “Sex, Lies, and Videotape: Getting Away with Rape in Marriage in South Carolina,” provides such an example. When South Carolina passed its spousal sexual battery law in 1991, the statute established a crime with elements quite distinct from the general sexual battery law. The latter provided marital rape victims less legal protection than non-spousal rape victims. Chapter Four traces the passage of South Carolina’s spousal sexual battery law and highlights the first case brought under the new statute. The chapter further discusses revisions to South Carolina’s rape shield laws, evaluating such evidentiary protections for rape victims in relation to those promulgated in other states and those provided under the Federal Rules of Evidence.

Together, the chapters offer a historical analysis of the marital rape exemption and related topics within the United States as they represent changing social and legal attitudes about women’s autonomy. As a result of those changing attitudes, if prosecutors tried John Rideout today instead of 1978, the jury may have reached a different conclusion – and so, too, may have the public.

**CHAPTER 1**  
**“ALL MEN AND WOMEN ARE CREATED EQUAL”: THE LONG JOURNEY**  
**TOWARD PERSONAL AUTONOMY FOR MARRIED WOMEN IN AMERICA**

On April 26, 1857, several men raped Agnes O’Connor in Chicopee, Massachusetts, and subsequently faced criminal charges for that crime. The indictment alleged that the defendants acted “violently and against her will [to] feloniously . . . ravish and carnally know” the victim.<sup>44</sup> Following their conviction, the defendants appealed the judgment on the grounds that: “it is not alleged in the indictment, that said Agnes O’Connor was ravished, &c. by force, as required by law,” and “because it is not alleged but that said Agnes O’Connor was the wife of one of the defendants, or which defendant, if any.”<sup>45</sup> The court upheld the convictions, dismissing both arguments raised by the defendants. Writing for the court, Justice Bigelow explained that the indictment set forth all of the elements necessary to constitute the offense of rape despite the omission of the words “by force” because the word ravish “of itself imports the use of force.”<sup>46</sup> Similarly, Bigelow reasoned, no precedent in the United States or England had ever required an indictment for rape to include an averment that the victim was not the wife of one of the defendants.

The significance of *Commonwealth v. Fogerty* is threefold. The elements of the crime used to convict the defendants of rape – the use of force, carnal knowledge of the victim, and the act accomplished against the will of the victim – would define rape statutes across the United States without successful challenge for the next one hundred twenty years. *Fogerty* was the first documented case in the United States in which a court

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<sup>44</sup> *Commonwealth v. Fogerty*, 74 Mass. 489 (1857).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

recognized the legal impossibility of a man raping his wife, acknowledging that marriage to the victim was a defense to a charge of rape. This marital rape exemption would remain in all fifty states until the mid-1970s. The legal protection for a husband was not absolute, however, as *Fogerty* made clear. While the state could not convict a man for the rape of his wife if he acted alone, in many states, the law allowed the prosecution of a man who acted in concert with another to commit rape upon his wife.<sup>47</sup>

The controversy about a husband's license to rape was not new when laws began to change in the 1970s and 1980s. The women of first-wave feminism, who championed for women's rights in the second half of the nineteenth century, decried marital rape. To understand the underpinning of this activism, however, one must start by looking at women's rights activists in the late eighteenth century.

The infant stage of the American women's rights movement began to take form among elite women by the eighteenth century, as noted by the March 31, 1776 letter from Abigail Adams to her husband John Adams, asking that he "Remember the Ladies," act more favorably than his ancestors, and arrest the traditional (one might say natural) tyranny of men in society.<sup>48</sup> The French woman who came to be known as Olympe de Gouges, took up a similar struggle, publishing pamphlets and giving public speeches in favor of rights for women – the right to divorce, control of property, and maternal

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<sup>47</sup> *Ibid.*, 491.

<sup>48</sup> The descriptor "American," selected purposefully, signifies the overall focus of this dissertation is the change in societal attitudes and laws within the United States regarding rape inside of marriage. It in no way ignores the significant influence of British common law on the laws governing the British colonies in North America or the subsequent states that emerged following the independence of the United States. Rather, it signifies the distinct timing and methods used to bring about changes in American society, a society that found influence from Britain and to a lesser extent France, but that developed apart from those nations. The quotation from Abigail Adams comes from a letter that she penned to her husband between March 31 and April 5, 1776. *Adams Family Papers: An Electronic Archive*. Massachusetts Historical Society. <http://www.masshist.org/digitaladams/>

welfare. In 1791, she issued *Declaration of the Rights of Woman and the Female Citizen*, her most celebrated work and the first official document in support of women's rights written by a woman in Western Europe. While not well-received by social critics at the time, de Gouges' work advocated for a system of gender-neutral meritocracy, in which one's advancement in society would be based, not on gender or familial connections, but on one's abilities and talents. The next year, in *A Vindication of the Rights of Woman* (1792), British writer Mary Wollstonecraft blamed contemporary political, educational, and religious institutions for the systematic subjugation of women, demanding equal education, civil, and political rights for *all* human beings.

Well-read American women like Elizabeth Cady Stanton and Lucretia Mott, best known as leaders of the American suffrage movement, would have been familiar with the work of de Gouges and Wollstonecraft, perhaps finding inspiration from those and other women who demanded an end to the second-class status imposed on women.<sup>49</sup> As one of their first priorities, Stanton, Mott, and others in the early women's rights movement addressed property rights for married women, an issue causing contention across the nation. The passage of married women's property acts was anything but straightforward; however, it was a step toward the advancement of equality for women in marriage. By recognizing married women's property rights, the resulting legislation challenged marital unity, the system of coverture, and a husband's property interest in his wife.

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<sup>49</sup> Stanton and Mott had met in London in 1840. Both had traveled to England with their husbands for the World Anti-Slavery Convention, only to learn that convention organizers refused to seat female delegates. In this way, the male leaders of the convention spurred to fruition the development of the women's rights movement in England and America. Alana Jeydel, *Political Women: The Women's Movement, Political Institutions, the Battle for Women's Suffrage and the ERA* (London: Routledge, 2004), 28; Pamela Slotte and Mila Halme-Tuomisaari, ed. *Revisiting the Origins of Human Rights* (Cambridge University Press, 2015), 172.

Resentment to this two-tiered system came to a head in the Jacksonian era, challenging the legal understanding of man and wife. Arguments utilized economic reasoning as well. Coverture had arisen when the economy relied upon land ownership and agricultural production; yet, this system no longer seemed as viable when the economy shifted in favor of an urban commercial market. The rise of a female labor force, the advent of life insurance, and the growth of savings banks all called for a reassessment of the role of the wife in society. Between 1820 and 1860, such arguments justified the passing of legislation to protect married women's property. The first wave of Married Women's Property Acts, passed in the 1830s, arose in part because of the decade's banking crisis, which culminated in the Panic of 1837.<sup>50</sup> Enacted first in southern states, these laws found support from male legislators out of a desire to empower their daughters against spendthrift sons-in-law, specifically to protect their daughters' property from their husbands' creditors.<sup>51</sup> Beginning in 1848 New York, the second wave of marital property legislation resulted from similar motivation: wealthy fathers wanted to ensure that their sons-in-law would be unable to gain access to their daughters' inheritances. Yet, as these laws passed, they did not provide universal

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<sup>50</sup> Shammas, "Re-Assessing the Married Women's Property Acts," 11; Richard H. Chused, "Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures," *The American Journal of Legal History* 29, no. 1 (1985), 4. As Woody Holton has noted: "Each of the financial panics that struck the United States in the decades after the ratification of the Constitution set off a scramble for mechanisms by which to safeguard debtors' property." Thus, the laws to insulate a married woman's property from her husband's creditors were but one reaction to the vicissitudes of the nation's economy in the nineteenth century. Woody Holton, "Equality as Unintended Consequence: The Contracts Clause and the Married Women's Property Acts," *The Journal of Southern History* 81, no. 2 (2015), 319.

<sup>51</sup> Joseph A. Custer, "The Three Waves of Married Women's Property Acts in the Nineteenth Century with a Focus on Mississippi, New York, and Oregon," *Ohio Northern University Law Review* 40 (2014), 39-440; Shammas, "Re-Assessing the Married Women's Property Acts," 9-30.

protection for women, as state legislators fumbled with piecemeal affirmative rights for women, and jurists limited the application of these new laws.<sup>52</sup>

Mississippi, the first state to adopt a Married Women's Property Act in 1839, is illustrative of the limited benefits granted to married women by such legislation.<sup>53</sup>

Mississippi Senator Thomas B. J. Hadley introduced the marital property legislation. In its original form, the bill was visionary, yet well beyond the comfort level of most lawmakers. Had it passed, Hadley's bill would have given married women nearly the same property rights as men and single women:

[E]very free woman who got married in Mississippi would be allowed to retain whatever possessions she owned on her wedding day, along with all the money she earned and all the gifts she received afterward. And the income generated by these assets would be hers to dispose of as she pleased.<sup>54</sup>

Additionally, the bill would have given Mississippi the distinction as the first common law state to provide married women the right to draft a last will and testament. Less than one month after Hadley introduced his bill, Governor Alexander G. McNutt signed it into law, albeit in an almost unrecognizable incarnation. The new law provided that brides would retain ownership over only one type of property brought into a marriage – slaves.<sup>55</sup> Even then, married women had only limited possessory rights over their slave property in the same way the law allowed them rights over their own land. Management of the slaves

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<sup>52</sup> Shammass, "Re-Assessing the Married Women's Property Acts," 13-16; Kathleen Sullivan, *Constitutional Context: Women and Rights Discourse in Nineteenth-Century America* (Baltimore: Johns Hopkins University Press, 2007).

<sup>53</sup> Arkansas passed a Married Women's Property Act in 1835, several years prior to Mississippi; however, at the time Arkansas had not yet gained statehood.

<sup>54</sup> Holton, "Equality as Unintended Consequence," 331-32.

<sup>55</sup> Like Mississippi, many other southern states focused on the possession of slaves to the near exclusion of every other sort of property when passing initial married women's property acts. Holton has argued that much of the motivation behind the southern states allowing married women to own personal property was a result of "the boom-bust cotton economy – and by the fact that enslaved workers, being both valuable and mobile, were uniquely vulnerable to seizure by creditors." Holton, "Equality as Unintended Consequence," 314-15.

would rest with their husbands, who would also receive any income the slaves generated. Amendments to the bill also removed clauses that guaranteed married women the right to wages earned outside the home and the right to write wills. Such changes undermined what would have been a significant stride toward marital equality.<sup>56</sup>

In the four decades beginning in 1840, legislators expanded early laws providing only debt protection to include “the right of married women to manage, enjoy the profits, sell, and will personal and real property that they had owned prior to marriage or had been given or inherited from a third party during marriage.”<sup>57</sup> Even so, married women could not count on automatic or absolute protection from these expanded laws. In the decades when married women’s property legislation faced revisions, courts were asked to rule on disputes concerning the appropriate definition of a married woman’s estate separate from that of her husband. The language of many state statutes was vague enough to leave room for argument and therefore litigation.<sup>58</sup>

Whenever possible, judges tended to resolve conflict in a way that would uphold economic patriarchy within the family unit, often imposing additional burdens on married women who chose to maintain property separate from their husbands. Courts refused to apply the laws retroactively; thus, women married prior to the law’s enactment would not gain protection granted under the legislation. Some courts applied the law only to property women acquired after the law went into effect, regardless of their marriage date. Regarding the right to contract, some jurisdictions required married women to specify that their separate estate would be responsible for any debts that arose because of the

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<sup>56</sup> Holton, “Equality as Unintended Consequence,” 134.

<sup>57</sup> Shammas, “Re-Assessing the Married Women’s Property Acts,” 11.

<sup>58</sup> Chused, “Late Nineteenth Century Married Women’s Property Law,” 4.

business relationship created under the contract, in order for the contract to be enforceable. Married women who chose to claim earnings as part of a separate estate often faced court-imposed obstacles. In New York, for instance, “the earnings had to be paid by a third party, the services had to be unconnected to household activities (e.g., boarding, sale of eggs and butter), and the woman had to specify that she was operating under a separate account.”<sup>59</sup> Despite early limitations, contemporary feminists viewed married women’s property acts as a great victory, perhaps even the most significant change in the legal status of women in Anglo-American society in seven hundred years of common law.<sup>60</sup> Nineteenth-century feminists, including Elizabeth Cady Stanton and Lucretia Mott, attacked the legal fiction of marital unity, arguing that it was an antiquated example of patriarchal values that no longer seemed appropriate in modern society.<sup>61</sup> Many in the nineteenth-century women’s rights movement believed a woman’s loss of legal personhood at marriage was a more pressing problem than the absence of suffrage. Feminists attacked laws that allowed a man to control his “wife’s property, collect and use her wages, [and] select the food and clothing for herself and children.”<sup>62</sup> This initial step toward property ownership was a catalyst for women gaining the right of personal autonomy.

As white activists like Elizabeth Cady Stanton and Lucretia Mott concerned themselves with the legal fiction of marital unity and married women’s property acts, activist African Americans turned their attention to discourses of rape and lynching, two

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<sup>59</sup> Shammas, “Re-Assessing the Married Women’s Property Acts,” 15. See also, Basch, *In the Eyes of the Law*.

<sup>60</sup> Shammas, “Re-Assessing the Married Women’s Property Acts,” 9.

<sup>61</sup> Basch, “Invisible Women,” 349; Deborah Rhode, *Justice and Gender: Sex Discrimination and the Law* (Cambridge: Harvard University Press, 1989), 24-5.

<sup>62</sup> Ellen Dannin, “Marriage and Law Reform: Lessons from the Nineteenth-Century Michigan Married Women’s Property Acts,” *Texas Journal of Women and the Law* 20, no. 1 (2010), 27.

issues that “have historically influenced understandings of race, gender, and sexuality within American society.”<sup>63</sup> Both forms of violence address the power dynamic of control over the body of another. As Sociology Professor Patricia Hill Collins has described, sexual violence has served as a method by which to control marginalized or non-dominant groups – African Americans, women, the poor, as well as gays and lesbians.

Prior to the Civil War, slave owners had unlimited sexual access to their slaves. As *Missouri v. Celia* (1855) demonstrated, legally sanctioned white male privilege granted sexual access to slave women. Robert Newsom purchased Celia when she was fourteen years old. For the next five years as Celia worked on Newsom’s farm, he raped her regularly and fathered two children by her. In 1855, when she was again pregnant, Celia requested that Newsom refrain from future instances of sexual force. When he refused, she killed him and disposed of his body. She was subsequently charged with his murder. A Missouri rape law enacted in 1845 made it a crime “to take any woman unlawfully against her will and by force, menace or duress, compel her to be defiled.”<sup>64</sup> At trial, the defense attorney argued that Celia had acted in self-defense, fearing imminent sexual assault. After the prosecution and defense had presented their respective arguments, the judge, relying on the Missouri Slave Code of 1804 that made no distinction between slaves and other personal property, explained to the jury that Celia,

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<sup>63</sup> Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (New York: Routledge, 2005), 216. Additional scholarship that exemplifies identity politics and intersectionality written by African American women includes Gloria T. Hull, Patricia Bell Scott, and Barbara Smith, eds. *All the Women are White, All the Blacks are Men, but Some of Us are Brave-- Black Women's Studies* (Old Westbury, NY: The Feminist Press, 1982); Kimberly Springer, *Living for the Revolution: Black Feminist Organizations, 1968–1980* (Durham, NC: Duke University Press, 2005); and Melissa Harris-Perry, *Sister Citizen: Shame, Stereotypes, and Black Women in America* (New Haven, CT: Yale University Press, 2011).

<sup>64</sup> Missouri statute of 1845, article 2, section 29.

being a slave, was her master's property. As property, the judge reasoned, the rape law did not apply to Celia, despite the fact that the statute referred to "any woman." Further, because Celia was "property" and not a "woman," the judge held that she could not raise the argument of self-defense with respect to rape.<sup>65</sup> He instructed the jury to consider only whether Celia had murdered Newsom. Found guilty by a jury of twelve white men, and after the exhaustion of appeals to stay her execution, Celia hanged for the crime of murder.<sup>66</sup>

In the post-emancipation South, Collins asserted, the institutionalization of "lynching and rape served as gender-specific mechanisms of sexual violence whereby men were victimized by lynching and women by rape. Wide-scale lynching occurred in tandem with the rise of the myth of the Black man as rapist who set his eyes upon White women. Quite often, lynching was a public affair, sanctioned, and ritualized to "install a hegemonic White masculinity over a subordinated Black masculinity."<sup>67</sup> As such, the lynching of African American men connotes the emasculation of both the victim and other Black men within the community. In contrast to public lynching, the rape of Black women occurred in private and their suffering personal an invisible within society. Just as the myth of the Black rapist justified violence against men, the myth of the

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<sup>65</sup> The denial of Celia's womanhood echoes the questioning of Sojourner Truth just four years earlier in 1851, when at the Women's Rights Convention in Akron, Ohio, asked the now iconic "Ain't I a Woman?" Granted, in 1851, Truth had her freedom, but it did not erase the discrimination she faced as a Black woman.

<sup>66</sup> Melton A. McLaurin, *Celia: A Slave: A True Story of Violence and Retribution in Antebellum Missouri* (Athens, GA: University of Georgia Press, 1991). Harriet Jacobs' autobiography *Incidents in the Life of a Slave Girl* provides another example of sexual accessibility of white men to their slaves. See also, Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South*. (Chapel Hill, NC: University of North Carolina Press, 1988) and Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon & Schuster, 1975), both of which speak to sexual improprieties committed by slave owners toward their slaves.

<sup>67</sup> Collins, *Black Sexual Politics*, 219.

hypersexualized Black woman served to blame victims for their own rapes. Collins recognized the incongruity of the solution raised by Black male leaders: “their political solution of installing a Black male patriarchy in which Black men would protect ‘their’ women from sexual assault inadvertently supported ideas about women’s bodies and sexuality as men’s property. . . . Black women’s suffering under racism would be eliminated by encouraging versions of Black masculinity whereby Black men had the same powers that White men had long enjoyed.”<sup>68</sup> While such actions would elevate the position of Black men, African American women continued to find themselves at the mercy of men.

The activism of many African American women parallels their personal experiences. For instance, Ida B. Wells, journalist, women’s rights advocate, and anti-lynching crusader, rejected the myths of the Black male rapist and the immoral, licentious Black woman. The lynching of several of her friends influenced Wells’ worldview; thereafter, she devoted much of her life to the anti-lynching crusade. Similarly, Anna Julia Cooper, one of the first four African American women to earn a doctorate degree, promoted the cause of Black women’s education. Her book, *A Voice from the South*, represented not only her political activism, but also an early example of Black feminism.<sup>69</sup>

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<sup>68</sup> *Ibid.*, 217.

<sup>69</sup> Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, Second Edition (New York: Routledge, 2000), 210. See also, Mia Bay, *To Tell the Truth Freely: The Life of Ida B. Wells* (New York: Hill and Wang, 2009); Anna Julia Cooper, *A Voice from the South* (Oxford University Press, 1988); Karen A. Johnson, *Uplifting the Women and the Race: The Educational Philosophies and Social Activism of Anna Julia Cooper and Nannie Helen Burroughs* (New York: Garland Publishing, 2000).

Despite a divergence of guiding issues, both white and African American women activists promoted greater gender equality in American society. Legislation passed in New York certainly served as encouragement for the emergence of the modern American women's rights movement. In April 1848, after more than ten years of debate, New York enacted a married women's property act, granting married women control over property they brought into a marriage or received after they wed.<sup>70</sup> Three months later, Elizabeth Cady Stanton and Lucretia Mott organized the now legendary meeting at Seneca Falls, New York. The convention attracted three hundred men and women, some skilled activists, many Quakers, and nearly all abolitionist.<sup>71</sup> It was there that they issued the Seneca Falls *Declaration of Sentiments and Resolutions*, which called for complete equality and treatment in all areas of women's lives. Patterned on the *Declaration of Independence*, the language of and emotion elicited by the *Declaration of Sentiments* was instantly recognizable: "all men *and women* are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."<sup>72</sup> The purposeful imitation also advanced the belief that the rights asked for were justified by the American traditions of equality and rebellion. While the founding fathers set blame at the foot of King George III, the authors of the *Declaration*

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<sup>70</sup> Sara M. Evans, *Born for Liberty: A History of Women in America* (New York: Free Press Paperbacks, 1997), 93-95; Judith Wellman, "The Seneca Falls Women's Rights Convention: A Study of Social Networks," *Journal of Women's History* 3, no. 1 (1991), 9-37. As Wellman explains, New York experienced economic and social changes in the 1840s as a result of urbanization, the industrial revolution, and the movement of commercial agriculture to regions further to the west. These changes, at least in part, spurred legal discussions of married women's property rights and women's suffrage throughout the decade.

<sup>71</sup> Lori D. Ginzberg, *Elizabeth Cady Stanton: An American Life* (New York: Hill and Wang, 2009), 56-7. One issue that prompted the Seneca Falls Convention was the imposed limitations on women's participation in the anti-slavery movement. More than a century later, similar exclusion provided momentum for the rise of the women's movement in the 1960s and 1970s, as women felt dismissed from the civil rights movement and the anti-war movement.

<sup>72</sup> "Declaration of Sentiments and Resolutions Woman's Rights Convention, Held at Seneca Falls, 19-20 July 1848," The Elizabeth Cady Stanton & Susan B. Anthony Papers Project, <http://ecssba.rutgers.edu/docs/seneca.html> (Emphasis added).

*of Sentiments* asserted that the subjugation of women resulted from the historical and absolute tyranny of men over women.<sup>73</sup> The bold, radical demand for full citizenship made an argument for women “in a way that claimed republicanism for women not as mothers responsible for rearing good little citizens but as autonomous individuals deserving of that right.”<sup>74</sup> In doing so, the signatories challenged the Victorian ideal of gender-based separate spheres by asserting a public role for women.<sup>75</sup> While almost unanimously denounced by the male establishment – publishers, politicians, and clergymen alike – the *Declaration of Sentiments* prompted more meetings in other cities and states, and the U.S. women’s movement was born, paving the way for the first steps in addressing marital rape.<sup>76</sup>

Another key issue in the legal address of marital rape was divorce, or the lack thereof, which prevented women from leaving abusive marriages. The liberalization of divorce laws did serve as a leveling force in American society. The right to attain a divorce was also a legal disability of women for many years in the United States. In England, divorce was relatively nonexistent until 1857; marriage was a divine institution and a sacrament that fell under the jurisdiction of ecclesiastical courts.<sup>77</sup> English law did

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<sup>73</sup> Ginzberg, *Elizabeth Cady Stanton*, 58.

<sup>74</sup> Evans, *Born for Liberty*, 95.

<sup>75</sup> Women not only outnumbered men in attendance at the Seneca Falls Convention, but also as signatories on the *Declaration of Sentiments*, making up a full two-thirds of those who signed the document.

<sup>76</sup> Ellen Carol DuBois argues that American women were discontent with their lot years prior to Seneca Falls, yet until that time their dissatisfaction remained disorganized. The women’s rights movement that emerged from Seneca Falls shaped these sentiments into a feminist political agenda. Wellman, ““The Seneca Falls Women’s Rights Convention,” 9, citing Ellen DuBois, *Feminism and Suffrage: The Emergence of an Independent Women’s Movement in America, 1848-1869* (Ithaca: Cornell University Press, 1978). For one look at the significance of the Seneca Falls Convention, see, Howard Chused, “Married Women’s Property Law: 1800-1850,” *Georgetown Law Journal* 71, no. 5 (1983): 1359.

<sup>77</sup> Prior to 1857, divorce in England was a matter for ecclesiastical courts, which applied canon law. Under canon law, a couple no longer wishing to be married might obtain an annulment with a view to remarriage, or a separation, in which case remarriage was not an option. After receiving a separation from an ecclesiastical court, an injured spouse with great wealth might petition Parliament for a private bill severing the marriage bond completely. However, the prohibitive cost of the petition made it an impossibility for

recognize an action called divorce *a mensa et thoro*, in which the parties might live apart if one was guilty of adultery or extreme cruelty. Most American colonies, however, did not transport this strict prohibition on divorce. In fact, the earliest reported divorce in the colonies was in Massachusetts in 1661. That is not to say that the colonies – or later states – provided liberally for divorce.<sup>78</sup> Notably, South Carolina did not provide for divorce until 1942, and in New York State, adultery was the only grounds for divorce until 1966.

The states saw marriage in contractual terms, where each party had fixed rights and obligations; it was up to the state to promote and preserve marriage. To succeed in a divorce proceeding, the plaintiff had to prove that the defendant had irrevocably broken the terms of the marriage contract. The most common form of evidence supported claims of adultery, desertion, or sexual incapacity.<sup>79</sup> Between 1820 and 1860, states revised their divorce statutes, making the termination of marriage easier: as expected, as grounds for divorce expanded, divorce rates increased.<sup>80</sup> By the 1960s, fault-based divorce became legally routine, as couples seeking to dissolve their marriages claimed wrongs that closely followed the letter of the law, demonstrating “the exact minimum requirements and even the precise legal phrases needed for a fault-based divorce.”<sup>81</sup> In time, divorce laws shortened residency requirements for filing, reacting to “migratory divorces,” in which one party to the marriage would take up residence in a state that had a shorter

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common citizens. In 1857, the Matrimonial Causes Act created a court that had the jurisdiction to dissolve marriages under certain, but not all, circumstances. Gail L. Savage, “The Operation of the 1857 Divorce Act, 1860-1910,” *Journal of Social History* 16, no. 4 (1983), 103-110.

<sup>78</sup> Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2002), 47-48.

<sup>79</sup> Cott, *Public Vows*, 47-48.

<sup>80</sup> Cott, *Public Vows*, 47-52. Where liberalization of divorce occurred, states added extreme cruelty, gross neglect of duty, fraudulent marriage contract, and habitual drunkenness as grounds for divorce.

<sup>81</sup> Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (New York: Penguin Books, 2006), 252.

residency requirement or more liberal grounds for filing.<sup>82</sup> Similarly, by 1985 all fifty states offered no-fault divorce for couples claiming irreconcilable differences.<sup>83</sup> Each of these changes to divorce laws provided women greater opportunity to leave abusive marriages.

Scholars in a variety of fields have studied the implications of more liberal divorce laws, specifically those that allow one spouse to decide unilaterally to end the marriage. Such laws provide an important escape route in a troubled marriage, but the benefits may be more significant. Studies have shown that access to unilateral divorce has led to a significant reduction in domestic violence and a drop in the number of married women who attempt suicide. Higher separation and divorce rates also result in lower homicide rates among intimate partners.<sup>84</sup> At the same time, however, no-fault divorce laws could prove detrimental to a partner who did not want to end the marriage by reducing his or her bargaining power. This was particularly true for full-time homemakers who were economically vulnerable. A new cohort of women emerged who found themselves among the ranks of the poor as divorce rates doubled between 1965 and

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<sup>82</sup> In a series of decisions between 1942 and 1957, the United States Supreme Court moved toward acceptance of migratory divorce, thereby requiring states to honor such out-of-state divorces. Future Court decisions provided national policy for post-divorce situations involving alimony and child support, granting jurisdiction over such matters to the state in which the divorced individuals lived, and allowing the pursuit of a nonpaying former spouse over state lines.

<sup>82</sup> Cott, *Public Vows*, 195.

<sup>83</sup> No-fault divorce was not a new phenomenon when California instituted the practice. As Stephanie Coontz has noted, a form of no-fault divorce was evident in the Middle Ages “when a couple swore that ‘discord reigns between us and communal life has become impossible.’” Stephanie Coontz, *Marriage, a History*, 104-105.

<sup>84</sup> Stephanie Coontz, *Marriage, a History*, 293. To review the sources Coontz relied on, see Betsey Stevenson and Justin Wolfers, “Bargaining in the Shadow of the Law: Divorce Laws and Family Distress,” National Bureau Economic Research Working Paper 10175 (2003), <http://www.nber.org/papers/w10175.pdf>; William Bailey and Ruth Peterson, “Gender Inequality and Violence Against Women,” in John Hagan and Ruth Peterson, eds., *Crime and Inequality* (Palo Alto, CA: Stanford University Press, 1995); and Leonard Paulozzi et al., “Surveillance for Homicide Among Intimate Partners – United States, 1981-1998,” Centers for Disease Control, *Morbidity and Mortality Weekly Report* 50 (October 21, 2001).

1978. Diana Pearce coined the phrase “the feminization of poverty” to describe this gendered, economic shift.<sup>85</sup>

While divorce was more accessible in the era of no-fault, the government maintained its interest in the family unit: how to define “family” or “marriage”; the division of obligations when divorce divided a family; and the financial implications divorce had for women and children. By more liberally reforming divorce laws, state legislatures and courts contributed to and reflected changing moral and legal definitions of marriage. As no-fault replaced fault-based divorce, petitioners no longer had to demonstrate that the other spouse had broken the state-defined terms of the marriage contract. Rather, no-fault statutes suggested that the state should refrain from deciding if one party to the marriage had failed to live up to the marriage agreement. If the couple determined the marriage was not meeting their expectations for the union, one or the other could seek legal dissolution.<sup>86</sup> Divorce reforms in the no-fault era moved toward gender-neutrality regarding child custody, child support and alimony, viewing both men and women as income earners and caregivers.

Then in the 1976 case *Marvin v. Marvin*, the California Supreme Court acknowledged the “substantial increase in the number of couples living together without marrying,” resulting in the first cohabitating non-married partner receiving “palimony”

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<sup>85</sup> Coontz, *Marriage, a History*, 292-293; Ruth Rosen, *The World Split Open: How the Modern Women's Movement Changed America* (New York: Penguin Books, 2006), 337; Diana Pearce, *Feminization of Poverty* (Washington, D.C.: Institute for Women's Policy Research, 1989). For more on divorce and the feminization of poverty, see Ruth Sidel, *Women and Children Last: The Plight of Poor Women in Affluent America* (New York: Viking, 1982); Linda Gordon, ed., *Women, the State, and Welfare* (Madison, WI: University of Wisconsin Press, 1990); and Rochelle Lefkowitz and Ann Withorn, eds., *For Crying Out Loud: Women and Poverty in the United States* (New York: The Pilgrim Press, 1986).

<sup>86</sup> Cott, *Public Vows*, 206.

when the couple separated.<sup>87</sup> Recognizing the prevalence of nonmarital relationships as indicative of changing mores of society, the Court explained its decision:

The judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed. The courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration. We add that in the absence of an express agreement, the court may look to a variety of other remedies in order to protect the parties' lawful expectations.<sup>88</sup>

This landmark decision influenced the economic aspect of cohabitating relationships across the nation as courts in one state after another addressed the validity of palimony and contracts for cohabitation. While some states were reluctant to adopt the *Marvin* standard, the legal principle that emerged was that “sex outside marriage could no longer be labeled illicit in any simple sense.”<sup>89</sup> Reflective of this change in legal and social mores, the number of unmarried-cohabitant households increased almost ten-fold between 1970 and 2000, reaching nearly five million by the dawn of the twenty-first century.<sup>90</sup> Ultimately, the effect of divorce reforms and the creation of economic rights for cohabitating partners was to expand individual rights outside of the traditional marital state that favored male interests.<sup>91</sup>

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<sup>87</sup> *Marvin v. Marvin*, 18 Cal.3d 660 (1976).

<sup>88</sup> Noel Myricks, “Palimony”: The Impact of *Marvin v. Marvin*,” *Family Relations* 29, no. 2 (1980), 211.

<sup>89</sup> Ariela R. Dubler, “Immoral Purposes: Marriage and the Genus of Illicit Sex,” *The Yale Law Journal* 115, no. 4 (2006), 811. In addition to *Marvin v. Marvin*, see *Latham v. Latham*, 274 Ore. 421 (1976) and *Carlson v. Carlson*, 256 N.W.2d 249 (Minn. 1977) to review the reasoning of state courts that provided the “opportunity to create and strengthen institutional support for persons who have created family relationships without the benefit of marriage.” Myricks, “Palimony,” 214.

<sup>90</sup> Marsha Garrison, “Nonmarital Cohabitation: Social Revolution and Legal Regulation,” *Family Law Quarterly* 42, no. 3 (2008), 313. See also Craig A. Bowman and Blake M. Cornish, “A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances,” *Columbia Law Review* 92, no. 5 (1992), 1164-1211, in which the authors argue that domestic relations law failed to keep pace with changing social realities of relationships other than traditional marriage. While focusing on same-sex cohabitating couples, the points made by Bowman and Cornish applied equally to heterosexual couples living together outside of marriage.

<sup>91</sup> For more on the history of marriage and divorce in America, see Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America* (Chicago: University of Chicago Press, 1980); Stephanie Coontz, *The Way We Really Are: Coming to Terms with America's Changing Families* (Basic Books,

While legal access to divorce increased for women over the course of the twentieth century, these changes did not automatically eliminate the exemptions in the law that protected husbands who raped their wives. Activists who challenged the marital rape exemption in the mid- to late-twentieth century faced the difficulty of overcoming both historical and modern justifications for the legal protection granted to husbands. As noted in the Introduction, spousal immunity sprang from the opinion forwarded by Matthew Hale's seventeenth-century treatise, *History of the Pleas of the Crown*. Notably, Hale did not base his assertion on any supporting authority; despite this legal deficiency, his contention came to be the legal standard in England and the United States. Justice William Ventris Field, in a 1889 dissenting opinion, brought this deficiency to light and proposed that there were circumstances under which a wife could refuse intercourse (and thereby a husband could be guilty of rape). His commentary went virtually unnoticed and the marital exemption remained.<sup>92</sup>

Temperance workers, abolitionists, social purity crusaders, and other advocates for women's rights addressed sexual coercion publicly during the early nineteenth century. However, barring evidence of significant violence, rape in marriage was nearly invisible in Victorian America "since it seldom found its way into public discourse, private correspondence, the dockets of criminal courts, or the transcripts of divorce

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1998); Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1999); Jessica Weiss, *To Have and To Hold: Marriage, the Baby Boom & Social Change* (Chicago: University of Chicago Press, 2000); and Joseph M. Hawes and Elizabeth I. Nybakken, eds., *Family & Society in American History* (Urbana, IL: University of Chicago Press, 2001).

<sup>92</sup> Theresa Fus, "Criminalizing Marital Rape: a Comparison of Judicial and Legislative Approaches," *Vanderbilt Journal of Transnational Law* Vol. 39 (2006), 481-517. The Justice Field discussed in Fus's article served in the Court of the Queen's Bench in London from 1875 to 1890, and should not be confused with Stephen Johnson Field who served as an Associate Justice of the United States Supreme Court between 1863 and 1897.

trials.”<sup>93</sup> By the mid-nineteenth century, some advocates began to extend their concern with sexual coercion to include actions that occurred between husband and wife. Most vocal and direct in their outcry against rape in marriage were individuals who society held to be more radical or anarchist – members of groups like the Free Lovers. Victoria Woodhull and Tennessee Claflin, sisters who published the newspaper *Woodhull and Claflin’s Weekly*, boldly blamed married women’s inability to refuse the sexual advances of their husbands for collective maladies women faced. According to one 1871 editorial in that newspaper: “Women, in short, were beginning to feel that access to their bodies should be ‘theirs to grant or refuse.’ The conflict between women’s desire for self-ownership and their subjection to ‘undesired sexual relations’ was generating internal ‘antagonism’ that was ultimately responsible for the destruction of their physical well-being.”<sup>94</sup> Additional issues of *Woodhull and Claflin’s Weekly* mirrored this sentiment, as

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<sup>93</sup> Jesse F. Battan, “‘In the Marriage Bed Women’s Sex Has Been Enslaved and Abused’: Defining and Exposing Marital Rape in Late-Nineteenth-Century America,” in *Sex Without Consent: Rape and Sexual Coercion in America* (New York University Press, 2001), 206-207. For more on nineteenth and early twentieth-century moral reform campaigns against seduction, prostitution, and sexual assault, see Mary Frances Berry, “Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South,” *Journal of American History* 78, no. 3 (1991); Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (Ithaca, NY: Cornell University Press, 1999); John D’Emilio and Estelle Freedman, *Intimate Matters: A History of Sexuality in America*, second edition (Chicago, IL: University of Chicago Press, 1999); Peggy Pascoe, *Relations of Rescue: The Search for Female Authority in the American West, 1874-1939* (Oxford University Press, 1993); and Lori D. Ginzberg, *Women and the Work of Benevolence: Morality, Politics, and Class in Nineteenth-Century United States* (New Haven, CT: Yale University Press, 1990).

<sup>94</sup> Battan, “In the Marriage Bed,” 205. As Battan has noted, one important thing that distinguished the Free Lovers and other, more aggressive activists from the more “moderate” women’s rights activists is the language they used. They actually called unwanted sexual intimacy (forced and coerced) between spouses “rape,” rather than using euphemisms like “forced maternity” and “voluntary motherhood,” which focused on the result rather than the sexual act itself. Battan, “In the Marriage Bed,” 209; Linda Gordon, *Woman’s Body, Woman’s Right: A Social History of Birth Control in America* (New York: Penguin Books, 1983); Barbara Leslie Epstein, *The Politics of Domesticity: Women, Evangelism, and Temperance in Nineteenth-Century America* (Middletown: Wesleyan University Press, 1981). At the same time, such language used in public forums subjected these individuals to arrest and incarceration for violating the Comstock Act. In fact, Woodhull faced arrest for violating the Comstock Act when she published an article discussing an adulterous relationship between a minister and his parishioner, after Comstock himself found the article obscene in content. In addition to *Woodhull and Claflin’s Weekly*, sentiments of Free Lovers in relation to rape in marriage can be found in editions of *Lucifer the Light-Bearer*, a journal published by Moses Harman in the late nineteenth and early twentieth centuries. One purpose of *Lucifer*, according to Harman,

contributing writers relayed the testimony of women who complained of sexual abuse within marriage.

In newspapers, pamphlets, and novels, Free Lovers spoke of different forms of sexual coercion within marriage: physical, economic, and psychological. Their writing and speeches spoke of the resulting consequences women suffered because of this abuse, which included physical and emotional injury, and even death.<sup>95</sup> While limited in scope, such efforts drew on “the sexual ideology of the radical Enlightenment and the abolitionist movement,” using terms such as “‘prostitution’ and ‘slavery’ to describe the emotional condition and legal position of the married woman,” highlighting the importance of consenting to sexual relations.<sup>96</sup>

In contrast, most suffragists and moral reformers, highly concerned about maintaining social respectability and garnering mass support, generally did not “advance very far beyond prevalent standards of propriety in discussing sexual matters publically.”<sup>97</sup> Furthermore, reformers addressing the politics of marriage focused on alcoholism and unrestrained male sexuality as the root cause of sexual violence within marriage, thereby avoiding any direct attack on the institution of marriage itself.

Elizabeth Cady Stanton and other writers of the era made a case against many oppressive

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was to free women from the subservient positions they held in marriage, specifically those related to reproduction. Like Woodhull, Harman faced arrest for violating the Comstock Act. In Harman’s case, arrest and imprisonment followed the publication of a letter that referred to forced sex in marriage as rape. Comstock also targeted Ezra Heywood, author of *Cupid’s Yoke, or the Binding Forces of Conjugal Life*. A Free Lover, Heywood “called marriage a slavish institution and compared it to prostitution because the wife exchanged sex for monetary support.” Just as inciting to Comstock, Heywood provided information about birth control, a topic prohibited under the Comstock Laws. Cott, *Public Vows*, 125-26. For more on Comstock’s influence and birth control, see note 60, *infra*, and the accompanying text.

<sup>95</sup> Battan, “In the Marriage Bed,” 209.

<sup>96</sup> *Ibid.*, 207.

<sup>97</sup> Linda Gordon, “Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States,” *Feminist Studies* 1, no. 3/4 (1973), 6.

conditions within the state of marriage; they singled out obligatory sex for particular condemnation. Such women identified the law as complicit in such atrocities, holding the legal system responsible for women's oppression. Stanton once wrote: "What father could rest at home by night, knowing that his lovely daughter was at the mercy of a strong man drunk with wine and passion and that, do what he might, he was backed up by law and public sentiment?"<sup>98</sup> Pauline Wright Davis, in an address to the National Woman Suffrage Association in 1871, spoke out against the laws that made "obligatory the rendering of marital rights and compulsory maternity."<sup>99</sup> While nineteenth-century feminists did make strides related to the legal foundation of marriage, laws protecting a woman from sexual coercion by her spouse was not one of them.<sup>100</sup>

Closely related to sexual coercion within marriage were the ideas of involuntary motherhood and childrearing, as they contributed to the oppression of women. The late nineteenth century saw the rise of the voluntary motherhood movement, which advocated reproductive self-determination that would allow women to "make pregnancy, childbirth, and motherhood matters of conscious choice."<sup>101</sup> According to Linda Gordon, those who advocated for voluntary motherhood were either suffragists, part of the moral reform movement, or members of Free Love groups. Both suffragists and Free Lovers viewed reproduction in the context of social changes, which they hoped included "a decline in

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<sup>98</sup> Ellen Carol DuBois and Richard Cándida Smith, eds., *Elizabeth Cady Stanton, Feminist as Thinker: A Reader in Documents and Essays* (New York: New York University Press, 2007), 183.

<sup>99</sup> Linda Gordon, *The Moral Property of Women: A History of Birth Control Politics in America* (Urbana-Champaign: University of Illinois Press, 2002), 62.

<sup>100</sup> David Finklehor and Kersti Yllo, *License to Rape: Sexual Abuse of Wives* (New York: Holt, Rinehart and Winston, 1985), 3-4. See also, Mari Jo Buhle and Paul Buhle, *The Concise History of Woman's Suffrage* (Champaign: University of Illinois Press, 1978) and Linda Gordon, *Woman's Body, Woman's Right* (New York: Grossman, 1976).

<sup>101</sup> Linda Gordon, "Voluntary Motherhood," 5; Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (Oxford University Press, 1980), 201-209.

patriarchal power within the family.”<sup>102</sup> At the same time, neither group – nor the women’s rights movement as a whole in the nineteenth century – supported contraception as a way to limit family size, as birth control advocates in the early 20<sup>th</sup> century would. Despite the reluctance of the feminist movement to embrace the use of abortion or contraception as methods of limiting family size: “Abortionist and sellers of abortifacients and contraceptive methods had been advertising extensively, if subtly, for decades, their main clients being married women. . . . Both abortion and the market for contraceptive aids such as condoms, pessaries, and douches gave unmistakable signs that men and women, married and not, wanted to limit pregnancies.”<sup>103</sup>

Despite their widespread use, many women’s rights activists in American society viewed contraceptive devices as unnatural and their use raised the fear of sexual promiscuity, which in turn threatened the very fabric of society by undermining the family unit.<sup>104</sup> Nevertheless, nineteenth-century reformers wanted women to be able to limit pregnancy if it was physically or psychologically in their best interest. Toward this end, they advocated abstinence, either by mutual consent of the married couple or as a unilateral decision by the wife to refuse her husband. While law and custom promoted sexual intimacy as a wife’s responsibility, voluntary motherhood promoted a woman’s right to refuse as representing “her independence and personal integrity.”<sup>105</sup>

In the years following the Civil War, many women publicly advocated for a woman’s inherent right to control the number of children she bore, while also demanding

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<sup>102</sup> Steven M. Buechler, *Women’s Movements in the United States: Woman Suffrage, Equal Rights, and Beyond* (Rutgers University Press, 1990), 98; Gordon, “Voluntary Motherhood,” 6.

<sup>103</sup> Cott, *Public Vows*, 126.

<sup>104</sup> Linda Gordon, “Voluntary Motherhood,” 6-7; Degler, *At Odds*, 203.

<sup>105</sup> Linda Gordon, “Voluntary Motherhood,” 9-11.

recognition of female sexuality. Notable examples include Pauline Davis Wright, Isabella Beecher Hooker, and Elizabeth Cady Stanton.<sup>106</sup> Perhaps the most extreme supporter of a woman's right to her own body at that time was Eliza B. Duffey, who promoted the idea that women had no obligation to bear children, but rather had the right to avoid motherhood entirely if they so desired. Duffey went further, criticizing women who did not limit their family size and concluding that unlimited reproduction would result in premature aging and senility.<sup>107</sup>

Voluntary motherhood emphasized the physical dangers intercourse and resulting pregnancy posed to women in the nineteenth century. Pregnancy, childbirth, and even abortions were dangerous and could lead to permanent injury or death for a woman. Yet only a few in the voluntary motherhood movement favored the use of contraceptive devices to limit conception. Dr. J. Soule argued:

No woman shall hereafter be compelled to bear children against her wishes. God knows it is *bad enough* [emphasis in the original] for a woman to bear children when she consents to it, without being compelled, time after time, to bear them

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<sup>106</sup> *Ibid.*, at 7 and 11. Gordon quotes each of these women, providing insight into their advocacy for women's autonomy. At the 1871 National Woman Suffrage Association Convention, Wright criticized any law "which makes obligatory the rendering of marital rights and compulsory maternity." Isabella Beecher Hooker, in conversation to her daughter, described the sexual double standard: "Multitudes of women in the ages who have scarce known what sexual desire is – being wholly absorbed in the passion of maternity, have sacrificed themselves to the beloved husbands as unto God – and yet those men, full of their human passion and defending it as righteous & God-sent lose all confidence in womanhood when a woman here and there betrays her similar nature & gives herself soul & body to the man she adores." Stanton explained: "womanhood is the primal fact, wifehood and motherhood the incidents . . . must the heyday of her existence be wholly devoted to the one animal function of bearing children? Shall there be no limit to this but woman's capacity to endure the fearful strain on her life?"

<sup>107</sup> Sue Lynn McGuire, "Fannie's Flirtations: Etiquette, Reality, and the Age of Choice," *The Register of the Kentucky Historical Society* 93, no. 1 (1995), 43-78. For more on the ideas of Eliza B. Duffey, see Lorelee MacPike, "The New Woman, Childbearing, and the Reconstruction of Gender, 1880-1900," *NWSA Journal* 1, no. 3 (1989), 368-397; Regina Markell Morantz, "Making Women Modern: Middle Class Women and Health Reform in 19<sup>th</sup> Century America," *Journal of Social History* 10, no. 4 (1977), 490-507; Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge, MA: Harvard University Press, 2013); and Regina Morantz-Sanchez, *Sympathy and Science: Women Physicians in American Medicine* (Chapel Hill: University of North Carolina Press, 2000). Individuals like Eliza B. Duffey and the aforementioned Victoria Woodhull and Tennessee Claflin ran the risk of legal complications as they promoted voluntary motherhood and condemned rape in marriage due to the Comstock Act, which regulated the distribution of material deemed obscene.

when she does not want them . . . [Birth control places women] in a freer, a happier, and more independent position.<sup>108</sup>

At the same time, Frederick Hollick, author of several medical advice books, promoted the benefits of birth control for women's health as preferable to abortion. Dr. George Napheys argued that a woman's independence required control over her own fertility. Napheys reasoned:

Religion might tell woman . . . that "it is her duty to bear all the children she can. . . if a woman has a right to decide on any question . . . it certainly is how many children she shall bear. . . Certainly . . . wives have a right to demand of their husbands at least the same consideration which a breeder extends to his stock."<sup>109</sup>

Despite these efforts to promote voluntary motherhood, at the end of the nineteenth century the majority within the women's rights community had not embraced the use of contraceptive devices to prevent conception.

In the early twentieth century, some radical women's rights activists embraced contraception. As women became convinced that relief from enforced childbearing could come through birth control, they subordinated the issue of forced sex within marriage to the struggle for contraception and abortion rights.<sup>110</sup> The primary focus of the birth control movement was to promote a woman's right to decide when and if she wanted to become pregnant.<sup>111</sup> At the center of the movement, Margaret Sanger "viewed birth control as a means to women's autonomy," voicing her belief: "It is none of society's

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<sup>108</sup> Degler, *At Odds*, 202, citing J. Soule, *Science of Reproduction and Reproductive Control* (New York, c. 1856).

<sup>109</sup> Degler, *At Odds*, 202, citing George H. Napheys, *The Physical Life of Woman: Advice to the Maiden, Wife, and Mother* (Philadelphia, 1871).

<sup>110</sup> Finkelhor and Yllo, *License to Rape*, 4-5.

<sup>111</sup> Gretchen Hathaway Tyson, "The Effect of Women's Advocacy Groups on Legislative Changes in the United States with Specific Emphasis on Marital Rape Legislation in Pennsylvania and New York," Ph.D. dissertation, University of Pittsburg (1993), 17.

business what a woman shall do with her body.”<sup>112</sup> In 1912, Sanger began to advocate for the use of contraceptives, both in writing and at speaking engagements. She saw birth control as a way for women to enjoy sexual intimacy free from the fear of unwanted pregnancies. Two objectives guided Sanger’s actions: “sexual freedom for middle-class women” and eradicating “the misery of working-class women who had virtually no control over their own fertility, and bore child after child despite grinding poverty.”<sup>113</sup> Initially intent on providing poor women with contraceptives to control their fertility, Sanger changed her focus when stymied by conservative opposition to birth control clinics. Thereafter, “she began to target elite and middle-class audiences and to emphasize the erotic potential for women by separating sex from reproduction.”<sup>114</sup> The Comstock law thwarted her efforts, as the federal obscenity laws included prohibitions against information about contraception.<sup>115</sup> Facing forty-five years in prison if convicted

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<sup>112</sup> Ellen Carol DuBois and Lynn Dumenil, *Through Women’s Eyes: An American History with Documents*, Third Edition (New York, NY: Bedford/St. Martin’s, 2012), 482.

<sup>113</sup> John D’Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America*, Second Edition (Chicago: University of Chicago Press, 1997), 232.

<sup>114</sup> DuBois and Dumenil, *Through Women’s Eyes*, 534.

<sup>115</sup> Anthony Comstock, perhaps the most infamous anti-vice crusader in American history, zealously pursued those whom he believed had violated the Federal Obscenity Statutes of 1865 and 1872. Intent on strengthening the government’s position and expanding what the law considered “obscene” to include information on birth control, Comstock worked with Congressman Clinton Merriam and Senator William Buckingham to pass legislation commonly known as the Comstock Law. That law provided: “No article, or thing, designed or intended, for the prevention of conception, or notice of any kind in writing or print, giving information directly or indirectly, where or how, or of whom, or by what means either of the things before mentioned may be obtained or made, shall be carried in the mail.” Vincent Cirillo, “Birth Control in Nineteenth-Century America: A View from Three Contemporaries,” *Yale Journal of Biology and Medicine* 47 (1974), 263. In 1873, Comstock became special agent to the Postmaster General with authority to enforce the new law, a position he accepted with great enthusiasm. Notably, the position funded as part of a federal appropriations bill, “was created with the understanding of the postmaster general that Anthony Comstock himself would fill it.” Helen Lefkowitz Horowitz, *Rereading Sex: Battles over Sexual Knowledge and Suppression in Nineteenth-Century America* (New York: Vintage Books, 2002), 381-383. For a detailed analysis of Comstock and the federal legislation that took his name, see *Rereading Sex*, specifically chapters 13-19. As Martha J. Bailey explains, in addition to outlawing the interstate mailing, shipping, or importation of items deemed “obscene,” the Comstock Act encouraged lawmakers to enact similar laws on the state level. By 1900, forty-two states had anti-obscenity laws, and by 1920 another three states passed similar legislation. Even so, the language of the statutes varied by state, which after 1960 would have an impact on access to and the purchase of contraceptives. The obscenity statutes fell into three categories: “general obscenity statutes that banned the dissemination of obscene information, the sale of

of violating the law, Sanger fled to Europe where she gained access to contraceptive devices, which she would later sneak into the country, more information about birth control, and an international following. When she returned to the United States, she demanded a trial, but the federal prosecutor decided to drop the pending charges against Sanger. Thereafter, she embarked on a national speaking tour before settling in Brooklyn, New York, and opening the first birth control clinic in the United States. Sanger once again faced arrest, a trial, and possible conviction, this time for disseminating information on birth control without a physician present. The government's actions against Sanger provided the birth control cause with significant publicity and drew attention to a shift in the sexual norms that had governed the middle class for more than fifty years. Further:

To advocate fertility control among women through access to contraceptive devices rather than through abstinence implied an unequivocal acceptance of female sexual expression. It weakened the link between sexual activity and procreation, altered the meaning of the marriage bond, and opened the way for more extensive premarital sexual behavior among women.<sup>116</sup>

This was certainly a consequence never anticipated or intended by the government as it enforced the laws governing the distribution of information about contraceptives.

The birth control movement was above all things fluid and adaptive. Across time and regional boundaries, tactics adapted to the political, economic, and social interests of

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obscene information, and the sale of indecent or immoral 'articles or instruments,'” but did not categorize contraception as obscene; advertising or information bans that “explicitly outlawed the distribution of information or advertising about” items used for the prevention of conception; and sale bans that prohibited a generic sale of contraceptives.” Notably, states with sale bans also had advertising bans. The sale bans that remained in effect in the early 1960s resulted in significant variance in the availability and cost of obtaining and using the pill. Martha J. Bailey, “‘Momma’s Got the Pill’: How Anthony Comstock and *Griswold v. Connecticut* Shaped US Childbearing,” *The American Economic Review* 100, no 1 (2010), 98-129. The U.S. Supreme Court addressed limitations on access to birth control in the 1965 case *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court’s decision struck down Connecticut’s ban on the use of contraceptives, but had far-reaching implications as legislators revised state laws to permit sales of contraceptives to married women. Five years later, the Court extended this right to unmarried individuals in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>116</sup> D’Emilio and Freedman, *Intimate Matters*, 232-233.

the population.<sup>117</sup> In the 1920s, for instance, two very different impulses motivated the birth control movement: the move toward sexual liberalism and eugenics. Sexual liberalism, represented by sexual freedom in Hollywood films, promoted companionate marriage characterized by mutual sexual satisfaction and even sexual expression outside the confines of marriage. The use of contraceptives would reduce the possibility of pregnancy and increase personal satisfaction during intimacy. Eugenics rhetoric promoted restricted reproduction by “undesirables” for whom birth control was a necessity. According to D’Emilio and Freedman, because of her single-minded goal of making birth control a major political issue, Sanger “was willing to play to nativist and middle-class fears of immigrants, blacks, and the poor.”<sup>118</sup> Sanger promoted the eugenics agenda and played on the rhetoric of nativists, when she “defined the purpose of birth control as ‘more children from the fit, less from the unfit.’ It was ‘nothing more or less than the facilitation of the process of weeding out the unfit, or preventing the birth of defectives.’”<sup>119</sup>

Sanger and her followers adjusted their tactics to address the economic crisis of the 1930s. Increased poverty caused by the depression meant that couples had difficulty supporting large families. Activists “trumpeted fertility limitations for the poor as an ‘important relief measure,’” thereby reducing the size of families receiving government aid.<sup>120</sup> As the decade progressed, the number of family planning clinics increased nationwide: there were twenty-eight clinics in 1929, one hundred fifty-eight by 1935, and

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<sup>117</sup> Robyn Rosen, “The Shifting Battleground for Birth Control: Lessons from New York’s Hudson Valley in the Interwar Years,” *New York History* 90, no. 3 (2009), 189.

<sup>118</sup> D’Emilio and Freedman, *Intimate Matters*, 245.

<sup>119</sup> D’Emilio and Freedman, *Intimate Matters*, 245.

<sup>120</sup> Tyson, “The Effect of Women’s Advocacy Groups,” 19; D’Emilio and Freedman, *Intimate Matters*, 245.

five hundred forty-nine by the beginning of 1940.<sup>121</sup> As Norman Hines noted there was an uneven distribution of these clinics across the country. Clinics were more likely to appear in areas of higher population, particularly in the North. In contrast, facilities were more limited in “the South and in the sparsely settled areas of the West.”<sup>122</sup>

For the birth control movement to succeed, it was necessary to separate birth control from obscenity laws. Advocates were able to accomplish this by reframing birth control as a scientific, medical issue rather than a form of pornography. Promoting this new definition, the American Birth Control League “emphasized how birth control prevented the cycle of poverty, untimely deaths, and unwanted children.”<sup>123</sup> A significant first step toward the legalization of birth control came in 1936 with *United States v. One Package of Japanese Pessaries*.<sup>124</sup> The case challenged the provision of the Tariff Act of 1930 that had incorporated the anti-contraception element of the Comstock Law. The federal appellate court that heard the case held that the Tariff Act did not apply to physicians who were importing contraceptive devices in order to use them to protect the health of their patients.

By the end of the 1930s, the climate toward birth control had changed enough among politicians, physicians, and the public, that contraception was more acceptable.<sup>125</sup>

The birth control movement gained further legitimacy with the formation of Planned

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<sup>121</sup> Price v. Fishback, Michael R, Haines, and Shawn Kanto,r, “Births, Deaths, and New Deal Relief during the Great Depression,” *The Review of Economics and Statistics* 89, no. 1 (2007), 12; Norman E. Himes, “A Decade of Progress in Birth Control,” *The Annals of the American Academy of Political and Social Science* 212 (1940), 90.

<sup>122</sup> Himes, “A Decade of Progress in Birth Control,” 91.

<sup>123</sup> Tyson, “The Effect of Women’s Advocacy Groups,” 19.

<sup>124</sup> *United States v. One Package of Japanese Pessaries*, 86 F.2d 737 (1936).

<sup>125</sup> According to D’Emilio and Freedman, by the mid-1930s, the fifteen largest manufacturers of condoms were producing a million and a half each day. Sales soared as availability increased: customers could purchase this form of contraception in drugstores, gas stations, restaurants, barbershops, and newsstands. D’Emilio and Freedman, *Intimate Matters*, 245.

Parenthood of America in 1942.<sup>126</sup> Once again in the late 1940s and 1950s, the message of advocates changed to suit the realities of American life. During the postwar baby boom, when women were marrying earlier and having children sooner and more often, Planned Parenthood emphasized the right of couples “to continue their sexual relationship without doubling the size of their families,” and spacing children.<sup>127</sup> Fertility studies demonstrated that despite the baby boom, eighty-one percent of married women utilized some form of contraception in the years 1955 to 1960.<sup>128</sup>

The birth control pill, commercially available in 1960, further challenged historical views of contraception. Premarital sex had been increasing steadily, albeit gradually, since the 1920s, but the introduction of the birth control pill weakened the link between sex and marriage as “growing numbers of . . . women began to stake out their right to enjoy sex for pleasure rather than for procreation.”<sup>129</sup> The decade “witnessed a profound shift in attitudes toward *female* premarital sex.”<sup>130</sup> Women in the post-pill era could enjoy physical intimacy while avoiding pregnancy, a shotgun wedding, a prolonged stay at a home for unwed mothers, an illegal or dangerous abortion, or a damaged reputation. Realistically, each of these consequences was still a possibility, but with greater access to reliable birth control, the probability of any of them coming to fruition

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<sup>126</sup> Rilma Buckman explained the transition from the American Birth Control League to the Planned Parenthood Federation of America. According to Buckman, Margaret “Sanger withdrew from the American Birth Control League, which she had helped to organize in 1921, because of differences over matters of policy; but she continued her educational work through the Clinical Research Bureau and the newly-established National Committee on Federal Legislation for Birth Control. . . . [These three entities] merged into a new national organization known as the Birth Control Federation of America, Inc., which in turn changed its name in 1942 to the Planned Parenthood Federation of America, Inc.” Rilma Buckman, “Social Engineering: A Study of the Birth Control Movement,” *Social Forces* Vol. 22, no. 4 (1944), 422.

<sup>127</sup> *Ibid.*, 249.

<sup>128</sup> Just as the rise of birth control clinics varied by location, so too did the use of contraception. D’Emilio and Freedman have noted variation among groups based on racial/ethnic identity, social class, and geographic location. See *Intimate Matters*, 249-250.

<sup>129</sup> Rosen, 55; Coontz, *Marriage, a History*, 524-255; Garrison, “Nonmarital Cohabitation,” 312-313.

<sup>130</sup> Garrison, 312.

dropped dramatically. Thus, changing social attitudes in the 1960s, accompanied by pharmaceutical advancements, gave way to greater sexual autonomy, which would lay the groundwork for the anti-rape movement and discussions about marital rape.

It would be the second-wave feminists, beginning in the late 1960s, who would revive the issue of forced sex in marriage and make it a subject of public debate. The feminist movement that emerged in the 1960s found inspiration from many sources, including Simone de Beauvoir, Betty Friedan, and Kate Millett, as well as the experiences women gained from their participation in the civil rights movement, the antiwar movement, and other movements of the New Left.

First published in 1949 as *Le Deuxième Sexe*, Simone de Beauvoir's *The Second Sex* elicited a discussion about the historical status of women that scholars still debate today. Some have referred to the text as a "feminist bible," despite the underlying religious connotation and de Beauvoir self-identifying as an atheist. One writer boldly called *The Second Sex* "an act of Promethean audacity – a theft of Olympian fire – from which there is no turning back. It is not the last word on 'the problem of women,' . . . but it marks the place in history where an enlightenment begins."<sup>131</sup> Beauvoir posited a self-other relationship between man and woman, where man was the self/subject and woman the other/object, understood only in relation to man.<sup>132</sup> Women, like minority groups such as Blacks and Jews, de Beauvoir concluded, were "objectified as the Other in ways that were both overtly despotic and insidious," subjugated merely for belonging to the

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<sup>131</sup> Judith Thurman, "Introduction to Simone de Beauvoir's 'The Second Sex,'" *The New York Times* May 27, 2010, [http://www.nytimes.com/2010/05/30/books/excerpt-introduction-second-sex.html?\\_r=0](http://www.nytimes.com/2010/05/30/books/excerpt-introduction-second-sex.html?_r=0).

<sup>132</sup> Karen Vintges, "Simone de Beauvoir: A Feminist Thinker for Our Times," *Hypatia* 14, no. 4 (1999), 133.

particular group into which they were born.<sup>133</sup> Beauvoir illustrated this self-other relationship with repeated discussions of sex between males and females, where men were generally the actors and women those acted upon.<sup>134</sup>

While *The Second Sex* was not primarily a book that admonished men for sexually assaulting women, de Beauvoir did make recurring reference to rape. She used rape imagery to describe women's first experiences with sex. Whether within or outside of marriage, de Beauvoir explained that such experiences could be traumatizing for women. For instance, de Beauvoir asserted:

The woman is penetrated and impregnated through the vagina; it becomes an erotic center uniquely through the intervention of the male, and this always constitutes a kind of rape. In the past, a woman was snatched from her childhood universe and thrown into her life as a wife by a real or simulated rape; this was an act of violence that changed the girl into a woman: it is also referred to as "ravishing" a girl's virginity or "taking" her flower. This deflowering is not the harmonious outcome of a continuous development; it is an abrupt rupture with the past.<sup>135</sup>

The language of this passage delineates male from female, actor from subject. The man penetrates, impregnates, and snatches the woman, throwing her into her new life. The woman on the other hand is ravished, taken, and deflowered by the man, and as such, her passive involvement is subordinated to his. Through this example and the many others provided in *The Second Sex*, de Beauvoir created the framework of "women as other," marginalized and subjected to the dominance of males in society. Later feminists would utilize this structure to discuss how that gender disparity created situations that promoted

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<sup>133</sup> Thurman, "Introduction to Simone de Beauvoir's 'The Second Sex.'"

<sup>134</sup> Beauvoir provides one example of a wild, primitive people whose females were the aggressors, granted the right to "rape any stranger who came into the village. . . . [Afterward,] the tribesmen laughed at this exploit; by this rape, the victim was constituted as passive and dependent flesh; he was possessed by the women and through them their husbands, while in normal coitus man wants to affirm himself as possessor." Simone de Beauvoir, *The Second Sex* (New York: Vintage Books, 1949), 216.

<sup>135</sup> Beauvoir, *The Second Sex*, 442.

– or at least condoned – violence against women. Ultimately, it is de Beauvoir’s views on sex as rape that foreshadow future arguments women’s disempowerment in heteronormative relationships, especially marriage.

Beauvoir’s most notable, some might say subversive, challenge to the status quo asserted: “One is not born, but rather one becomes a woman: no biological, psychological or economic fate determines the figure that the human female presents in society.”<sup>136</sup> These twenty-six powerful words challenged the social construct that defined “woman” in contemporary society, and they disparaged the myth of blissful domesticity and sentimental motherhood. In addressing women’s subordination, de Beauvoir emphasized the dilemma of modern women: they had basic political rights, yet still “suffered from extreme cultural, social, and economic marginality.”<sup>137</sup> While promoting equality for women, she also acknowledged that equality could coexist with difference. Women, particularly with access to contraceptives and paid employment, could emerge with new, individual personal identities independent of men. For de Beauvoir, equality between men and women would result from the eradication of women’s oppression. While largely ignored in the United States and England until the 1970s, thereafter, *The Second Sex* was a foundational work underscoring second-wave feminist activism.<sup>138</sup>

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<sup>136</sup> Rosen, *The World Split Open*, 56.

<sup>137</sup> *Ibid.*, 57.

<sup>138</sup> Vintges, “Simone de Beauvoir,” 140. For a brief overview of some of the controversy that surrounded the principles de Beauvoir espoused, see Dorothy Kaufmann, “Simone de Beauvoir: Questions of Difference and Generation,” *Yale French Studies* 72 (1986), 121-131. For more on de Beauvoir’s influence on second-wave feminism, see Mary Lowenthal Felstiner, “Seeing ‘The Second Sex’ through the Second Wave,” *Feminist Studies* 6 (1986), 247-276. Jo-Ann Pilardi has evaluated the critical reception that *The Second Sex* received in France, the United States, and England, depicting the cyclic nature of the scholarly responses. Jo-Ann Pilardi, “The Changing Critical Fortunes of the Second Sex,” *History and Theory* 23, no. 1 (1993), 51-73.

In her best-selling book, *The Feminine Mystique*, Betty Friedan argued that the strict gender division promoted in post-World War II America stunted the lives of many women, resulting in extremely high levels of female dissatisfaction, boredom, and even psychosomatic complaints. The problem, Friedan postulated, arose from the societal expectation that women would find contentment in the home, raising children and taking care of their husbands, tasks made easier with the modern, timesaving appliances that were more widely available in 1950s America. To move beyond the resulting malaise that suburban domesticity caused, Friedan encouraged women to pursue their passions outside the home, whether in education or employment.<sup>139</sup> While *The Feminine Mystique* often receives credit for jumpstarting second-wave feminism, the text is not without its detractors.<sup>140</sup> Critics have argued that the “problem” Friedan identified and her solutions were applicable only to upper and middle-class, white women. Contrary to Friedan’s assertions, not all housewives were unhappy. Many women embraced their new roles as homemakers; unlike their mothers and unmarried sisters, they were not compelled to take low-paid employment outside the home. Additionally, not all Americans could or did live

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<sup>139</sup> Betty Friedan, *The Feminist Mystique* (New York: W. W. Norton & Company, 2001).

<sup>140</sup> The scholarship that reflects the influence of *The Feminine Mystique* is plentiful. One path of this scholarship has been to evaluate the accuracy of Friedan’s conclusions and their applicability to the female population as a whole in the late 1950s and early 1960s. Representative texts in this group are Joanne Meyerowitz, “Beyond the Feminine Mystique: A Reassessment of Postwar Mass Culture, 1946-1958,” *Journal of American History* 79, no. 4 (1993), 1455-1482; Daniel Horowitz, “Rethinking Betty Friedan and the Feminine Mystique: Labor Union Radicalism and Feminism in Cold War America,” *American Quarterly* 48, no. 1 (1996), 1-42; Daniel Horowitz, *Betty Friedan and the Making of the Feminine Mystique: The American Left, the Cold War, and Modern Feminism* (University of Massachusetts Press, 1998); and Stephanie Coontz, *A Strange Stirring: The Feminine Mystique and American Women at the Dawn of the 1960s* (Basic Books, 2012). Other scholars, like Sarah Maxwell and Elisabeth Katharina Kleinlercher, have used the *Feminine Mystique* as a standard by which to measure women’s activism and literature. Sarah Maxwell, *Success and Solitude: Feminist Organizations Fifty Years after the Feminine Mystique* (University Press of America, 2009) and Elisabeth Katharina Kleinlercher, *The ‘Feminine Mystique’: Sylvia Plath’s ‘The Bell Jar’ and Mary McCarthy’s ‘The Group’* (Saarbrücken, Germany: AV Akademikerverlag, 2013). Works that extended Friedan’s concept of a feminine mystique to other groups outside the white, middle class include Hasia Diner and Shira Kohn, *A Jewish Feminine Mystique?: Jewish Women in Postwar America* (Rutgers University Press, 2010) and William E. Waters, *The Black Feminine Mystique: A Naomi Long Madgett Poetry Award Finalist* (AuthorHouse, 2014).

by the norms of suburban domesticity, ideals that were out of reach for many racial minorities, inner city residents, recent immigrants, and rural Americans. In fact, at the height of the postwar period, more than one-third of American women held jobs outside the home. By the 1960s, one worker in three were women, and three of five working women were married. Nevertheless, Friedan and her “problem without a name” did breathe life into the nascent women’s movement of the 1960s, setting the stage for substantive progress in criminalizing marital rape.<sup>141</sup>

Particularly interesting is the influence that Friedan had on public perception regarding topics she only lightly covered or did not show up in her book. When Stephanie Coontz agreed to write a book on the influence of the *Feminine Mystique* on American society, she interviewed a wide variety of women, some of whom had read the book and some who merely thought they had. One notable commonality that emerged was the conflation of Friedan’s message with a wide swath of issues related to the women’s movement. Coontz notes that one respondent insisted that “The *Feminine Mystique* documented how women in the 1950s were excluded from many legal rights and paid much less than men – although in fact the book spends very little time discussing legal and economic discrimination against women.”<sup>142</sup> Another woman interviewed swore that *Feminine Mystique* encouraged women to burn their bras, while others assured Coontz

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<sup>141</sup> Following the release of *The Feminine Mystique*, Friedan’s influence was so great among women’s rights advocates that she became the first president of the newly formed National Organization for Women in 1966. As Friedan explained in the first speech of her presidency, the objective of NOW was “to take action to bring women into full participation in the mainstream of American society now, exercising all privileges and responsibilities thereof in truly equal partnership with men.” Betty Friedan, “The National Organization for Women’s 1966 Statement of Purpose,” <http://now.org/about/history/statement-of-purpose/>

<sup>142</sup> Coontz, *A Strange Stirring*, xvi.

“that Friedan had called for the end to marital rape and sexual harassment – ideas that do not appear anywhere” within the book.<sup>143</sup>

Kate Millett took up the feminist cause with *Sexual Politics*, published in 1970.<sup>144</sup> Like the rhetoric of Friedan, Anne Koedt, and Shulamith Firestone, Millett’s writing interrogated the intersection between identity and sexuality for women.<sup>145</sup> Millett acknowledged the legal success of first-wave feminists in achieving suffrage, while simultaneously addressing what she saw as the noxious, yet subtle, lingering influence of patriarchy in sexual relations. In *Sexual Politics*, Millett unabashedly analyzed the misogyny she found in American and British literature. D. H. Lawrence, Henry Miller, and William Burroughs were particular targets. As Ruth Rosen has observed: “Through a close reading of their texts, Millett demonstrated how much cruelty and hatred these misogynist authors had directed at women.”<sup>146</sup> Women within the pages of the novels Millett analyzed “never seemed to mind male acts of rape, violence, or mutilation. The moment a man penetrated a woman, she invariably experienced sublime heights of orgasmic bliss. In fact, the crueler the male character was, the greater her sexual

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<sup>143</sup> *Ibid.*

<sup>144</sup> Kate Millett, *Sexual Politics* (New York: Doubleday, 1970).

<sup>145</sup> Jane Gerhard, “Revisiting ‘The Myth of the Vaginal Orgasm’: The Female Orgasm in American Sexual Thought and Second Wave Feminism,” *Feminist Studies* 26, no. 2 (2000), 466. Anne Koedt challenged contemporary notions of female sexuality when she published “The Myth of the Vaginal Orgasm,” *Notes from the First Year* (New York: New York Radical Feminists, 1968). Koedt argued: “men had prevented women from realizing that the clitoris was the key to female orgasmic stimulation. And if the clitoris were the key to orgasmic stimulation, her argument implied that women could replace men with masturbation, other women, and sex toys.” Rosen, 150. Acknowledgement of the clitoral orgasm threatened the heterosexual standard of male-female sexual intimacy. D’Emilio and Freedman, 313. Widely read and highly debated, Shulamith Firestone’s *The Dialectic of Sex: A Case for Feminist Revolution* (New York: Bantam, 1970) presented a feminist theory of politics that suggested sex, not class, was the root of all oppression. The most controversial aspect of the text was Firestone’s proposal that women be freed from the “tyranny of their biology by any means available, and the diffusion of the childbearing and child-rearing role to the society as a whole, to men and other children as well as women.” Rosen, 152, referencing chapter 1 of Firestone’s *Dialectic of Sex*. Criticism of Firestone’s proposal highlighted the socialist nature of her solution and her apparent dismissal of “women’s important biological contribution as the bearers and rearers of children.” *Ibid.*

<sup>146</sup> Rosen, *The World Split Open*, 153.

satisfaction seemed to be.”<sup>147</sup> *Sexual Politics*, in its early days as a dissertation and later as a published text, broke ground in its departure from traditional thesis writing, opening the field of feminist literary criticism and giving a new voice to feminist theory.<sup>148</sup>

Millett’s assertions, as well as the arguments presented by other feminist scholars and novelists, led many women to evaluate just how liberating the Sexual Revolution had been for them. While the birth control pill, and later the intrauterine device, separated sexual intimacy from conception, emancipation from earlier sexual norms diminished perceptions of intercourse outside of marriage as deviant. Still, this sexual liberation did not free all women from the guilt of intimacy separate from marriage, nor did such encounters result in fulfilling experiences for all involved.

Throughout the 1970s, feminist activism addressed the gender inequalities that remained in society – those areas where political, economic, and social distinctions still separated women from men. One significant area of concern was women’s ability to exercise control over their bodies. “Although the American women’s movement began by emphasizing women’s ‘sameness,’ the focus on women’s autonomy over their bodies “refocused attention on those female experiences that made women unique.”<sup>149</sup>

Consciousness-raising sessions led to discussions about dismissive and condescending treatment from the male-dominated medical community, sexual harassment that stemmed

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<sup>147</sup> *Ibid.*

<sup>148</sup> Sara M. Evans, *Tidal Wave: How Women Changed America at Century’s End* (Free Press, 2004), 96. See also, Catherine R. Stimpson, Alix Kate Shulman, and Kate Millett, “‘Sexual Politics’: Twenty Years Later,” *Women’s Studies Quarterly* 19, no.3/4 (1991), 30-40 and Patricia Ticineto Clough, “The Hybrid Criticism of Patriarchy: Rereading Kate Millett’s *Sexual Politics*,” *The Sociological Quarterly* 35, no. 3 (1994), 473-486, which calls for cross-disciplinary analysis and application of Millett’s feminist framework.

<sup>149</sup> Rosen, *The World Split Open*, 175.

from the sexual objectification of women, the illegality of abortion and its consequences, and the legal difficulties women faced with regard to rape and domestic violence.<sup>150</sup>

Facing a medical establishment that continued to treat women “as ignorant or hysterical patients,” in a manner that was humiliating, dismissive, and woefully ignorant of the “female biological experience,” feminists “sparked a campaign to train more women doctors, to reeducate male physicians, and to create a women-oriented health movement.”<sup>151</sup> At the forefront of this movement was a group of activists from Boston that emerged from Bread and Roses, a women’s liberation organization in existence from 1969 through 1971, which later identified itself as the Boston Women’s Health Collective. Members, none of whom were physicians, became experts on the topic of women’s bodies, studying female “anatomy, physiology, sexuality, venereal disease, birth control, abortion, pregnancy, and childbirth,” before publishing their findings in pamphlet form and then in the greatly expanded book *Our Bodies, Ourselves* in 1973.<sup>152</sup> Illustrating the self-help theme of second-wave feminism, *Our Bodies, Ourselves*, written in language accessible to the layperson, discussed medical information as well as previously taboo topics like lesbianism and sexual violence.<sup>153</sup> Health activists addressed a wide range of issues facing women and their reproductive health, questioning why

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<sup>150</sup> Chapter 2 discusses Nebraska’s domestic violence and sexual assault movement that emerged in the 1970s and 1980s.

<sup>151</sup> Rosen, *The World Split Open*, 175-176. As Estelle Freedman has noted, the women’s health movement attempted to restore medical authority over reproduction that male gynecologists had usurped from midwives. While a few women entered the medical profession in the nineteenth century, it was not until the 1960s that a significant number of women integrated into the profession. In 2000, more than forty percent of medical students in the United States were female. Estelle B. Freedman, *No Turning Back: The History of Feminism and the Future of Women* (New York: NY, Ballantine Books, 2003), 215.

<sup>152</sup> Boston Women’s Health Collective, *Our Bodies, Ourselves* (New York: Simon and Schuster, 1973); Evans, *Tidal Wave*, 48; Rosen, *The World Split Open*, 176; DuBois and Dumenil, *Through Women’s Eyes*, 699.

<sup>153</sup> Freedman, *No Turning Back*, 216.

physicians – not patients – had power over health decisions. Encouraging women to be active medical consumers rather than passive patients at the mercy of patriarchal medical structures, health activists challenged everything from decisions about contraception and abortion to radical mastectomies and coercive sterilization.

While feminists were encouraging women to seize control of their reproductive health, activists were also spearheading the domestic violence movement. The development of the domestic violence movement was not the result of a singular event, but rather the culmination of a series of continuous events evolving around the nation beginning in the 1970s. Victims of domestic violence found themselves isolated from friends, family, and community resources. Early calls for change were hardly outrageous. Advocates asked only that the legal system treat battered women fairly and equitably, questioning “why a woman beaten in her own home by her husband was denied . . . justice, while someone assaulted in the street was recognized as a legitimate victim of a crime.”<sup>154</sup> Those within the domestic violence movement believed that treating domestic violence as seriously as other forms of violent crime would convey to the public that such behavior was no longer socially or legally acceptable.<sup>155</sup> Yet this change in opinion would not come easily.

At the forefront of the movement, feminist scholars both chronicled and advanced the agenda of domestic violence activism. Del Martin’s 1976 publication of *Battered Wives* was the first general text to introduce the problem of domestic abuse.<sup>156</sup> An informative source on domestic violence in the United States, it critically analyzed the

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<sup>154</sup> Lisa A. Frisch, “Research That Succeeds, Policies That Fail,” *The Journal of Criminal Law and Criminology* 83, no. 1 (1992), 209.

<sup>155</sup> *Ibid.*, 209-210

<sup>156</sup> Del Martin, *Battered Wives* (San Francisco: Glide Publications, 1976).

legal and political status of women abused by their husbands. *Battered Wives* also served to validate the view held by many feminist members of the movement: domestic violence was the result of institutional misogyny. Martin described society as a patriarchal one in which males defined and then confined women to inferior roles by means of intimidation, threats, and the use of force. Two years later while she chaired a meeting sponsored by the United States Commission on Civil Rights, Martin contended that the condition of battered women was a matter of national concern.<sup>157</sup>

Susan Schechter published *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* in 1982. Reflecting on her motivation for writing the text, Schechter explained: "I hoped to tell a story about feminist, grassroots organizing and about the hard work required to build organizations, change law and social policy, and at the same time sustain a social movement. I wanted to brag about and document the accomplishments but also describe the hard, complicated work almost invisible underneath our new buildings and laws."<sup>158</sup> In doing so, Schechter acted as both historian of and visionary for the battered women's movement. Through her writing and public speaking, she promoted the fundamental assertion of the feminist movement that "women

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<sup>157</sup> "History of Battered Women's Movement," The California Department of Health Services, Maternal and Child Health Branch, Domestic Violence Section, and Interface Children Family Services (September 1999). Martin was a co-founder of the Coalition for Justice for Battered Women; La Casa de las Madres, a shelter for battered women; and the California Coalition against Domestic Violence. In addition to being a nationally recognized advocate for battered women, Martin was a significant force within the lesbian community. With her longtime partner, Phylis Lyon, Martin founded the lesbian organization Daughters of Bilitis in 1955. Together they published the *Ladder*, one of the first lesbian magazines in the United States. Martin was the first openly gay woman elected to the board of directors of the National Organization for Women. In that role, she campaigned to add lesbian issues to the organization's agenda. Martin was also an active member of the Alice B. Toklas Democratic Club, founded in 1972 to support gay candidates in San Francisco. Bruce B. Lawrence and Aisha Karim, *On Violence: A Reader* (Durham, NC: Duke University Press, 2007), 255; William Grimes, "Del Martin, Lesbian Activist, Dies at 87," *New York Times*, August 27, 2008; "Remembering Del Martin," Lyon-Martin Health Services, <http://lyon-martin.org/about-us/the-lyon-martin-story/remembering-del-martin/>.

<sup>158</sup> Fran S. Danis, "A Tribute to Susan Schechter: The Visions and Struggles of the Battered Women's Movement," *Journal of Women and Social Work* 21, no. 3 (2006), 336-337.

had a right to control their own bodies and lives.”<sup>159</sup> *Women and Male Violence*, credited with framing “the issues of intimate violence in a way that helped shape every subsequent analysis of domestic violence, its causes and solutions,” extolled activists to do more.<sup>160</sup>

In 1979, psychologist Lenore Walker released *The Battered Woman*, the book that introduced the theory of Battered Woman Syndrome (BWS). Walker’s controversial theory suggested that women who endure repeated physical or psychological acts at the hands of their husbands might suffer from a form of post-traumatic stress disorder, which would impair their ability to think rationally and make reasonable decisions.<sup>161</sup> Cyclical behavior between the woman and her abusive partner, characterized by three distinct phases – tension-building, acute battering, and calm respite – might result in a pattern of psychological and behavioral symptoms. An individual suffering from BWS usually presents four common ideations: she believes that the violence was somehow her fault; she does not have the ability to place responsibility for the violence elsewhere; she fears for her life or the lives of her children; and she holds an irrational belief that her abuser is

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<sup>159</sup> *Ibid.*, 336.

<sup>160</sup> <http://clas.uiowa.edu/faculty/susan-schechter>. Schechter devoted her career to help bridge the gap between programs addressing domestic abuse and those for children's welfare. Her strength lay in her ability to challenge the domestic violence community and the child welfare community to work through their distrust and differences and find ways to collaborate on behalf of battered women and their children. She helped establish the first domestic violence shelter in Chicago and then created the nation’s first domestic violence program in a children’s hospital in Boston. Campbell Robertson, “Susan Schechter, 57, Author of Books Exploring Impact of Domestic Violence,” *New York Times*, February 16, 2004; Danis, “A Tribute to Susan Schechter,” 336.

<sup>161</sup> Lenore Walker, *The Battered Woman* (New York: Harper Collins, 1979). The American Psychological Association did not recognize the term Post-Traumatic Stress Disorder until 1980 with the release of the DSM-III. While the disorder was first used to describe psychological difficulties experienced by war veterans, according to the National Institute of Mental Health, mental health professionals now acknowledge that it can result from a variety of traumatic events, such as being kidnapped, child abuse, rape, plane crashes, or natural disasters.

omniscient. Physical symptoms might include headaches, chest pains, anxiety, insomnia, panic attacks, and agitation.<sup>162</sup>

Since the release of *The Battered Woman*, female defendants have raised BWS as a defense in criminal cases to justify violent acts committed against their abusive husbands. While not all jurisdictions will allow a defendant to raise the defense of BWS, the majority of states have allowed expert testimony on BWS. The watershed case involving BWS was *State v. Kelly*, involving a 1984 appeal before the New Jersey Supreme Court. In *Kelly*, the defendant faced the charge of stabbing her husband to death with a pair of scissors. She claimed to have acted in self-defense, fearing for her life after seven years in an abusive marriage. The trial court had prevented the testimony of an expert on BWS and the defendant appealed. The New Jersey Supreme Court held: “the battered-woman’s syndrome is an appropriate subject for expert testimony; . . . the expert’s conclusions, despite the relative newness of the field, are sufficiently reliable under New Jersey’s standards for scientific testimony; and that defendant’s expert was sufficiently qualified” to testify at trial.<sup>163</sup>

One commonality addressed by Martin, Schechter, Walker, and other scholars, was that there was a ubiquitous sentiment across America that what happened in the home was private and personal, and therefore not to be shared in public or addressed by

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<sup>162</sup> Richard W. Swanson, “Battered Wife Syndrome,” *Canadian Medical Association Journal* 30, no. 6 (1984), 709. Swanson posits that evidence of Battered Woman Syndrome is possible when physical (including sexual) and psychological abuse occurs with *any* male with whom a woman has an intimate relationship.

<sup>163</sup> *State v. Kelly*, 97 N.J. 178 (1984). Notably, the Court referred to or cited Walker nearly a dozen times in its opinion. The deference to Walker was not surprising. As David L. Faigman observed in a 1986 article: “Of the researchers who have investigated battering relationships, Walker is the most active in relating battered woman research to the legal context, and it is her work that courts most often rely on in their decisions.” David L. Faigman, “The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent,” *Virginia Law Review* 72, no. 3 (1986), 622.

governmental entities.<sup>164</sup> This code of silence also hid the fact that domestic violence often included sexual assault.<sup>165</sup> In the 1970s and 1980s, women organized politically against the all-too-common violence that influenced their lives, transforming the way that society viewed violence against women. For instance, “battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class.”<sup>166</sup>

The feminists of the 1970s, largely white and middle-class, characterized women’s oppression as universal, overlooking ways in which other forms of oppression and hierarchy intersected with gender. The recognition of gendered violence as social and systemic, however, gave way to the development of identity politics, a construct that helps to explain the oppression experienced by members of a particular group, whether defined by race, class, sexual orientation, or some other characteristic, and “serves as a source of strength, community, and intellectual development.”<sup>167</sup> However, as Kimberlé Crenshaw cautioned, “The problem with identity politics is that it frequently conflates or ignores intragroup differences. In the context of violence against women, this elision of difference is problematic because the violence that many women experience is often

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<sup>164</sup> *Looking Back, Pushing Forward: Three Decades in the Fight Against Domestic Violence* (Cambridge, MA: Polaroid Corporate Media Center, 1993).

<sup>165</sup> A 2007 study funded by the National Institute of Justice found that two-thirds of women who had been physically assaulted by an intimate partner had also been sexually assaulted by that partner. Lauren R. Taylor with Nicole Gaskin-Laniyan, “Sexual Assault in Abusive Relationships,” *NIJ Journal* 256 (2007), <http://nij.gov/journals/256/Pages/sexual-assault.aspx>.

<sup>166</sup> Kimberlé Crenshaw, “Intersectionality and Identity Politics: Learning from Violence against Women of Color,” in Wendy K. Kolmar and Frances Bartkowski, ed. *Feminist Theory: A Reader*, Third Edition (New York: McGraw Hill, 2010), 482. For more on the politicization of gender-based violence, see Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement* (Boston: South End Press, 1982) and Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: Harper & Row, 1989).

<sup>167</sup> Kimberlé Crenshaw, “Intersectionality and Identity Politics,” 482.

shaped by other dimensions of their identities, such as race, class, and sexual orientation. Moreover, ignoring difference *within* groups contributes to tension *among* groups, another problem of identity politics that bears on efforts to politicize violence against women.”<sup>168</sup> For example, both feminist efforts to address gender discrimination and anti-racist activism that highlights the experience of people of color may operate as though the issues are mutually exclusive. While sexism and racism often intersect in the lives of women of color, the exclusivity issue may result in an either/or situation in which the individual has to choose which characteristic of her identity she will elevate – i.e. gender, race, or sexual orientation.<sup>169</sup>

Nevertheless, identity politics and intersectionality provided cohesion for women of color who organized activist efforts that often operated independently of those led by white activists. At the same time, women of color engaged in the development of additional theoretical paradigms that addressed concerns unique to minority women. Notable within this group are two scholars noted earlier in this chapter: Kimberlé Crenshaw, one of the founders of critical race theory, and Patricia Hill Collins, whose work addresses the intersectionality of race, class, gender, and nation. Other African American scholars have added to the growing body of literature on the intersection of race and gender in American society. In *Women, Race, & Class*, Angela Davis evaluated women’s struggles, both Black and white, to remove economic, social, and sexual barriers that prevented gender equality. Davis addressed racism in the woman’s suffrage

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<sup>168</sup> *Ibid.*

<sup>169</sup> For an overview of the legal scholarship on the intersectionality of gender and race, see Regina Austin, “Sapphire Bound!” *Wisconsin Law Review* 1989 (1989), 539-578; Angela P. Harris, “Race and Essentialism in Feminist Legal Theory,” *Stanford Law Review* 42, no. 3 (1990), 581-616; and Marlee Kline, “Race, Racism, and Feminist Legal Theory,” *Harvard Women’s Law Journal* 12 (1989), 115-150.

movement and analyzed the myth of the Black rapist. In a chapter on the birth control movement, Davis was critical of contraception and sterilization as applied to women of color, linking it to the eugenics movement and identifying it as a form of racial/ethnic genocide.<sup>170</sup> Johnnetta Betsch Cole and Beverly Guy-Sheftall addressed the role of gender and sexuality in racism in *Gender Talk: The Struggle for Women's Equality in African American Communities*. Cole and Guy-Sheftall spoke equally to the racist exploitation of Black bodies and the sexist oppression of Black women. They called upon Black men to “acknowledge their gender privileges and [to] . . . publicly disavow sexist attitudes and behaviors . . . [and replace] patriarchy with partnerships.”<sup>171</sup>

Such activism took hold in the 1970s and 1980s, as white and African American women began meeting in small groups, engaging in quiet, intimate conversations that broke the silence of domestic abuse and provided evidence that these women were not alone in their experiences.<sup>172</sup> They spoke of a lack of assistance for women who lived in abusive households. When responding to reports of domestic violence, police officers generally acted with grave caution. Even when there was evidence of physical assault or a court issued protective order, rarely did the police make an arrest.<sup>173</sup> In fact, most police forces across the United States followed a no-arrest policy, in which police officers would not arrest the physical aggressor in a domestic dispute. During the 1970s, for

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<sup>170</sup> Angela Y. Davis, *Women, Race, & Class* (New York: Random House, 1981).

<sup>171</sup> Johnnetta Betsch Cole and Beverly Guy-Sheftall, *Gender Talk: The Struggle for Women's Equality in African American Communities* (New York: One World/Ballantine Books, 2003), 128-153, 221. Additional scholarship that exemplifies identity politics and intersectionality written by African American women includes Gloria T. Hull, Patricia Bell Scott, and Barbara Smith, eds. *All the Women are White, All the Blacks are Men, but Some of Us are Brave-- Black Women's Studies* (Old Westbury, NY: The Feminist Press, 1982); Kimberly Springer, *Living for the Revolution: Black Feminist Organizations, 1968–1980* (Durham, NC: Duke University Press, 2005); and Melissa Harris-Perry, *Sister Citizen: Shame, Stereotypes, and Black Women in America* (New Haven, CT: Yale University Press, 2011).

<sup>172</sup> *Looking Back, Pushing Forward*

<sup>173</sup> *Ibid.*

example, Michigan police officers were under orders to “avoid arrest if possible” in domestic violence situations. In Oakland, California, police officers learned to respond to domestic disputes as peacemakers rather than enforcers of the law.<sup>174</sup>

In the mid-1970s, women working domestic violence hotlines realized that the battered women calling were in need of a place of refuge if they were ever going to leave their abusers. To meet the initial need, some advocates opened their homes to those in need. Similarly, as explained by Barbara J. Hart of the Pennsylvania Coalition against Domestic Violence, selected churches offered asylum to women escaping domestic violence in much the same way they offered sanctuary to draft evaders during the era of the Vietnam War.<sup>175</sup> For those women who did escape, there was a need greater than simply a safe location. The emergence of shelters as safe havens also made available clothing, food, and other personal items that the women had left behind.<sup>176</sup> From their inception, shelters relied on donations to assist with operating costs and services offered to clients.

The tireless work of activists began to pay off. Across the country, support and understanding was more prevalent. Still, it was not an easy transition. Police officers still hesitated to arrest men during domestic violence call outs. Doctors who treated patients with recurring injuries were generally ineffective allies. Many ignored signs of domestic violence, embraced the belief that it was a private, family matter, or believed that social workers were best poised to handle these conflicts.<sup>177</sup> Even potential allies within the

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<sup>174</sup> Nancy James, “Domestic Violence: A History of Arrest Policies and a Survey of Modern Laws,” *Family Law Quarterly* 28, no. 3 (1994), 513.

<sup>175</sup> *Looking Back, Pushing Forward*

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

criminal justice system were ineffectual, primarily because there was a lack of communication between the different components of that system. Candace Mosley, a professional in the areas of domestic violence and crimes against women, explained that a variety of individuals from law enforcement and criminal, civil, and juvenile courts may have interacted with a particular family, but rarely did they make the connections that would have brought their disparate interests together.<sup>178</sup>

During the late 1970s and early 1980s, many laws changed to reflect the criminalization of battering. Legal changes in New York between 1970 and 1983 provide a great example of the gradual criminalization of domestic violence. In 1970, New York police officers received the authority to make warrantless arrests when there was a reasonable belief that a crime had been committed. This discretion allowed an arrest in the case of domestic violence, even if the crime had occurred outside the observation of the police officer. In 1977, New York granted married women the right to have abusive husbands prosecuted. Jurisdiction over first-degree assaults became the purview of the criminal court rather than family court in 1980, another step by the legal system in acknowledging the seriousness of the offense. Then a significant policy shift occurred within the family court: the original purpose of keeping the family together was amended to reflect the goal of ending family violence. Finally, in 1983, an amendment to the state law “made abuse victims eligible for compensation to the same extent as other crime victims.”<sup>179</sup>

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<sup>178</sup> Formerly a prosecutor, today Candace Mosley is Director of Programs for the National District Attorneys Association. In that capacity, she manages national training programs, independent contract training programs, the National Center for the Prosecution of Violence Against Women, and the National Criminal Justice Academy for NDAA. Mosley has lectured extensively on the issues of violence against women and serves on a variety of boards and working groups organized in the area of domestic violence.

<sup>179</sup> Frisch, “Research That Succeeds,” 210.

The momentum behind these changes stemmed largely from the efforts of domestic violence advocates; however, there were other noteworthy influences as well. Civil lawsuits filed against police departments increased significantly, focusing on the constitutional issues of due process and equal protection under the law. The 1984 case, *Thurman v. City of Torrington*, was a turning point for department no-arrest policies and attitudes toward domestic violence in general. The *Thurman* court held that “official behavior that reflects an ongoing pattern of deliberate indifference to victims of domestic assault violates the Equal Protection Clause of the Fourteenth Amendment.”<sup>180</sup>

Tracey Thurman’s marriage to her husband, Charles “Buck” Thurman, was a tempestuous one. Three times, she attempted to leave him, but she always returned after he promised to change his abusive ways. In October 1982, she escaped a fourth time, returning to her hometown of Torrington, Connecticut. Tracking her down, Buck arrived in the small New England town and settled into a pattern of tormenting Tracey, sometimes calling her as many as twenty-five times a day, demanding to see her and their son, C.J.<sup>181</sup> Tracey obtained a restraining order, but without enforcement by the Torrington Police Department, the restraining order did no good. Buck’s harassment continued. He repeatedly showed up at Tracey’s house; in the presence of police officers, Buck smashed in the window of Tracey’s car while she was in it; and he threatened to kill Tracey and C.J. She called the Torrington Police many times, but received little or no relief.

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<sup>180</sup> *Ibid.*, 210-211.

<sup>181</sup> J. Parker and S. Schindehette, “Thousands of Women, Fearing for Their Lives, Hear a Scary Echo in Tracey Thurman’s ‘Cry for Help.’” *People Weekly* October 9, 1989.

Police charged Buck with breach of the peace for breaking the car window, but when convicted he received a suspended sentence. In another instance, the police told Tracey that they would need to see Buck violate the restraining order for them to act. On yet another occasion, police officers told Tracey that the only officer able to assist her was on vacation, so there was nothing they could do. Still, Tracey continued to report violations of the restraining order to the police and asked for assistance when Buck continued to threaten her. However, as Mahlon Sabo, the Torrington Police Chief, told Tracey, the situation would be easier if Buck was not her husband since the city police officers followed department policy of not making arrests when husbands and wives were involved, a practice that was quiet common among law enforcement at the time.<sup>182</sup>

On June 10, 1983, Buck tracked Tracey to the home of a girlfriend she was visiting. Tracey once again called the police to ask for assistance. By the time an officer arrived on the scene twenty-five minutes later, Buck had stabbed Tracey thirteen times in the face, neck, and shoulders. While Buck stood over Tracey's body holding a bloody knife, the police officer failed to arrest Buck for another twenty minutes, allowing time for Buck to kick Tracey in the head, breaking her neck. The attack left Tracey paralyzed on her right side and without feeling on her left. After seven months in the hospital, Tracey testified at her husband's trial and filed a lawsuit against the Torrington Police Department and twenty-four of its police officers who failed to act on her behalf, claiming that their reluctance to intervene violated her constitutional right to equal protection.<sup>183</sup>

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<sup>182</sup> *Ibid.*; Nancy Blodgett, "Violence in the Home," *ABA Journal* 73, no. 6 (1987), 66.

<sup>183</sup> Blodgett, "Violence in the Home," 6-67; Amy Eppler, "Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?" *The Yale Law Journal* 95, no. 4 (1986), 788.

In *Thurman v. City of Torrington*, the district court explained that the police policy of not arresting men who battered their wives reflected an impermissible stereotypic view that husbands may physically abuse their wives. The court held:

A man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly [*sic*], a police officer may not knowingly refrain from interference in such violence, and may not automatically decline to make an arrest simply because the assaulter and his victim are married to each other. Such inaction on the part of the officer is a denial of the equal protection of the laws.<sup>184</sup>

The court found the Torrington police negligent and awarded Tracey nearly two million dollars in damages.<sup>185</sup> The State of Connecticut thereafter instituted a mandatory arrest policy in cases of domestic violence.<sup>186</sup> Following Connecticut's example, other police departments changed their policies to include mandatory intervention in domestic violence cases.

As the domestic violence movement moved into the 1980s and 1990s, societal awareness was evident throughout the nation. Expanded media exposure helped bring an increase to public attention regarding the plight of victims. *60 Minutes*, one of the nation's most notable prime time, televised newsmagazines, aired a segment in 1982 titled "A Place to Go," which promoted sensitivity and support for domestic violence victims. The segment, which focused on domestic violence shelters in Austin, Texas, was part of the most watched episode of the season.<sup>187</sup>

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<sup>184</sup> *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

<sup>185</sup> Eppler, "Battered Women and the Equal Protection Clause," 788. The events leading up to the trial were the subject of the made-for-television movie, *A Cry for Help: The Tracey Thurman Story*, which aired on NBC in October 1989.

<sup>186</sup> Nancy James, "Domestic Violence," 511-512.

<sup>187</sup> Tiffany K Wayne, *Women's Rights in the United States: A Comprehensive Encyclopedia of Issues, Events, and People* (Santa Barbara, CA: ABC-CLIO, 2014), 76; Laura L. Finley, *Encyclopedia of Domestic Violence and Abuse* (Santa Barbara, CA: ABC-CLIO, 2013), 207.

The domestic violence movement gained more public attention in June 1990, when then-Senator Joseph Biden introduced the bill that would become the Violence Against Women Act (VAWA). Biden explained that the bill had three broad goals: “to make streets safer for women; to make homes safer for women; and to protect women’s civil rights.”<sup>188</sup> The provisions of the bill were expansive, covering all types of gender-based violence, whether domestic violence, stalking, rape, or homicide. Initially, Biden’s bill seemed to face more opposition than support from women’s groups and civil rights groups: “One group claimed the bill would violate the First Amendment, another that its rape penalties were too high, and still another that it would detract from efforts to pass legislation addressing other more important women’s issues.”<sup>189</sup>

Undeterred by the opposition, Biden brought together women leaders who, under the leadership of the NOW Legal Defense Fund, would create a coalition of “grassroots providers, shelters, religious organizations, survivors, mental health providers, prosecutors, and victims’ rights advocates” to combat objections to VAWA legislation.<sup>190</sup> Notable opposition arose in the Department of Justice under President George Herbert Walker Bush, and within the federal judiciary. Particularly caustic was the opposition by then-Chief Justice William Rehnquist who publicly denounced VAWA for its open-ended criminal provisions and civil rights provision that Rehnquist predicted would force federal courts into resolving ordinary family disputes. Biden and the grassroots coalition were up to the challenge and pushed forward, finally gaining the support necessary for the bill to pass in

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<sup>188</sup> “1 is 2 Many: Twenty Years Fighting Violence Against Women and Girls,” (Washington, D.C.: Office of the Vice President, 2014), 10.

<sup>189</sup> *Ibid.*, 12.

<sup>190</sup> *Ibid.* See, Fred Stebeigh, *Equal: Women Reshape American Law* (New York, NY: W.W. Norton & Company, 2009), 346-351.

1994. When VAWA went into effect, it authorized “\$1.8 billion to aid police, prosecutors, and victim advocates in combatting crime against women.”<sup>191</sup>

That same year, the Ad Council and the Family Violence Prevention Fund (FVPPF) launched a domestic violence prevention campaign using the tagline “There’s no excuse for domestic violence.” Public service advertisements highlighted “an effort to reduce domestic violence by making it socially unacceptable.”<sup>192</sup> According to the American Medical Association, at that time, domestic violence was the number one health threat for women.<sup>193</sup> The campaign, which encouraged people to get involved in prevention efforts, spread like wildfire, as anti-domestic violence literature and publicity materials adorned walls in city hall buildings, doctors’ offices, shelters, hospitals, and courthouses. Two and a half months after the campaign launch, FVPPF workers had responded to requests for over ten thousand domestic violence prevention action kits.<sup>194</sup>

Despite the forward momentum brought on by VAWA, advocates realized that as long as domestic violence was still occurring, there was room to do more. Advocates promoted a two-pronged strategy: reactive measures to assist victims and proactive

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<sup>191</sup> Jen Weiss, “When Violence Hits Home: Media Campaign Targets the Mainstream,” *Off Our Backs* 4, no. 8 (1994), 21. The U.S. Supreme Court struck down as unconstitutional the civil rights remedy of VAWA in *United States v. Morrison*, 529 U.S. 598 (2000). While a setback, the majority of the law remained intact. VAWA was expanded and improved in 2000, 2005, and reauthorized a third time in 2013. Despite *Morrison*, “VAWA and its subsequent reauthorizations have vastly improved services for victims of sexual and domestic violence and stalking, as well as education and training about violence against women for victim advocates, health professionals, law enforcement, prosecutors and judges. The numerous new legislative provisions include a ban on states charging rape victims for forensic sexual assault examinations and the criminalization of stalking by electronic surveillance.” According to Legal Momentum, the current name of NOW’s Women’s Legal Defense and Education Fund: since 1994, the Office on Violence Against Women “has awarded nearly \$4 billion in VAWA grant funds to state, tribal, and local governments, non-profit organizations focused on ending violence against women and universities. The American Recovery and Reinvestment Act, signed into law on February 19, 2009, included an additional \$225 million to combat the legacy of laws and social norms that long served to justify violence against women.” <https://www.legalmomentum.org/history-vawa>.

<sup>192</sup> “Domestic Violence Prevention (1994-Present),” Advertising Educational Foundation, [http://www.aef.com/exhibits/social\\_responsibility/ad\\_council/2472](http://www.aef.com/exhibits/social_responsibility/ad_council/2472). Accessed October 12, 2015.

<sup>193</sup> Weiss, “When Violence Hits Home,” 21.

<sup>194</sup> “Domestic Violence Prevention (1994-Present).”

tactics to prevent future violence.<sup>195</sup> Achieving this goal would require a collaborated effort among community-based groups, where each contributor understood and respected the knowledge and skills that the others brought to the association. Law enforcement, lawyers, physicians, and other professionals would need to listen to and learn from survivors and advocates who had become the experts on domestic violence.<sup>196</sup>

Educational programs promoted the training for those encountering victims and their families; simply going through the mechanics of taking a victim statement, providing emergency room treatment, or helping a victim acquire an order of protection was not enough. These professionals needed to learn to act with compassion, to understand the interpersonal dynamics within the violent family, to provide services for the children of female victims, and to provide structural support that would allow victims to become survivors.

Closely related to the domestic violence movement was the call for women's sexual autonomy. Recognizing a threat to that sexual self-sovereignty, consciousness-raising discussions delineated a path from the sexual objectification of women to their vulnerability in public to sexual assault.<sup>197</sup> Beginning in the radical arm of the women's rights movement, "organizers reframed sexual violence not merely as a private trauma but also as a nexus of power relations and a public policy concern," clearly associating the problem of sexual violence with male privilege.<sup>198</sup> At the time, victims rarely reported sexual assault, victim blaming was common, and society perpetuated the belief that rape

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<sup>195</sup> *Looking Back, Pushing Forward*

<sup>196</sup> *Ibid.*

<sup>197</sup> Evans, *Tidal Wave*, 48.

<sup>198</sup> Estelle B. Freedman, *Redefining Rape*, 276-277.

was a rare event. Armed with the motto “the personal is political,” activists sought to change laws and public opinion.<sup>199</sup>

One strategy used to change public opinion and influence legal revision was to provide “open public forums in which victims and survivors of crimes against women could speak out.”<sup>200</sup> Issues debated in the forums included weak rape laws and enduring myths about rape, both of which brought wife abuse and rape into public discourse. Advocates also used marches and conventions to bring woman/wife abuse to the attention of the public, often garnering state and national exposure for their cause. As Susan Schechter explained: “lawyers, therapists, women’s crisis and anti-rape workers were reporting numerous calls and visits from abused women desperately in need of housing and legal assistance,” thereby demonstrating the pervasiveness of the problem.<sup>201</sup>

In her 1971 essay, “Rape: The All-American Crime,” Susan Griffin challenged the notion that rape was an act of sexual desire, instead referring to it as an act of violence in which “a man attempted to gain complete control over a woman.”<sup>202</sup> Estelle Freedman described the significance of Griffin’s work: “She exploded each of the myths about rape in American culture, addressed the legal obstacles to prosecuting sexual violence, named white male privilege as the heart of the problem, and recognized the particular vulnerability of women of color and the costs of the myth of the black

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<sup>199</sup> Some have attributed the phrase “the personal is political” to Carol Hanisch, whose essay of the same name appeared in *Notes from the Second Year: Women’s Liberation* in 1970. Hanisch denies giving the essay its title, suggesting instead that it was the creation of *Notes* editors Shulamith Firestone and Anne Koedt. Rosen, *The World Split Open*, 181-182. To read the original paper and a new introduction by Hanisch, see <http://www.carolhanisch.org/>

<sup>200</sup> Tyson, “The Effect of Women’s Advocacy Groups,” 25.

<sup>201</sup> *Ibid.*, 28. Here, Tyson was relying on Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women’s Movement* (Boston, MA: South End Press, 1982).

<sup>202</sup> Susan Griffin, “Rape: The All-American Crime,” *Ramparts* 10, no. 3 (1971), 26-35.

rapist.”<sup>203</sup> Journalist Susan Brownmiller advanced the ideas introduced by Griffin in *Against Our Will*, a groundbreaking text that discussed the universality of rape.<sup>204</sup>

According to Brownmiller, rape had occurred throughout time in parts of the world under a variety of circumstances, including the act of conquest when sexual assault is an acceptable part of the spoils of war. Echoing Griffin’s assertion that rape was about power, Brownmiller pronounced in the book’s introduction:

Man’s discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times, along with the use of fire and the first crude stone axe. From prehistoric times to the present, I believe, rape has played a critical function. It is nothing more or less than a conscious process of intimidation by which *all men keep all women* in a state of fear.<sup>205</sup>

It was this fear, Brownmiller noted, that sustained female subordination. Throughout the nearly four hundred pages of the text, Brownmiller explored the power dynamics represented by rape, proposed changes to the laws governing sexual assault, and introduced her reader to the emerging feminist anti-rape movement.<sup>206</sup>

Emboldened by the works of Griffin and Brownmiller, feminists identified rape as a problem that law enforcement and women’s groups needed to address. Advocates established rape crisis hot lines and rape crisis centers to provide victims with counselling, legal aid, help in dealing with the police and hospital personnel, and assistance in the form of support groups. By the mid-1970s, more than four hundred centers were operating in towns and cities across the United States.<sup>207</sup> Concurrently,

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<sup>203</sup> Freedman, *Redefining Rape*, 277-278.

<sup>204</sup> Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Fawcett Columbine Books, 1975).

<sup>205</sup> *Ibid.*, 14-15.

<sup>206</sup> Freedman, *Redefining Rape*, 278.

<sup>207</sup> Evans, *Tidal Wave*, 49; Freedman, *Redefining Rape*, 278. For more on the rise of rape crisis centers, see chapter 2.

activists advocated for changes in the way that police officers and the court system treated sexual assault victims, maintaining that this treatment was tantamount to being victimized a second time. “Feminists called for training police, emergency room staff, and court personnel to make them more sympathetic to women reporting rape. . . [and] have insisted on the reform of legal procedures as well.”<sup>208</sup> Since the 1970s, states have changed their sexual assault statutes and court procedures in alignment with many of the concerns raised by second-wave advocates. The testimony of a corroborating witness is no longer required for a conviction, and in the majority of states, the law no longer requires that a victim establish that she resisted to prove that an assault occurred. Gone, too, in the majority of jurisdictions are questions about what the victim was wearing, whether she knew her attacker, and testimony about the victim’s prior sexual experiences, all vestiges of myths about rape.<sup>209</sup>

Susan Brinson, Professor of Mass Communication at Auburn University, posited that in “societies in which justice and the right to physical integrity are championed, a fundamental conflict occurs among cultural values” when confronting issues of rape. Such conflict may be resolved through the development of rape myths by allowing society to rationalize the prevalence of the crime by offering explanations [or excuses] for its occurrence.<sup>210</sup> In fact, myths associated with rape long influenced social and legal attitudes about sexual assault. Overcoming these myths was necessary if anti-rape

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<sup>208</sup> Freedman, *Redefining Rape*, 287.

<sup>209</sup> Freedman, *No Turning Back*, 288. Chapter 4 discusses at length the creation and adoption of rape shield laws, which protect a rape victim’s sexual history from public scrutiny in court.

<sup>210</sup> Susan L. Brinson, “The Use of Opposition of Rape Myths in Prime-Time Television Dramas,” *Sex Roles* 27 no.7/8 (1992), 360.

advocates hoped to educate the public and convince legislators to change sexual assault laws.

Martha Burt, researcher at the Urban Institute in Washington, D.C., identified four recurring rape myths: the victim asked for it, the victim wanted it, the victim lied about it, and the victim was not really hurt.<sup>211</sup> Each of these explanations turn the focus from the rapist to the victim, suggesting victim culpability. The first myth suggested that the victim provoked the sexual attention because of her behavior, the clothing she was wearing, or her choice to be in the “wrong” place. This, of course, presupposes that there is a “right” way for a woman to dress or behave, that there is a “right” place for them to be, and that a woman who transgresses from this model has asked to be sexually violated.

Closely related is the “victim wanted it” myth, which proposed that the victim enjoyed rough/forced sex. Once again, her clothing, behavior, and location served as evidence of her desire. Evidence of promiscuity on the victim’s part further supported the contention that “she wanted it,” and negated the possibility that a rape actually occurred.<sup>212</sup> The supposition that women want forced sex opens the door to two other, equally pervasive myths: a woman cannot be raped against her will, and women never really mean no. As Brinson explained:

The former suggest that any healthy woman can get away from her attacker if she *really* wants to, thus insinuating that many rape victims wanted to be attacked. The later asserts women may say no, but they *really do want* to be raped. . . . [These myths] return us to patriarchal notions of women desiring male domination, as well as the belief that rape is an act of sex rather than violence.<sup>213</sup>

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<sup>211</sup> Martha R. Burt, “Cultural Myths and Supports for Rape.” *Journal of Personality and Social Psychology* 38 (1980), 217-230.

<sup>212</sup> Melissa Anne Bazhaw, “For Better or for Worse? Media Coverage of Marital Rape in the 1978 Rideout Trial,” Master’s thesis, Georgia State University (2008), 78.

<sup>213</sup> Brinson, “The Use of Opposition of Rape Myths,” 363.

Each argument turns the focus back on the desires of the victim, making her responsible for the attack and denying any injury.

A third myth noted by Burt, the “rape lie,” argued that a victim, who had consented to sex, later changed her mind or regretted the action. To alleviate guilt the victim claimed rape, implying that she did not want the sex in the first place. This myth, like the others, shifts responsibility from the rapist to the victim. Additionally, it focuses on the untruthful woman who vindictively blames an innocent man.<sup>214</sup>

During their efforts to revise public opinion about rape, feminists became more outspoken about dispelling the myth that sexual violence occurs only between strangers, while in fact, some husbands raped their wives. Yet the laws of every state in the country spoke to the legal impossibility of spousal rape. Sociologist Diana Russell laid the foundation for the activism that followed in her books *The Politics of Rape* and *Rape in Marriage*.<sup>215</sup> Russell conducted the largest and most thorough empirical study of marital rape, interviewing a random sample of over nine hundred women in San Francisco, California, in 1978. For the purpose of her study, Russell defined rape as “rape by force,

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<sup>214</sup> *Ibid.*

<sup>215</sup> Diana Russell, *The Politics of Rape: The Victim's Perspective* (New York: Stein and Day, 1975); Diana Russell, *Rape in Marriage* (Indiana University Press, 1990). In *The Politics of Rape*, Russell theorized that a wife's past history of other rape might precipitate marital rape. Russell supported her contention with several examples: one marital rape victim had been raped by her stepfather when she was younger; another victim was raped by her husband after she was the victim of stranger rape. The research on which *Rape in Marriage* was based was conducted as part of a study funded by the National Institute of Mental Health, for which Russell was the Principle Investigator. Laura X, founder of the National Clearinghouse for Marital and Date Rape, was also deeply involved in the movement to end marital rape. The stated purpose of the National Clearinghouse on Marital and Date Rape, located in Berkeley, California, was “to stop violence in the lives of women and girls by challenging the legal, political, social, familial, psychological, economic, and religious bases that create and condone the abuse.” Laura X dedicated her life's work to those goals. She assisted in the campaign to criminalize marital rape in several jurisdictions, including her home state of California. She toured the country and appeared on numerous television news programs to raise awareness of marital rape. Laura X also provided assistance on several appellate cases in Georgia, Florida, New Jersey, New York and Virginia where marital rape was at issue. Laura X, “Accomplishing the Impossible: An Advocate's Notes From the Successful Campaign to Make Marital and Date Rape a crime in All 50 U.S. States and Other Countries,” *Violence Against Women* 5, no. 9 (1999), 1064-1081.

rape by threat of force, and rape when the wife is in no position to consent because she is unconscious, drugged, asleep, or in some other way helpless.”<sup>216</sup> About fourteen percent of all married respondents revealed that their husbands had raped them or attempted to rape them. Russell proposed that the actual number might have been higher since many wives she encountered did not view themselves as rape victims and believed they had a duty to submit to their husband’s desires for sex, even when they were not interested.<sup>217</sup>

Armed with these statistics, Russell posited that spousal rape might be the most prevalent form of rape. She further proposed that despite public opinion to the contrary, rape in marriage might be more traumatic than stranger rape. She explained:

Wife rape can be as terrifying and life-threatening to the victim as stranger rape. In addition, it often evokes a powerful sense of betrayal, deep disillusionment, and total isolation. . . . Much more is at stake for a victim of wife rape than for a woman who is raped by a stranger. When a woman has been raped by her husband she cannot seek comfort and safety at home. She can decide to leave the marriage or to live with what happened. Either choice can be devastating. Leaving involves all the trauma and readjustment of divorce, economically, social, and psychologically, including feeling responsible for the suffering of the children, if there are any. But staying with someone who has raped you . . . usually means being raped again, often repeatedly.<sup>218</sup>

Russell went on to say that the general public, feminists, and even workers in the domestic violence movement, had failed to make rape in marriage a pressing concern, instead largely ignoring the realities surrounding the crime. Her goal in writing *Rape in Marriage* was, in part, to provide empirical data on wife rape to facilitate legal and social change. Ultimately, Russell’s research on marital rape dispelled the societal myths that

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<sup>216</sup> Jill Elaine Hasday, “Contest and Consent: A Legal History of Marital Rape,” *California Law Review* 88, no. 5 (2000), 1496.

<sup>217</sup> Russell, *Rape in Marriage*, 58.

<sup>218</sup> *Ibid.*, 198.

rape in marriage is rare, that marital rape is less traumatic than other kinds of rape, and that by simply avoiding strangers and dark alleys women can avoid rape.<sup>219</sup>

Thereafter, women's rights advocates began calling for social recognition of rape in marriage and legal prohibitions against that act. Such action would require society to overcome not only the traditional justifications for spousal immunity, but also the modern justifications for the retention of the marital rape exemption. By the middle of the twentieth century, support for the marital rape exemption was based on several rationales: marital privacy, marital reconciliation, fear of false allegations, the difficulty of proving rape, and the belief that rape within marriage was less severe than rape outside of marriage.<sup>220</sup>

Proponents of the concept of marital privacy advocated that the right was so fundamental that the outside world – i.e. the government – should be prevented from defining or interfering with the activities therein.<sup>221</sup> Since the mid-1960s, courts have countered the argument of marital privacy as it relates to spousal rape by suggesting that the protection of privacy within marriage only applied to consensual acts, not to violent unilateral ones. Thus, states must balance the right to privacy with their obligation to

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<sup>219</sup> Libby O. Ruch, "Review: Sexual Violence against Women," *Journal of the History of Sexuality*, 2, no. 4 (1992), 636.

<sup>220</sup> Linda Jackson, "Marital Rape: A Higher Standard Is in Order," *William & Mary Journal of Women and the Law* 1 (1994), 189.

<sup>221</sup> In *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court explained that matters concerning intimacy and personal choice – marriage, procreation, contraception, family relationships – involve fundamental rights deserving protection from governmental interference. Such "choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." 505 U.S. at 851. In addition to the issues of birth control, abortion, and sterilization, see note 137, *infra*; the Court has applied this standard to interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967); acts of intimacy between consenting adults, *Lawrence v. Texas*, 539 U.S. 558 (2003); and same-sex marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

protect the right of an individual's bodily integrity. Other courts have argued that to sustain the justification of marital privacy, the court would be endorsing a husband's legal control over his wife's body.<sup>222</sup>

The rationale of marital reconciliation was really an extension of the marital privacy argument, in which a figurative closed curtain keeps out the public. By keeping the public out, the couple within the home would resolve their differences independent of external forces. Some theorized that this resolution process would foster greater mutual respect between the parties, leading to a greater likelihood of reconciliation. In contrast, if a woman brought the law into the marriage by bringing criminal charges against her husband, such action would exacerbate the marital discord, making reconciliation unlikely. Opponents of this rationale, including most jurists, refuted the argument suggesting that if the marriage had deteriorated to the level of rape there was little in the marriage left to reconcile.<sup>223</sup>

The third arena of justification for spousal immunity is the "fear-based argument." There was the fear that fabricated claims by vindictive women would result in the conviction of innocent men. Closely related to this was the floodgate argument, which proposed that permitting women to come forward and seek the prosecution of their

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<sup>222</sup> See, for instance, *People v. Liberta*, 474 N.E. 567 (N.Y. 1984); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *People v. DeStefano*, 467 N.Y.S.2d 506 (County Ct. 1983). The argument for marital privacy was further complicated by individuals who argued: "a seeming lack of consent may be simply a manifestation of the fact that resistance during preliminary love-making greatly increases the sexual pleasure of women." For this position, see "Rape and Battery between Husband and Wife: Criminal Law," *Stanford Law Review* 6 no. 4 (1954), 719-28, particularly the last paragraph and footnote, in which the author cites Sigmund Freud's *New Introductory Lectures on Psycho-Analysis* and "Forcible and Statutory Rape: An Exploration of the Operations and Objectives of the Consent Standard," *Yale Law Journal* 62, no. 1 (1952), 55-83. The second of these works presents a Freudian justification for distrusting a female victim who may level "malicious or psychopathic accusations" against her sexual partner. Having entered into the liaison with sexual ambivalence or a conflict between desire and fear, "a woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feeling which might arise after willing participation." *Ibid.*, 61, 67-68; Estrich, *Real Rape*, 5.

<sup>223</sup> Jackson, *Marital Rape*, 190-91.

husbands for rape would open the floodgates for spousal rape prosecutions, thus overloading the court system. Opponents of this reason claimed that fabricated rape allegations would be unlikely, not only because they are traditionally difficult to prove, but also as Susan Brownmiller rightfully noted, because prosecution for those crimes is often more shameful for the female victim than the male defendant.<sup>224</sup>

The final modern justification argued that marital rape was less serious than other rapes. One rationale behind this position is that a married person maintains a reduced expectation of personal autonomy than a single person, and therefore, the violation to a marital rape victim is less harmful than that to non-marital rape victims. Opponents of this argument claimed just the opposite, arguing that marital rape carried with it a stronger sense of betrayal, disillusionment, and even self-blame.<sup>225</sup>

The efforts of second-wave feminists brought about legislative changes to protect women. However, these changes were not always immediate, nor were they absolute. Activists argued for women's rights to bodily autonomy, which they believed should include the power to refuse sexual intimacy with one's husband. Gradually, courts began to support the unilateral right of women to decide to use birth control, to procure an abortion, to undergo a hysterectomy, and to select sterilization procedures.<sup>226</sup> Using this

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<sup>224</sup> Jackson, *Marital Rape*, 193; Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Ballantine Books, 1993). See chapter 3, which discusses the fear and floodgate-based arguments at length.

<sup>225</sup> Jackson, *Marital Rape*, 194. See also, Michael Gary Hilf, "Marital Privacy and Spousal Rape," *New England Law Review* 16, no. 1 (1981), 31-44 and Diana Russell, *Rape in Marriage* (Bloomington: Indiana University Press, 1990).

<sup>226</sup> The right to use birth control was first enunciated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Supreme Court created a new constitutional right, that of privacy within marriage. The Court explained that although the Constitution does not explicitly protect a right to privacy, the varied guarantees spelled out within the First, Third, Fourth, and Ninth Amendments, together create penumbras – or zones – that establish a right to privacy. The issue of birth control was further developed in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where the right was extended to non-married couples, and *Carey v. Population Services International*, 431 U.S. 678 (1977), where the Supreme Court struck down on equal protection grounds a New York law that prohibited the sale or distribution of contraceptives to persons under the age of 16. As an introduction to the Court's position on abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), the first case in

success as a foundation, women's rights advocates pushed for further court-recognized liberties, such as freedom from forced intercourse with their husbands.

Changes to the marital rape exemption have been as varied as the states in the nation. State statutes, not federal law, generally regulate domestic relations and most crimes against the body. Therefore, each state has the authority to pass, alter, or abolish regulations in these areas independently of the other forty-nine. The laws relating to spousal immunity from rape charges are no exception. There are a few general trends visible when evaluating the history of state governance of rape in marriage. The absolute exemption, evident in all fifty states before the mid-1970s, was addressed in a variety of ways. Court-made law and legislative changes are the basic way that any legal change occurs; however, in the latter category, those changes completely eliminated the exemption, denied the exemption if certain statutory conditions existed, expanded the exemption to include cohabitating boyfriends, or expanded the realm of immunity to apply to voluntary social (sexual) companions.

State courts used their power of judicial review to find marital exemptions unconstitutional. Generally in doing so, they explained their decisions using Fourteenth Amendment equal protection analysis, although in a few cases jurists based their opinions

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which the Supreme Court articulated that the privacy right introduced in *Griswold* was broad enough to cover a woman's right to decide on having an abortion; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), in which the trimester framework set forth in *Roe* was replaced with the viability standard; *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52 (1976), where challenges were brought against Missouri's abortion law, specifically as it addressed fetal viability, and consent – the woman's informed consent, consent of a woman's husband unless her life was in jeopardy, and consent of a parent or one serving *in loco parentis* for a female under the age of eighteen; and *Stenberg v. Carhart*, 530 U.S. 914 (2000), in which the Court held a Nebraska law prohibiting "partial birth abortions" unless the mother's life was in danger violated the liberty protected by the due process clause of the Fourteenth Amendment. Cases in which courts have addressed a woman's unilateral decision separate from her husband to undergo a hysterectomy or other sterilization procedures include *Murray v. Vandevander*, 522 P.2d 302 (Okla. Ct. App, 1974) and *Ponter v. Ponter*, 135 N.J. Super. 50, 342 A.2d 574 (1975), both of which referred to the abortion cases decided on privacy and personal autonomy grounds.

on First Amendment grounds relating to freedom of association and privacy. In one case, the New York Court of Appeals held that there was no “rational basis to distinguish between marital and non-marital rape, noting the ‘various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny.’”<sup>227</sup> The Supreme Court of New Jersey made direct reference to changes in legal and social conditions since Matthew Hale first issued his opinion on spousal immunity. The court noted, “The rule, formulated under vastly different conditions, need not prevail when those conditions have changed.”<sup>228</sup> Noting several changes since Hale’s pronouncement, the New Jersey court held that the state’s rape laws aimed at protecting the safety of the women involved, not the property rights of fathers and husbands. Furthermore, with the demise of the legal fiction of marital unity and the advent of married women’s property laws, the court concluded in 1981 that the marital rape exemption had no place in contemporary New Jersey law.<sup>229</sup>

The year 1985 falls nearly at the halfway point between the first state addressing the marital rape exemption and the year in which the final state did so. As such, exploring the status of changes to the exemption at that time is particularly illuminative. In January 1985, twenty-seven states exempted husbands from prosecution for the rape of a wife if the couple were living together; at the same time, twenty states that could, by virtue of legislation, prosecute a cohabitating husband for raping his wife.<sup>230</sup> In other states, however, legislators placed obstacles in the way of the absolute elimination of the

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<sup>227</sup> *People v. Liberta*, 64 N.Y.2d 152 (1984).

<sup>228</sup> *State v. Smith*, 85 N.J. 193 (1981).

<sup>229</sup> *Ibid.*

<sup>230</sup> Finkelhor and Yllo, *License to Rape*, 140.

exemption. Other states required the occurrence of certain circumstances before immunity was broken. The most absolute or severe conditions occasionally required the exemption to remain in place until a divorce decree legally ended the marriage. In such a situation, even if the couple had separated for a significant period and the wife had made it perfectly clear by her actions that she no longer wished to be married, the man was immune from prosecution for rape until the day the divorce was final. This situation appeared to present the injustice of unequal protection for women who would have no real protection until the slow-moving divorce process was final.<sup>231</sup>

Some states enacted partial exemption statutes that put limitations on the spousal exemption, which went into effect once the marriage had reached a point of no return. Thus, a wife could terminate her consent prior to divorce if she indicated to officials that she no longer wanted to be married. These provisions varied, covering situations where the couple was living apart (the most protective for the woman), where the couple was living apart and the woman had filed a petition for separation, annulment, or divorce (intermediate protection), or where the couple was legally separated under a court order (providing the least protection for the woman).<sup>232</sup> These conditions all presupposed that the woman had access to the means of leaving and a safe place to go if she did leave.

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<sup>231</sup> *Ibid.* In January 1985, this was the case in Alabama, Illinois, South Dakota, and Vermont.

<sup>232</sup> *Ibid.* In January 1985, the laws of Alaska, Arizona, Colorado, Idaho, Maine, Montana, New Mexico, Oklahoma, Texas, and Virginia ended the exemption once a couple was living apart. The laws of Indiana, Michigan, Nevada, Ohio, and Tennessee ended spousal protection once the couple was living apart and the wife had filed for legal divorce or separation. The law protected her from sexual assault by her husband once she filed the legal documents, rather than when the divorce was final. The laws of Kentucky, Louisiana, Maryland, Missouri, North Carolina, Rhode Island, South Carolina, and Utah entitled women to legal protection from spousal rape, but only once a court order finalized a separation between the couple. Thus, in those states, women at risk of spousal sexual assault were at the mercy of the bureaucratic system. A court-ordered separation could take as long as a divorce and it required the financial resources necessary to pay for attorneys and court costs.

Finally, there were the jurisdictions that considered rape by a spouse to be a lesser degree of sexual assault, crimes that carried less social stigma and less prison time if convicted. This was the approach taken by California and South Carolina, as will be seen in later chapters.<sup>233</sup>

While the general trend in the 1980s and 1990s was to limit or eliminate the exemption, in eleven jurisdictions, legislators expanded the protection granted to married men to cover cohabitating boyfriends.<sup>234</sup> If a man in one of those states raped his girlfriend, he could raise the affirmative defense that they were living together, thereby avoiding prosecution. Legislators may have believed that they were bringing the law up to date with modern trends. Unfortunately, the reality was that this style of legislation increased the number of men who could rape women with impunity and increased the number of women who might find themselves unprotected by the law.<sup>235</sup> Interrogating these gender-based legislative distinctions presents an even more troubling reality when one considers that legislators have been reluctant to extend marital protections to women in cohabitating situations. As Joanne Schulman has reported:

While men in these unmarried cohabitating relationships are increasingly granted the “marital privilege” of rape, women in these relationships have fared far worse in their attempts to obtain privileges of marriage such as spousal support (“palimony”), division of the couple’s property or civil orders of protection. In the few states where unmarried women are accorded these rights, courts have first required an express or implied agreement between the parties. No such requirement is made with respect to the expansion of the marital rape exemption.<sup>236</sup>

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<sup>233</sup> Finkelhor and Yllo, *License to Rape*, 147. For a comprehensive discussion of California’s spousal rape law, see Chapter 3. Chapter 4 details South Carolina’s approach to spousal rape.

<sup>234</sup> In 1980, thirteen states extended the privileges of marriage to unmarried persons: Alabama, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Montana, North Dakota, Pennsylvania, Texas, and West Virginia. The laws of eleven of those states extended the marital rape exemption to cohabitating relationships outside of marriage. Joanne Schulman, “The Marital Rape Exemption in the Criminal Law,” *Clearinghouse Review* 14, no. 6 (1980), 539.

<sup>235</sup> Finkelhor and Yllo, *License to Rape*, 148-49.

<sup>236</sup> Schulman, “The Marital Rape Exemption in the Criminal Law,” 539-40.

Viewed in this light, it is difficult to evaluate the legislative motives behind such actions as anything other than gender-biased.

A second type of expansion of the marital rape exemption emerged in the form of protection for voluntary social companions. In the limited cases where such laws existed, men benefitted from partial immunity if they had previously had consensual sexual contact with women they later raped. In such a case, the perpetrator would be immune from the charge of first-degree rape. In effect, this dangerous expansion legally sanctioned date rape.<sup>237</sup> A final way in which the marital rape exemption remained was through statutes that provided protection to husbands who engage in sex with their wives when those women are drugged, incapacitated, unconscious, or mentally handicapped, clearly all situations in which an individual cannot grant consent.

The women's activism discussed in this chapter spans more than 150 years, but the longevity of that activism eventually led to the criminalization of spousal rape in all fifty states. The efforts of first and second-wave feminists, who conquered issues like property and citizenship rights for married women, female suffrage, divorce, reproductive rights, and sexual autonomy, prepared American society to refute traditional ideas of marital unity and the impossibility of rape in marriage. As subsequent chapters will demonstrate, even at the height of the women's movement, the elimination of male privilege and sexual entitlement within marriage was not a foregone conclusion.

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<sup>237</sup> Schulman, 540; Finkelhor and Yllo, *License to Rape*, 149. This was the law in Delaware, Hawaii, Maine, North Dakota, and West Virginia in 1985. Of the five states, West Virginia's law came the closest to legalizing date rape, as the first-degree sexual assault statute in that state did not require evidence of prior voluntary sexual acts between the victim and defendant.

**CHAPTER 2**  
**‘INVADING THE DOMESTIC FORUM AND GOING BEHIND THE CURTAIN’:  
 NEBRASKA’S ELIMINATION OF THE MARITAL RAPE EXEMPTION AND  
 THE DEVELOPMENT OF COORDINATED VICTIM’S SERVICES**<sup>238</sup>

Diana Willis and her estranged husband Charles separated in January 1985. On the evening of March 1 of that year, Charles stopped by Diana’s home in Custer County, noticeably intoxicated. When Diana asked him to leave, he departed but not for long. Frightened by his appearance, she called a friend. She soon heard Charles return; he began ringing the bell and pounding on the door. After instructing the friend to call the police, she hung up and went toward the door. Before she made it that far, Charles forcibly entered the apartment and started to undress. Fearing for her safety, Diana backed away, stating “You’re not gunna [*sic*] do this to me, I won’t let you do this.”<sup>239</sup> Despite her protest, Charles followed her and tore off her pajamas. He threw her on the “couch and subjected her to sexual penetration.”<sup>240</sup> As Diana struggled and cried out, Charles “threatened to sodomize her if she didn’t shut up.”<sup>241</sup> When he was finished, he released her, all the while taunting her and making vulgar remarks. Diana fled the

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<sup>238</sup> The title of this chapter comes from a statement made in *State v. Black*, a North Carolina case from 1864. In *Black*, the Court explained: “A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.” *State v. Black*, 60 N.C. 266 (1864). The position espoused by the North Carolina court reflected the practice of law enforcement across the country to ignore domestic conflicts except when it resulted in considerable physical injury to one of the parties. While state laws eventually reversed the right of a husband to use force to control his wife, the practice of turning a blind eye to domestic issues was still evident in the mid- to late-twentieth century. Nebraska’s decision to eliminate the spousal rape exemption in 1975 indicates the legislators’ willingness to break with tradition to protect marital victims. The conscious choice to use the word ‘victim’ in the chapter title reflects the use of the term in the 1970s.

<sup>239</sup> *State v. Willis*, Nebraska Supreme Court, docket no. 86-015, Appellant’s Brief, 5.

<sup>240</sup> *State v. Willis*, Appellant’s Brief, 5-6.

<sup>241</sup> *Ibid.*, at 6.

apartment. When she was unable to gain assistance from a neighbor, she drove herself to the police department to report the crime.<sup>242</sup>

In the meantime, Officer Steve Scott arrived at the scene, responding to the report by Diana's friend. Observing no disturbance from the residence, Scott returned to the police department, where he found Diana "very hysterical" and "upset." She explained that Charles was at her home and asked the police to retrieve her children, who had been at the residence during the attack.<sup>243</sup> After Diana made a formal statement to the police, they transported her to the hospital for a medical examination. The exam showed evidence of sexual penetration and revealed bruises on Diana's breasts. Later that day, Charles admitted to a friend that he had been drinking before going to his wife's house and "molesting" her. Police later arrested and charged Charles with first-degree sexual assault.<sup>244</sup> In response to the charge, Charles filed a plea in abatement. Notably, this type of pleading by a defendant does not dispute that the charged offense occurred, but rather that there was something objectionable about the form of the charge. At the end of the hearing, the trial court "ruled that at common law a husband could not be found guilty of raping his wife and that the common law applied in Nebraska."<sup>245</sup> Therefore, since Charles was still legally married to Diana at the time of the sexual assault, the court quashed the evidence collected by the police and suspended the prosecution.

Incidents like the one involving Diana and Charles Willis have been too often a reality for much of United States history. Beginning in the early 1970s, however, activists

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<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid.*, 6. The Bill of Exceptions indicated that one of the children was awakened by the sexual assault, and when the child went to investigate the noise, observed part of the attack. Appellant Brief, 13.

<sup>244</sup> *Ibid.*

<sup>245</sup> *State v. Willis*, 223 Neb. 844, 845 (1986).

started calling into question American statutes and legal practices that embodied the common law definition of rape, noting that the Common Law defined the crime too narrowly. The classical image under both British and American law prior to feminist challenges in the seventies was that rape was “a violent attack perpetrated on an unsuspecting victim who was not acquainted with her attacker. The [rapist was] . . . an evil criminal leaping out of the bushes with a knife in hand, grabbing a terrified woman by the throat, and forcing her into submission in a dark corner.”<sup>246</sup> Over the next two decades, advocates demonstrated the falsity of this image, proving that stranger rape was far less common than intimate partner and acquaintance rape. At the same time, state legislators and jurists addressed the marital rape exemption in myriad ways. As noted in Chapter One, since state statutes, not federal law, regulate domestic relations and most crimes against the body, each state has the authority to pass, alter, or abolish regulations in these areas independently of the other forty-nine. Such is the case with laws relating to spousal immunity from rape charges.

Nebraska’s elimination of the marital rape exemption and its subsequent development of a coordinated response to domestic violence and sexual assault serve as a noteworthy case study. Nebraska was among the first states to eliminate the marital rape exemption, a decision made by a nearly unanimous state legislature. When asked to determine the validity of the state’s sexual assault statute, the Nebraska Supreme Court firmly upheld the law regardless of the relationship between victim and perpetrator.

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<sup>246</sup> Lisa M. Cuklanz, *Rape on Prime Time: Television, Masculinity, and Sexual Violence* (Philadelphia: University of Pennsylvania Press, 2000), 30. Today, evidence illustrates the fallacy of this misconception: “It is a myth that sexual assault victims are primarily assaulted by strangers. In fact, most assaults are committed by someone known to the victim such as a friend, intimate partner, relative, classmate, or co-worker.” 2004 Nebraska’s Task Force on Sexual Assault Crimes Report and Recommendations to the Attorney General, released January 2005.

Additionally, Nebraska demonstrated a progressive response to societal problems and victim needs related to domestic violence and sexual assault, years before the federal Violence Against Women Act, which was passed in 1994. Beginning in the early 1970s, victim advocates worked tirelessly to promote their agenda before an activist Unicameral, who willingly passed legislation that protected victims of sexual and physical violence.

Nebraska is the only state in the Union to have a unicameral form of state legislature. In 1934, citizens passed an initiative to amend the state constitution, thereby replacing the bicameral with a single-house legislature. The first session of the unicameral legislature occurred in 1937. The Unicameral also has the distinction of being the only nonpartisan legislature in the country. Election ballots do not list candidate party affiliation. The two candidates who obtain the most votes in the primary election advance to the general election. The 49 members of the Unicameral are known as Senators.<sup>247</sup> It is perhaps for this reason – a single-house, bipartisan legislature – that Nebraska Senators were able to address the marital rape exemption with little controversy or opposition.

Nebraska first addressed the marital rape exemption in 1975. Prior to 1975, sexual assault laws in Nebraska were governed by Neb. Rev. Stat. § 28-408, a rape law that dated back to 1887. The elements of the law included carnal knowledge of a female performed against the will of the victim. In addition, it included elements for statutory rape where the male was over eighteen and his consenting female partner was under eighteen, unless she was over fifteen and previously unchaste.<sup>248</sup> For the purpose of this

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<sup>247</sup> To learn more about the history of Nebraska's unicameral, see [http://nebraskalegislature.gov/about/ou\\_facts.php](http://nebraskalegislature.gov/about/ou_facts.php).

<sup>248</sup> Neb. Rev. Stat. § 28-408 (Reissue 1956). In 1913, the state legislature amended the statute, creating Neb. Rev. Stat. § 28-407 that addressed rape upon a daughter or sister and imposed a penalty of life imprisonment. With the promulgation of the incest law, Neb. Rev. Stat. § 28-408 remained a rape statute that applied to carnal knowledge of any other woman or female child not the daughter or sister of the

statute, a chaste female meant one who had never had unlawful sexual intercourse with a male prior to the intercourse for which a defendant was charged.<sup>249</sup> Nevertheless, while chastity is often considered to be synonymous with virginity, Nebraska courts have held that an act of sexual intercourse without a woman's consent and against her will, if she is capable of consent, does not destroy [a woman's] chastity.<sup>250</sup> The punishment for a crime under Neb. Rev. Stat. § 28-408 had been between three and twenty years; however, a 1969 amendment increased the range of penalty to three to fifty years.<sup>251</sup>

In 1975, Senator Wallace "Wally" Barnett, seeking to repeal both of the above statutes and replace them with new legislation that used the term "sexual assault," introduced Legislative Bill (L.B.) 23 to the Unicameral. The legislative intent of this new statute was:

to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of the judicial process, which will insure that the alleged offender in a criminal sexual offense case have [*sic*] preserved the constitutionally guaranteed due process of law procedures, and which will establish a system of investigation, prosecution, punishment, and rehabilitation for the welfare and benefit of the citizens of [the] state.<sup>252</sup>

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offender. For the offense of statutory rape, previous chastity of the victim was an essential element of the crime. *State v. Brionez*, 188 Neb. 488 (1972).

<sup>249</sup> *State v. Vicars*, 186 Neb. 311 (1971). As noted elsewhere in this work, for much of recorded history women were considered the property of men, property whose value was measured largely by their sexual purity. As such, rape laws viewed the crime as one against the property interests of the victim's father or husband, and a raped woman was less valuable than a virginal female. Penalties imposed for rape convictions often involved fines or similar compensation paid to the victim's father or husband. Long after the law set aside the view of female-as-male-property, attitudes about chastity remained in rape and sexual assault statutes. As is demonstrated in the Nebraska statute above, the elements of rape laws often distinguished between chaste and unchaste female victims. Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Brookfield, VT: Dartmouth Publishing Company, 1996), 44-49, 68.

<sup>250</sup> *State v. Brionez*, 188 Neb. 488 (1972); *State v. Richards*, 193 Neb. 345 (1975); *Marchand v. State*, 113 Neb. 87 (1925).

<sup>251</sup> L.B. 1263 (1969), introduced by Senator Henry Frederick Pederson, Jr., resulted in the increase in sentencing for rape. Legislators used L.B. 1263 to revise sentencing requirements for several crimes in addition to rape: mayhem, shooting, or stabbing with the intent to kill, assault with the intent to inflict great bodily injury short of death, and kidnapping. See, *State v. Kelly*, 190 Neb. 41 (1973).

<sup>252</sup> L.B. 23, as approved by Governor J. James Exon on May 1, 1975.

A further purpose of L.B. 23 was to “broaden the terms relating to criminal sexual acts and to make testimony less personal to the victim,” encouraging more victims to report the crime to authorities.<sup>253</sup> During floor debates for L.B. 23 on April 8, 1975, Senator Barnett acknowledged that Nebraska’s rape statute was out of date: “It was written in 1887 and it’s not been tampered with since that time so it might give you some idea of how it’s out of time with the world.” The tireless efforts of women’s groups from across the state, which included, but were not limited to, the Lincoln Coalition against Rape, the Governor’s Commission on the Status of Women, and the Personal Crisis Service of Lincoln, inspired Nebraska legislators to change the language used to describe the crime of rape, using instead the term “criminal sexual assault.” The rationale for this change was a broadening of the terms to include additional forms of offensive sexual contact and to make testimony less personal for the victims of sexually based crimes.<sup>254</sup>

The 1975 bill created the offenses of first- and second-degree sexual assault. L.B. 23 defined sexual assault in the first degree as an occurrence where:

Any person subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) the actor is more than eighteen years of age and the victim is less than sixteen years of age.

The penalty for a conviction was one to twenty-five years.<sup>255</sup> L.B. 23 defined sexual assault in the second degree as an occurrence where:

Any person subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, or (b)

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<sup>253</sup> L.B. 23, Introducer’s Statement of Purpose, January 15, 1975.

<sup>254</sup> L.B. 23 Committee Records of January 22, 1975, p. 3.

<sup>255</sup> L.B. 23 § 3(1) and (2). In 1977, a revision of the criminal code resulted in sexual assault in the first degree being redesignated as Neb. Rev. Stat. § 28-319. The revision resulted in no substantive changes to the statute.

knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct.

The penalty for a conviction was one to fifteen years.<sup>256</sup>

In passing such laws, Nebraska followed a path that many states took beginning in the mid-1970s. Barnett acknowledged that society often refers to victims of sexual assault as “she” because women are more often the victims of sex crimes than men.<sup>257</sup>

Nevertheless, L.B. 23 made the crime of sexual assault gender-neutral. It did away with the female as victim, male as offender distinction, instead using the term actor to refer to “a person accused of sexual assault,” and victim to identify “the person alleging to have been sexually assaulted.”<sup>258</sup> Additional word selection in the bill was very deliberate, using language that was more inclusive, was more sensitive to victims, and revised criminal statutes to reflect better the changing sexual culture of the era. The era highlighted the influence of a complex interplay between the new sexual culture of the 1970s, the women’s liberation movement, and the influence of the gay rights movement, while still supporting “the dominance of heterosexuality over other sexual orientations and the subordination of women as objects of male desire.”<sup>259</sup>

The changes brought by the passage of L.B. 23 reflected the efforts of women activists who hoped to make “positive contribution to the prevention of the crime [rape], the support of the victim, society’s awareness of the crime, and the affected treatment of the crime within a criminal justice system.”<sup>260</sup> On January 22, 1975, five of these women

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<sup>256</sup> L.B. 23 § 4(1) and (2).

<sup>257</sup> L.B. 23 Floor Debate of April 8, 1975, p. 2232.

<sup>258</sup> L.B. 23 §2(1) and (6).

<sup>259</sup> Elana Levine, *Wallowing in Sex: The New Sexual Culture of 1970s American Television* (Durham, NC: Duke University Press, 2007), 4-5.

<sup>260</sup> Karen Flowers, Testimony before the Judiciary Committee, January 22, 1975.

testified before the Judiciary Committee, providing support for L.B. 23, using arguments espoused by activists throughout the United States.

Karen Flowers, representing the Lincoln Coalition Against Rape, indicated that the Coalition's Police Law Group was responsible for laying the groundwork for what became L.B. 23. Flowers noted that rape was the most under-reported violent crime in America, in part because of "the victim's unwillingness to go through the ordeal that is presently a part of a rape prosecution."<sup>261</sup> She argued that the "ordeal" was a byproduct of myths about rape that reflected suspicion and mistrust of victims: "That the rape is primarily a crime of sex; that rape is a crime of impulse; that the rapist and the victim are strangers; that no healthy woman capable of resisting can be raped; that the woman asked for it; that women have a propensity to contrive false rape complaints; and that it can't happen to me."<sup>262</sup> Flowers then highlighted the elements of the proposed bill, focusing on the gender-neutral language, the elimination of the marital rape exemption, and revised evidentiary rules that protected victim privacy.<sup>263</sup>

While Flowers had briefly mentioned rape victims under-reporting, Kathy Smith provided more context for that phenomenon. Smith was the coordinator of the Lincoln Rape Line, a telephone crisis hotline. In discussing under-reporting, she used as an

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<sup>261</sup> *Ibid.* In 2015, rape remains the most under-reported violent crime in the United States.

<sup>262</sup> *Ibid.*

<sup>263</sup> At the time of her testimony, Flowers was a law student at the University of Nebraska College of Law. She went on to have a distinguished legal career. Flowers was the first woman appointed to the Lancaster County District Court. She presented at educational seminars for judges and lawyers, often on the topic of domestic relations. She was the recipient of the 2002 Distinguished Judge for Improvement of the Judicial System for her participation in the Lancaster County Adult Drug Court, and received the State Bar Foundation's Legal Pioneer Award in 2006. Lori Pilger, "District Judge Flowers to Retire at Year's End," *Lincoln Journal Star*, November 27, 2013.

example the women who utilized the crisis hotline in the previous four months.<sup>264</sup> She explained: “Of the fourteen rape victims who have contacted us since October 1, 1974, only four of these women have chosen to report the crime to the Police Department.”<sup>265</sup> Smith cited common reasons that the other ten had decided not to report the crimes: fear of not being believed, fear of being blamed, a lack of physical evidence, and the fear of relating past sexual history at a resulting trial. Victims in other cities commonly echoed these reasons for not reporting their victimization to the police.

Dr. Frances Campbell, a psychiatrist employed by the Eastern Nebraska Human Services Agency in Omaha, testified as the Chairperson of the Rape Committee of the Omaha Mayor’s Commission on the Status of Women. According to Campbell, the Rape Committee “was established in 1973 with a goal of influencing how a rape victim is treated by sensitizing hospital personnel, police and attorneys to the needs and feelings of a rape victim.”<sup>266</sup> The Rape Committee also provided public education programming, conducted research on the law regarding rape, and established a rape crisis line in Omaha, the largest city in Nebraska. Campbell opposed a defense attorney’s use of a victim’s past sexual history to establish consent, arguing: “what she did prior or since . . . has no bearing on the charge of rape.”<sup>267</sup> Campbell, therefore, supported the section of L.B. 23 that protected a victim from unnecessary intrusion into her private life.<sup>268</sup> She also

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<sup>264</sup> Kathy Smith, Testimony before the Judiciary Committee, January 22, 1975. Smith explained that the Lincoln Rape Line was co-sponsored by the Lincoln Coalition Against Rape and the Personal Crisis Service of Lincoln.

<sup>265</sup> *Ibid.*

<sup>266</sup> Frances Campbell, Testimony before the Judiciary Committee, January 22, 1975.

<sup>267</sup> *Ibid.*

<sup>268</sup> While Chapter 4 of this dissertation discusses the topic of rape shield laws at length, L.B. 23 § 5 is notable for creating such a provision for Nebraska in 1975. The law indicated that the previous sexual conduct of the victim or the defendant would not be admissible unless a judge determined that it was relevant to the case. Even then, the judge would set clear parameters of how the parties could introduce that evidence at trial. Specifically, the law indicated that prior sexual activity between the victim and a person

questioned the paradox of victim resistance: “If she fights and resists in order to show bruises, she runs a great risk of being physically abused and seriously injured. If she does not resist, and thus shows no injuries, it is often assumed that she consented and thus rape did not occur.”<sup>269</sup>

A further issue covered at the hearing was the fear that passage of L.B. 23 “would [make] it easy for woman to make a false report and to convict an innocent man of rape.”<sup>270</sup> Sherry Fairer, representing the Lincoln Police Department, responded to those concerns. From her experience as a police officer who had investigated rape cases, Fairer concluded that the procedural steps in an investigation of a rape complaint discourage women from making false reports. The victim must undergo a physical exam and be thoroughly questioned by the physician and then by the police. This process is lengthy and involves intimate and often embarrassing questions. The victim may also need to give a written statement, in which she recounts the details of her attack. Police officers next attempt to verify all of the information provided by the victim. The police forward their reports to the County Attorney’s Office, where attorneys may subject the victim to yet another interview. Finally, the victim might need to testify at trial. At any point during this process, the case may stall for lack of evidence, inconsistencies in the victim’s statement, if facts are disproven, or if the victim refuses to testify. According to Fairer,

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other than the defendant was relevant only to establish a pattern of conduct suggesting consent on the part of the victim. What was unique about Nebraska’s rape shield provision is that it addressed prior conduct by both victim and the accused. As Chapter 4 will demonstrate, in some jurisdictions the rules of evidence prevented a jury from hearing evidence of the defendant’s past sexual conduct, but not the victim’s. In 2009, the Nebraska legislature revised the state rape shield law with LB 97 § 5. The most significant result of that change became Neb. Rev. Stat. § 27-414, which allowed the introduction of evidence of similar acts of sexual assault which the defendant had been accused of committing.

<sup>269</sup> *Ibid.*

<sup>270</sup> Sherry Fairer, Testimony before the Judiciary Committee, January 22, 1975.

the emotionally arduous nature of these procedures make it unlikely that women will file false reports of rape.

Jean O'Hara, Executive Director of the Governor's Commission on the Status of Women, promoted a change in the range of sentencing for defendants convicted of sexual assault. Rather than have a defendant face one to fifty years for a conviction, O'Hara proposed one to twenty years. Her arguments foreshadowed the concerns raised by the jury and public in the Rideout case that made national headlines as the first trial of a man accused of raping his wife while they were still living together. Juries would be more willing to convict a (marital) rape defendant if they believed the sentence was an appropriate punishment for the crime. Here, O'Hara suggested that juries might find anything over twenty years to be excessive punishment for the crime of rape.<sup>271</sup>

The arguments that Flowers, Campbell, Smith, Fairar, and O'Hara made were by no means unique. Feminist activists across the country raised similar debates. What was unique in Nebraska was that the legislature accepted the evidence and passed the 1975 sexual assault statute without a spousal rape exemption. Nearly twenty years would pass before all of the other forty-nine states followed suit.

When Custer County prosecutors charged Charles Willis with first-degree sexual assault of his wife in 1985, Willis' behavior was not the only thing facing legal scrutiny. Also called into question was whether the sexual assault law allowed a marital rape exemption to remain in Nebraska. The case against Willis did not end with the district court suspending the prosecution against him. In fact, George Rhodes, the County

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<sup>271</sup> Jean O'Hara, Testimony before the Judiciary Committee, January 22, 1975.

Attorney, appealed the case to the Supreme Court of Nebraska.<sup>272</sup> In his application for appeal and subsequent appellant brief, Rhodes based his argument on two main issues: legislative intent and equal protection.

Rhodes first argued that “the intention of the Legislature in enacting [Neb. Rev. Stat. § 28-319] was to protect all persons, including spouses, from being subject to sexual penetration after having been overcome by force” and that the District Court had erred in finding that spouses are not protected by that statute.<sup>273</sup>

In his brief, Rhodes spent nearly fourteen pages describing the intent of the Legislature when it passed L.B. 23 in 1975. This argument sheds the most light on the intent of the spousal rape exemption. When L.B. 23 reached the floor of the legislature, its sixth section contained a provision that would exempt a spouse from the sexual assault statute *unless* the couple was living apart or had filed for separation or divorce. Senator John J. Cavanaugh moved for the adoption of an amendment that would remove the provision for spousal immunity. As Cavanaugh explained it, “among and between married partners sexual conduct is a matter of mutual consent and if either of the parties fails to consent,” the other should not have the right to “infringe upon the freedom and integrity of the other person. I don’t think that marriage should allow an immunity from that natural protection.”<sup>274</sup> Senator Ernest “Ernie” Chambers supported the motion, explaining: “there is such a thing as integrity of your body. I don’t feel that you give that up by entering a marriage contract.”<sup>275</sup> Senator Chambers elaborated:

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<sup>272</sup> *State v. Willis*, appeal number 86-015. Rhodes appealed the case directly to the Nebraska Supreme Court because the Nebraska Court of Appeals did not exist until September 1991.

<sup>273</sup> *State v. Willis*, Appellant’s Brief, 2.

<sup>274</sup> L.B. 23, 1975, Floor Debate 8 April 1975, p. 2238-2239.

<sup>275</sup> L.B. 23, 1975, Floor Debate 8 April 1975, p. 2239-2240. Chambers is the longest serving member of the Unicameral, and is a civil rights activist known for crusading for the rights of minorities and women. For

If a man would take a woman who did not consent to his advances even if she is called his wife, and beat her brutally into submission, then somebody would say you can charge him with assault and battery. But there is something far more fundamental involved in action of this kind. A person's sexual [integrity] has a particular standing and a sociological significance in this society. To degrade somebody or to destroy them sexually . . . to keep somebody in that type of bondage against their will and brutalize them, I think is immoral and it ought to be made illegal by this state.<sup>276</sup>

Chambers' sentiment echoes the belief that sexual assault is not only a heinous act, but one that is distinct from the textbook definitions of assault and battery. As such, to charge a rapist with assault and battery fails to acknowledge the crime committed or its long-term impact on the victim.

Only one member of the legislature supported the retention of the spousal exemption, Senator Glenn A. Goodrich. The foundation of Senator Goodrich's argument was that if the couple was still living in the same house without a notice of separation or divorce proceedings, the immunity should prevail. Goodrich asserted that as long as the couple remained married, what happened in the privacy of their home, behind the marital curtain, should be between them. He unabashedly argued that the state "shouldn't be sticking our nose into it unless he gets in a criminal way, violent, for example, which we have statutes to cover."<sup>277</sup> The statutes Goodrich was advocating were those for assault and battery. When questioned by Senator Cavanaugh if a husband has the right to sexually assault his wife without legal sanction, Senator Goodrich did not seem to recognize sexual assault as a violent act: "I'm not sure that a man can criminally assault, unless he uses violence or something like that."<sup>278</sup> Senator Goodrich went on: "The fact,

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more on Ernest Chambers, see Tekla Agbala Ali Johnson, *Free Radical: Ernest Chambers, Black Power, and the Politics of Race* (Lubbock, TX: Texas Tech University Press, 2012).

<sup>276</sup> L.B. 23, 1975, Floor Debate 8 April 1975, p. 2239-2240.

<sup>277</sup> L.B. 23, 1975, Floor Debate 8 April 1975, p. 2243.

<sup>278</sup> *Ibid.*, at 2243-2244.

for example, that you sexually attack her, is between you and your wife until such time she is separated from you, divorced from you or under separate maintenance arrangements.”<sup>279</sup> Such statements reflected a commonly held belief that domestic violence (including sexual assault) was a private family matter exempt from interference by the outside world – including law enforcement officers who had sworn to serve and protect individual citizens.

Both Senators Warren R. Swigart and Chambers verbally attacked Goodrich’s position, offering a number of reasons why an abused woman might stay in a marriage. Senator Swigart, who had volunteered for personal crisis services for several years, spoke of instances of inhumanity relating to marital discord. He recalled stories where a husband used his superior strength “to make a slave of his wife,” beating her, knocking out her teeth, leaving bruises and welts, all the while leaving his wife penniless and without resources to leave.<sup>280</sup> Senator Chambers’ reaction was even stronger:

There are a number of reasons if you know the fact of life Senator Goodrich why a woman may stay with a man even though she can’t stand him. There could be children involved. Because she has lived with him a certain period of time, she may not have gone to school while he went to school and she has no saleable skills or the ability to make a living for herself or her children on her own. Her health could have been destroyed. There are a thousand and one reasons why a woman may remain in a home and not file for divorce, separate [*sic*] maintenance or be separated [*sic*] from this beast that you say has the right to [do] anything he want[s] to a woman and the law ought to endorse it.<sup>281</sup>

When the call for a vote on the bill came, “the legislature specifically voted 33-1 to remove a spousal exemption so that the protection afforded by the state would be

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<sup>279</sup> *Ibid.*, at 2243, 2245. Separate maintenance, which is similar to alimony following a divorce, is financial support from one spouse to another before, during, and after a legal separation.

<sup>280</sup> *Ibid.*, at 2240-2241.

<sup>281</sup> *Ibid.*, at 2241-2242.

extended to wives.”<sup>282</sup> Powerful though the legislative intent claim was in *Willis*, Rhodes raised as a second argument a constitutional challenge to the District Court’s actions. Rhodes contended that by sustaining the defendant’s plea in abatement on the grounds that the defendant and victim were husband and wife, the District Court “unconstitutionally deprive[d] spouses of equal protection of the law” since under that ruling “spouses would not receive the protection from forcible assaults . . . afforded to non-spouses.”<sup>283</sup> Rhodes later argued that the Court, by supporting marital exemption for rape, was effectively relegating “wives to a station in life lower than that of slaves.”<sup>284</sup> In support of this argument, Rhodes relied upon court decisions from New York and Georgia. In the New York case, *People v. De Stefano*, the Court declared a statutory spousal rape exemption unconstitutional. After dismissing several rationales for maintaining the exemption, Justice Kenneth K. Rohl quoted John Stuart Mill:

A female slave has (in Christian countries) an admitted right . . . to refuse her master the last familiarity. Not so the wife . . . he can claim her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclination.<sup>285</sup>

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<sup>282</sup> Appellant brief, at 7. In passing the law, the senators acknowledge a broader societal implication. During the floor debate, Senator Chambers alluded to the harm that viewing domestic violence would have on children. Chambers proposed that young boys would learn to brutalize women and young girls would come to expect mistreatment from men. The implication of Chamber’s argument was that criminalizing spousal sexual abuse and punishing those who violate that law was one way to break the cycle of intimate partner violence.

<sup>283</sup> *State v. Willis*, Application for Leave to Docket an Appeal to the Supreme Court, filed December 20, 1985.

<sup>284</sup> Appellant brief at 22.

<sup>285</sup> *People v. De Stefano*, 467 N.Y.S. 2d 506 (1983), quoting John Stuart Mill, *The Subjugation of Women* (1869). By suggesting that slaves could refuse a master’s sexual advances, Mill’s argument clearly presents an idealized view of the lives and agency of slave women. Nevertheless, his line of reasoning illustrates that even those who rejected a master’s right to force himself upon a female slave upheld the belief that a married woman had a duty never to reject her husband’s sexual advances. See, Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England* (Princeton University Press, 1993), especially Chapter 6, “A Husband’s Right to His Wife’s Body: Wife Abuse, the Restitution of Conjugal Rights, and Marital Rape.”

Justice Rohl then concluded: “No rule or statute granting a spouse immunity can in today’s world withstand any of the tests associated with equal protection, to wit, ‘reasonable basis,’ ‘middle tier,’ or ‘strict scrutiny.’”<sup>286</sup> Therefore, the provision of the New York law that granted a husband immunity from prosecution for the rape of his wife was violative of the due process clause of the state and federal constitutions. Similarly, in *Warren v. State*, the Georgia Supreme Court dismissed the medieval wives-as-chattel theory, reasoning women’s rights have changed significantly since the medieval period. Those rights were protected by the due process and equal protection provisions in the federal and individual state constitutions to uphold rights of all persons within their territory.<sup>287</sup>

In rebuttal to Rhodes’ claims, Carlos E. Schaper and Gregory Anderson, lawyers for Charles Willis, filed an appellee or respondent brief that presented two main arguments. Their first proposition was that it was inappropriate for the State to reference “the statements and opinions of legislators . . . where the language of a statute is unambiguous.”<sup>288</sup> Schaper and Anderson suggested that the sexual assault statutes were not ambiguous and therefore the language of the statutes should be taken at face value. Notably, the Supreme Court ignored this proposition in its opinion. The second argument was that Nebraska had adopted the Common Law exemption, and since neither the rape nor sexual assault statutes explicitly stated that the criminal code would apply to spousal

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<sup>286</sup> Appellate brief at 23.

<sup>287</sup> *Warren v. State*, 255 Ga. 151 (1985).

<sup>288</sup> *State v. Willis*, Appellee Brief, 7-11. Shaper and Anderson relied upon passages from *American Jurisprudence* (Am. Jur.) and *Corpus Juris Secundum* (C.J.S.), two legal encyclopedias, to support this assertion. What their analysis failed to mention was that while Am. Jur. and C.J.S. provide a clear statement of specific legal concepts as they have developed over time, these entries are general overviews that may not account for state variation. Specific to this case, Shaper and Anderson included no reference from the encyclopedias that related to Nebraska law.

rape, the common law exemption should apply.<sup>289</sup> This argument referenced three prior Nebraska cases, *Hanks v. State*, *Jump v. State*, and *State v. Holloman*.<sup>290</sup> Unfortunately for Willis, the Nebraska cases offered in defense of this position all related to the pre-1975 rape statutes, not the current sexual assault law that Willis faced. Furthermore, while those cases involved charges of rape, none of them involved a defendant charged with the rape of his wife. The Supreme Court addressed this “oversight” early in its decision:

In each of these cases it was never the contention of the defendant that the victim of the rape was his wife. The defendants were, instead, complaining that the State had offered insufficient evidence to prove an essential element of the type of rape with which the defendant had been charged; that being rape upon a female other than the defendant's daughter or sister. Thus, the [current defendant's] addition of the word “wife” into the statutory list of sister and daughter was gratuitous at best and does not convince this court that we ever adopted the common-law spousal exclusion to rape.<sup>291</sup>

The Court then spent the next four pages explaining why they would not read the common law exemption into the Nebraska sexual assault statute.

One effect of the Court’s decision was to refute the historical justifications for spousal immunity: irrevocable consent, marital unity, and women as chattel.<sup>292</sup> The judges of the Nebraska Court joined with other jurists in dismissing Hale’s contention of irrevocable consent. The Court agreed with the Supreme Court of New Jersey that noted:

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<sup>289</sup> *State v. Willis*, Appellee Brief at 10.

<sup>290</sup> *Hanks v. State*, 88 Neb. 464 (1911); *Jump v. State*, 146 Neb. 501 (1945); and *State v. Holloman*, 197 Neb. 139 (1976). Of note, all of the Nebraska cases offered in defense of appellee’s argument were based on the earlier rape statute, not the laws related to sexual assault that were in effect when Willis was charged with assaulting his estranged wife. In each of these cases, the defendant faced charges of rape under Neb. Rev. Stat. § 28-408. On appeal, each raised as an assignment of error the fact that the prosecution had not established that the victim was not the accused’s sister or daughter. Such a familial relationship would have resulted in an acquittal or dismissal by the court since the crime of rape of a daughter or sister fell under Neb. Rev. Stat. § 28-407.

<sup>291</sup> *State v. Willis*, 223 Neb. at 846.

<sup>292</sup> For a full discussion of the historical justifications for spousal immunity, see Chapter 1.

Hale cited no authority for this proposition and we have found none in earlier writers. Thus the marital exemption rule expressly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some 300 years ago. Such a declaration cannot itself be considered a definitive and binding statement of the common law, although legal commentators have often restated the rule since the time of Hale without evaluating its merits.<sup>293</sup>

The State of Florida took a similar position, also referenced by the Nebraska Court. In *State v. Rider*, the Florida Appellate Court noted: “That this single sentence, which stands alone, naked of citation to any authority judicial or otherwise, could be considered sufficient precedent to allow a husband to rape with impunity his wife baffles all sense of logic.”<sup>294</sup>

The Nebraska Court further acknowledged that Hale delivered his theory at a time when marriages were essentially permanent, ending only at the death of a spouse or an act of Parliament. Since the vows of marriage were not retractable, perhaps Hale believed that consent to intimacy was not either. Since that time, however, “attitudes towards the permanency of marriage have changed and divorce has become far easier to obtain.”<sup>295</sup> For this reason, the Court concluded that a rule created “under vastly different conditions, need not prevail when those conditions have changed.”<sup>296</sup>

The *Willis* court also dismissed Blackstone’s unity in marriage argument and the women-as-chattel theory in one fell swoop, stating: “both of these theories no longer support the spousal exclusion.”<sup>297</sup> Citing a United States Supreme Court case, the Nebraska Supreme Court noted: “Nowhere in the common-law world – indeed in any

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<sup>293</sup> See, *State v. Smith*, 85 N.J. 193, 200, 426 A. 2d 38, 41 (1981).

<sup>294</sup> See, *State v. Rider*, 449 So. 2d 903 (Fla. App. 1984).

<sup>295</sup> *State v. Willis*, 223 Neb. at 847-848.

<sup>296</sup> *State v. Willis*, 223 Neb. at 846-847 (citing *State v. Smith*, 85 N.J. at 201). See also, *Warren v. State*, 225 Ga. 151 (1985).

<sup>297</sup> *State v. Willis*, 223 Neb. at 847.

modern society – is a woman regarded as chattel or demeaned by denial of separate legal identity and the dignity associated with recognition as a whole human being.”<sup>298</sup> The State of Nebraska itself had in effect done away with these legal disabilities for women in 1871 when it passed its version of the Married Woman’s Property Act, granting married women the right to own and maintain separate property, contract, carry out business, and earn wages on their own.<sup>299</sup>

The Court acknowledged another theory supporting spousal exclusion from rape prosecution – the use of signifying language. For instance, California’s penal code to this day defines rape as “sexual intercourse accomplished with a person *not the spouse of the perpetrator*” [emphasis added].<sup>300</sup> Similarly, “the use of the word ‘unlawful’ in rape statutes [often] signifies the incorporation of the common law spousal exclusion.”<sup>301</sup> While the word “unlawful” can be used in different ways, in the context of rape, it generally connotes “not authorized by law.” However, since “sexual intercourse between husband and wife is sanctioned by law,” standard judicial reasoning holds that the state could not prosecute a spouse for behavior that would otherwise be rape.<sup>302</sup> As the Court

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<sup>298</sup> *Id.*; *See, Trammel v. United States*, 445 U.S. 40 (1980).

<sup>299</sup> Neb. Rev. Stat. §§ 42-201 – 42-204 (Laws 1871, §§ 1-3, 5, p. 68). Since 1871, the Nebraska Supreme Court has taken the opportunity to both interpret and uphold the language of those statutes. The Court made clear that a wife has absolute control over the property she owned at the time of her marriage, *Broadwater v. Jacoby*, 19 Neb. 77 (1886); that property conveyed by a husband to his wife becomes her separate property, *Graff v. Graff*, 179 Neb. 345 (1965); and that a wife’s separate estate (property) is not liable for the debts of her husband, *Leighton v. Stuart*, 19 Neb. 546 (1886); *Callahan v. Powers*, 24 Neb. 731 (1888); *Taggart v. Fowler*, 25 Neb. 152 (1888). The Court also indicated that a married woman had the same right as her husband to contract, mortgage, convey, or sell her separate property, *Kloke v. Martin*, 55 Neb. 554 (1898); *Melick v. Varney*, 41 Neb. 105 (1894); *Bode v. Jussen*, 93 Neb. 482 (1913); *Focht v. Wakefield*, 145 Neb. 568 (1945). The Court further held that married women could enter into business partnerships, carry out business in their own names, and were entitled to the wages they had earned, *Shortel v. Young*, 23 Neb. 408 (1888); *Riley v. Lidtke*, 49 Neb. 139 (1896); *Plattsmouth State Bank v. John Bauer & Co.*, 133 Neb. 35 (1937).

<sup>300</sup> California Penal Code § 261. The language of § 261 does not mean that a husband cannot be charged with raping his wife in California. As Chapter 3 will demonstrate at great length, California has a separate statute, California Penal Code § 262, which criminalizes spousal rape.

<sup>301</sup> *State v. Willis* 223 Neb. at 847.

<sup>302</sup> *Commonwealth v. Chretien*, 383 Mass. 123, 131 (1981). *See, Warren v. State*, 225 Ga. 151 (1985).

explained, however, since the Nebraska rape statute never included the term “unlawful,” there was no basis for believing the spousal exclusion was the law in Nebraska.<sup>303</sup>

After concluding that the spousal exclusion had never been a part of Nebraska’s earlier rape law, the Court said such a conclusion was immaterial since the legislature had repealed the rape statute in 1975 when it passed the first-degree sexual assault law. At that point, the language of the new statute became the focus of the Court’s rationale – since it was, after all, the statute that Willis had been charged with violating. As a review, the new law declared a person guilty of sexual assault in the first degree if he or she subjected another to sexual penetration by force or threat of force.<sup>304</sup> The Court concluded that there was sufficient difference in wording between the old rape statute and the new sexual assault law to abrogate any common-law inter-spousal exemption.<sup>305</sup>

The Court elaborated, providing evidence of several differences between the statutes. First, the Court acknowledged the position first articulated by 1970s feminist anti-rape activists – that rape was a crime of violence, not an act of sexual passion. “First degree sexual assault,” the Court noted, “is not a ‘sexual [act] of an ardent husband performed upon an initially apathetic wife, [it is an act] of violence that [is] accompanied with physical and mental abuse and often leave[s] the victim with physical and psychological damage that is almost always long lasting.”<sup>306</sup> The Court’s statement was significant in that it echoed the “most important element of feminists’ anti-rape ideology of the 1970s: ‘The assertion that rape is violence provided feminists with a whole new

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<sup>303</sup> *State v. Willis*, 223 Neb. at 847. See, *Commonwealth v. Chretien*, 383 Mass. 123 (1981) and *State v. Smith*, 85 N.J. 193, 426 A. 2d 38 (1981), both of which reach a similar conclusion regarding the sexual assault statutes of their respective states.

<sup>304</sup> Neb. Rev. Stat. § 28-319(1).

<sup>305</sup> *State v. Willis*, 223 Neb. at 487.

<sup>306</sup> *State v. Willis*, 223 Neb. at 488, citing *Warren v. State*, 225 Ga. 151 (1985).

framework in which to analyze rape, to remove blame from the victims, and to develop a convincing argument to gain acceptance for their claims.”<sup>307</sup> Nebraska’s highest court acknowledged that reality in *Willis*. The second major distinction the Court highlighted was that the former rape statute required the sexual intercourse be the result of force. Under the sexual assault statute, a perpetrator could overcome a victim in several ways short of force, including express or implied threat of force, coercion, or deception. The new law was more expansive by including additional sexual acts: *any* form of sexual penetration would be sufficient for an arrest, not just the traditional element of penile-vaginal intercourse.

The decision in *Willis* stands as the definitive note on a marital rape exemption in Nebraska. The *Willis* court explained that since the passage of the 1975 sexual assault statute, there is no spousal immunity for rape in Nebraska. Since the Nebraska Supreme Court published the 1986 opinion, there have been fifty-seven appellate decisions related to Neb. Rev. Stat. 28-319, the sexual assault statute. As of September 2015, none of those appeals challenged the standard established in *Willis*.<sup>308</sup>

In addition to being a notable example for its legal approach to marital rape, Nebraska’s approach to the domestic violence and sexual assault (DV/SA) movements stands out among other states in the nation. Since the 1970s, the domestic violence and sexual assault movements have generally operated independent of one another. Nebraska is among the minority of states that has dual programming, meaning that DV/SA programs operate in tandem rather than independently. Like the sexual assault statute that does not differentiate between spousal and non-spousal sexual assault, DV/SA advocacy

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<sup>307</sup> Levine, *Wallowing in Sex*, 211.

<sup>308</sup> By far, the majority of appellants were challenging convictions for the sexual assault of a minor.

programs in Nebraska do not treat victims of intimate partner violence differently than those who suffer at the hands of strangers. Therefore, it is appropriate to review Nebraska's DV/SA programs through a broad lens, rather than one that pinpoints spousal rape victims.

Early efforts to address DV/SA in Nebraska illuminated the divide between the criminal justice system and victim advocates. Their varied organizational histories and differing roles when encountering sexual assault victims may help explain the conflict between the two groups. Although more women are employed "in law enforcement today, police departments are still generally male dominated, paramilitary organizations."<sup>309</sup> In contrast, "most sexual assault coalitions and community-based rape crisis centers were created as a result of the feminist movement, when women gathered together to demand better treatment for rape victims."<sup>310</sup> According to the Office for Victims of Crime, law enforcement have three primary responsibilities when responding to sexual assault cases. Police officers: protect, interview, and support the victim; investigate the crime with a view to apprehending the perpetrator; and collect and preserve evidence that prosecutors may use if the case goes to trial.<sup>311</sup> Police departments and their officers did not always prioritize these duties equally, particularly since few officers received training on how to interview and provide support to DV/SA victims. The primary focus of victim advocacy has always been the physical and emotional wellbeing of assault victims, as well as safeguarding victim's legal rights. As such, an

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<sup>309</sup> Kim Lonsway and Joanne Archambault, "Advocates and Law Enforcement: Oil and Water?" Accessed October 12, 2015. [http://www.mysati.com/enews/Dec2007/Promising\\_Practices\\_Dec07.pdf](http://www.mysati.com/enews/Dec2007/Promising_Practices_Dec07.pdf)

<sup>310</sup> *Ibid.*

<sup>311</sup> Office for Victims of Crime, [https://www.ncjrs.gov/ovc\\_archives/reports/firstrep/vicsexaslt.html](https://www.ncjrs.gov/ovc_archives/reports/firstrep/vicsexaslt.html). Accessed October 12, 2015.

advocate would want to ensure that victims receive all of the services to which they are entitled and that they have all the information they need to make sound decisions.

However, over the past four decades the Nebraska criminal justice system – law enforcement, prosecutors, probation, and courts – and victim service providers have worked to ease this tension and to apply collaborative methods to combat DV/SA.

Beginning as a grassroots movement in the 1970s, DV/SA advocacy in Nebraska has employed a variety of tactics to bring about change, the most successful of which employed collaborative efforts among advocates, law enforcement, court officials, and medical personnel. Early efforts to confront sexual assault occurred on the campus of the University of Nebraska.<sup>312</sup> In 1974, VISTA workers on campus created a crisis line in support of victims who needed help beyond what the police offered.<sup>313</sup> Two years later, operating under the name Lincoln Coalition against Rape, this group became part of Lincoln's Family Services Association, an umbrella organization that provided services for those suffering from mental health and drug issues as well as rape crisis. While advertised as a rape crisis program, those working the crisis line received many calls from victims of domestic violence who did not self-identify as rape victims. As a result, in 1978 the group added services that targeted domestic violence and renamed itself the Rape and Spouse Abuse Crisis Center (RSACC).<sup>314</sup> Both students and community members participated in the early years of the crisis line and subsequent Coalition. Two notable participants were Gina Washburn and Marcee Metzger, both of whom were

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<sup>312</sup> As discussed in this chapter, University of Nebraska refers to the institution in Lincoln, which is the flagship school in the University of Nebraska system. Also part of the Nebraska system are campuses in Omaha and Kearney.

<sup>313</sup> VISTA is the acronym used for Volunteers in Service to America, a national service program created in 1965 as part of President Lyndon Johnson's war on poverty.

<sup>314</sup> Interview with Patsy Martin, Communications and Resource Development Coordinator for Voices of Hope, formerly RSACC, March 26, 2015.

actively involved in the women's movement in the 1970s and 1980s. Washburn was an early coordinator of the organization when it was the Lincoln Coalition Against Rape. Metzger served as the Director of the University of Nebraska Women's Resource Center in the 1970s and is currently the Executive Director of Voices of Hope.

In 1989, the staff of RSACC decided to break away from the Family Services Association, creating an independent non-profit corporation in order to focus more exclusively on the issues of sexual assault, domestic violence, and incest. For the first six months, RSACC operated out of the home of one of its volunteers, Elizabeth "Liz" Kurtz.<sup>315</sup> Thereafter, it took up office space in an old federal building. The office proved to be inadequate and ill-suited to meet the needs of RSACC, however, and in 1992, RSACC began operating out of its current location, a house turned office near the city's center. Following the passage of the Violence Against Women Act in 1994, RSACC experienced greater acceptance within the community. This legitimacy, as well as its larger facility, allowed the Center to expand its services. Able to operate around the clock, RSACC offered daily walk-in services and a 24-hour crisis line, provided legal advocacy to clients, and sponsored more support groups and educational programs.

Three pieces of legislation passed between 1969 and 1978 directly and indirectly assisted the efforts of victim advocates. In 1969, the Nebraska Legislature created the Nebraska Commission on Law Enforcement and Criminal Justice (Crime Commission).<sup>316</sup> The Crime Commission has the authority to "educate the community at

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<sup>315</sup> Liz Kurtz remained active with RSACC until her death. Today, her children and grandchildren remain involved with Voices of Hope, the current name of RSACC. Telephone conversation with Patsy Martin, Communications and Resource Development Coordinator for Voices of Hope, October 27, 2015.

<sup>316</sup> The purpose for and responsibilities of the Crime Commission are codified as Neb. Rev. Stat. §§ 81-1415 to 81-1429.

large to the problems encountered by law enforcement authorities, promote respect for law and encourage community involvement in the administration of criminal justice.”<sup>317</sup> With the exception of a few statutorily required members, the rest of those serving on the Crime Commission are gubernatorial appointees.<sup>318</sup> The statute requires that at least one on the members serving from the “public at large” be a woman. Since 1970, women have filled between two and five seats on the Crime Commission. Accounting for fluctuating membership levels, women represented between ten and twenty percent of those serving on the Crime Commission between 1970 and 2013. While many held positions as members of the public, others served because of their political role or connection to law enforcement.<sup>319</sup> According to current Director Darrell Fisher, until last year, there was no seat reserved on the Crime Commission for a victim advocate. In 2014, a change to the guidelines provided that one seat on the Crime Victim’s Reparation Committee should be filled by a victim advocate.<sup>320</sup>

The legislature granted the Crime Commission, among other things, the power and responsibility to plan and implement improvements in the administration of criminal justice; to coordinate activities related to the administration of criminal justice; and to accept and administer funds from the federal government, the state government, and other

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<sup>317</sup> The current rendition of that statute is codified as Neb. Rev. Stat. § 81-1416 (2015).

<sup>318</sup> The statutorily required members have changed slightly over the years, but for many years the list has included the Governor, Attorney General, Superintendent of Law Enforcement and Public Safety, Director of Correctional Services, and the chairpersons of the Nebraska Police Standards Advisory Council and the Nebraska Coalition for Juvenile Justice. Neb. Rev. Stat. § 81-1417.

<sup>319</sup> For instance, Mrs. Clifford Jorgensen served on the Crime Commission during the 1970s and the first half of the 1980s in her capacity as the Chair of the Nebraska Committee for Children and Youth. Irene Abernethy, of Hastings, served on the Crime Commission throughout the 1970s and 1980s while the Hall County Supervisor. The governor appointed Shirley Kuhle because of her role as President of the Nebraska Task Force on Domestic Violence. Commission members Shirley Howell and Phyllis Lainson were mayors of the Nebraska towns of Fairbury and Hastings, respectively.

<sup>320</sup> Telephone interview with Darrell Fisher, October 27, 2015. The Crime Victim Reparation Committee is one of ten committees operating as part of the Crime Commission. See note 95 for more about the other committees.

sources for carrying out its functions.<sup>321</sup> The Crime Commission embraced its role as an agency of state government, providing a forum for discussion and problem solving, and as the state's justice advocate, developing comprehensive plans to improve the criminal justice system in Nebraska.<sup>322</sup>

In 1978, three years after the Nebraska legislature established the new guidelines for its sexual assault statute, the Committee on the Judiciary introduced the Protection from Domestic Abuse Act (L.B. 623).<sup>323</sup> According to Senator Wally Barnett, who introduced L.B. 623: "The purpose of this Act would be to channel welfare services to the victims of domestic abuse. Such assistance would include emergency shelter and intensive counseling services. This bill also [sought] to increase public and official awareness of the problem in hopes that such maybe curtailed or at least controlled in the future."<sup>324</sup>

Recognizing that domestic violence was an ongoing problem in Nebraska, the Committee held a series of public hearings across the state to gauge the extent of the

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<sup>321</sup> *Nebraska Blue Book* (Lincoln, NE: Nebraska Legislative Council, 1970). The current rendition of the statute enumerating the Crime Commissions responsibilities is codified as Neb. Rev. Stat. § 81-1423 (2015).

<sup>322</sup> According to the Crime Commission's website, ten standing committees make recommendations of the Crime Commission regarding specific concerns related to law enforcement and criminal justice in Nebraska. At least six of these committees have a direct or indirect impact on how the state addresses domestic violence and sexual assault. The standing committees, which may have a direct or indirect impact on DV/SA issues, include the Crime Victim Reparations Committee, the Juvenile Justice Coalition, the Office of Violence Prevention, the Police Standards Advisory Council, the Justice Behavioral Health Committee, and the Task Force on Human Trafficking. The remaining committees are the County Attorney Standards Advisory Council, the Criminal Justice Information Systems Advisory Committee, the Jail Standards Board, and the Racial Profiling Committee. <http://www.ncc.nebraska.gov>.

<sup>323</sup> In a telephone interview on October 28, 2015, former Senator Wally Barnett, 84, discussed what he recalled about the Protection Against Domestic Abuse Act. While Barnett did not recall being responsible for initiating the bill, as Chair of the Judiciary Committee, he was responsible for carrying the bill to the floor of the legislature. He explained that while serving as a state senator, he approached societal problems with "an aim to fix them." Of specific note from the 1970s, Barnett said that there was a real problem with both alcoholism and domestic violence. He did remember introducing legislation to assist alcoholics needing treatment and reasoned that it was about the same time the Judiciary Committee addressed domestic violence.

<sup>324</sup> L.B. 623 (1978) Introducer's Statement of Purpose, January 23, 1978.

problem and the attitudes of community members. A few common themes emerged from the hearings. Both men and women were asking for assistance from the state to address family conflict. Despite attempts to keep their families together, many women suffered beatings at the hand of their husbands. Female victims were afraid to leave their abusive homes because they feared physical reprisals that would be worse than what they had already endured. Victims also feared for the safety of their children.<sup>325</sup>

On January 23, 1978, the Committee held an open hearing on L.B. 623 at the Capitol Building in Lincoln. Individuals with a wide variety of experiences with domestic violence victims gave testimony. Karen Waller, State Coordinator for the Domestic Violence Project, testified in favor of L.B. 623. Waller was encouraged by the level of attention the Judiciary Committee was giving to the problem of domestic violence. She was proud that “Nebraska [was] one of the first states to attempt statewide coordination of community involvement in the domestic violence issue.”<sup>326</sup>

Witnesses testified about the negative effects of domestic violence. Joseph Julian, Associate Professor of Sociology at the University of Nebraska, explained that despite the misconception that domestic violence is a characteristic of impoverished families, it occurs across all socioeconomic classes and geographic locations.<sup>327</sup> Kappie Weber, representing the League of Women Voters in Nebraska, supported Julian’s comment by expressing the sobering reality that everyone on the room had some experience with abuse, albeit some more remotely than others.<sup>328</sup>

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<sup>325</sup> Senator Wally Barnett, Legislative record, March 2, 1978.

<sup>326</sup> Karen Waller, Testimony before the Judiciary Committee, January 23, 1978. Waller explained that funding for the Domestic Violence Project came from a grant distributed under the Comprehensive Employment Training Act. The project focused on rural areas in Nebraska that suffered from a lack of support services for the victims of domestic violence.

<sup>327</sup> Joseph Julian, Testimony before the Judiciary Committee, January 23, 1978.

<sup>328</sup> Kappie Weber, Testimony before the Judiciary Committee, January 23, 1978.

Witnesses provided testimony about the frequency at which domestic violence occurred in communities of various sizes throughout the state. Robert Coupland, a lawyer from the rural community of Valentine in north-central Nebraska, indicated that he had twelve to sixteen abused women come into his office in the previous year. They suffered from cracked ribs, lacerations near the eyes, knees twisted out of joints, and/or facial bruises. The women found their way to his office only after they had received medical treatment and their injuries had started to heal.<sup>329</sup> Benny Kling, Police Chief of Syracuse, Nebraska, indicated that his officers had responded to fifty-six domestic violence calls in the past twelve months. While some of the calls were to the same residences, the number seemed unusually high given that the population of Syracuse was about sixteen hundred in 1978.<sup>330</sup> Richard Dunning, City Prosecutor for Omaha, Nebraska, revealed that his office regularly met with nearly one thousand domestic violence victims each year. Dunning was quick to point out that the number did not include any cases involving felonies, reasoning the total number of victims in Omaha was actually much higher. Of the domestic violence victims Dunning saw, half filed a complaint, and only about fifteen percent actually made it to trial. He also testified that he was aware of four or five women in the previous three years who were murdered by their significant others after the women had visited the City Prosecutor's Office. Consequently, he said there was a real need for L.B. 623.<sup>331</sup>

Others described marital rape as a form of domestic violence. Jan Kohl, Vice President of the Lincoln Chapter of the National Organization for Women, indicated that

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<sup>329</sup> Robert Coupland, Testimony before the Judiciary Committee, January 23, 1978.

<sup>330</sup> Benny Kling, Testimony before the Judiciary Committee, January 23, 1978.

<sup>331</sup> Richard Dunning, Testimony before the Judiciary Committee, January 23, 1978.

historically marital rape was a condoned part of marriage. While legislation in many states was criminalizing such behavior, Kohl asserted that it remained a form of domestic violence.<sup>332</sup> Senator Herbert Duis of Gothenburg publicly acknowledged that rape was an intrinsic part of domestic violence during a March 2, 1978 session of the legislature. Such public recognition by Kohl and Duis demonstrated Nebraska's continued commitment to hold spousal rapists accountable for their actions and provide assistance to their victims.

A concern raised by both law enforcement and prosecutors was a lack of training related to domestic violence situations. Kling indicated that twenty-two percent of injuries officers experienced occurred during domestic violence calls. When injury did occur, it was generally at a home that police had visited multiple times. Kling argued that law enforcement officers needed more training on responding to domestic violence calls. On a related note, Kling supported the Nebraska Law Enforcement Training Center, but noted that it was understaffed, underfunded, and operating in too small of a facility.<sup>333</sup> Dunning also raised concerns about lack of training for the employees in the Prosecutor's Office. He noted that the prosecutors in his office simply lacked the training to successfully advise and assist battered women. They attempted to help the families work out their problems, but the best they could do was file assault and battery charges against the abusers. Even then, most of those cases did not go to trial because the victims were too scared to show up to testify.<sup>334</sup>

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<sup>332</sup> Jan Ellis Kohl, testimony before the Judiciary Committee, January 23, 1978. Kohl explained: "Women have, in the past, been considered to be the personal property of the man; thus, the man had the right to use his property as he saw fit. . . . Today, women are beginning to declare their individuality and independence in striving to be recognized as free persons in their own right with all the rights and responsibilities that freedom entails. No longer should the husband have the right to do with this free person as he chooses or treat this individual as his property. In many states, thankfully, a husband may no longer legally sexually assault his wife."

<sup>333</sup> Kling Testimony.

<sup>334</sup> Dunning Testimony.

Multiple witnesses provided support for L.B. 623 because it would provide necessary assistance to both victims and abusers. Marty Beach, representing the American Association of University Women, strongly supported the preventive measures in the bill. She explained that making people aware that violent behavior is not acceptable is vitally important. She was pleased to see provisions in the bill for emergency housing that would give victims a place of safety to go to when in crisis.<sup>335</sup> Beach also referenced the International Women's Conference held in Houston, Texas in 1977. Of special note was the Conference Resolution that concerned battered women. Participants at the conference prioritized financial assistance to provide emergency shelter and support services to battered women and their children. Pastor Richard Mintzlaff of Burwell, Nebraska, supported L.B. 623 in its entirety, but focused his testimony on the value of counseling for abusers. He promoted the inclusion of counseling as part of a probation plan, positing that most abusive men will not voluntarily seek out assistance for their behavior or underlying difficulties. On the other hand, many might benefit tremendously from individual or group counseling.<sup>336</sup> Debbie Reynolds, of the Lincoln Council on Alcoholism and Drugs, proposed that both victims and abusers needed assistance and counseling. Reynolds noted that she worked with women weekly who lived in abusive situations where alcohol was involved. She believed the resolution of alcohol problems would reduce domestic violence significantly. While most of the clients she saw were female, Reynolds noted that more men were beginning to visit her office. The men

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<sup>335</sup> Mary Beach, testimony before the Judiciary Committee, January 23, 1978.

<sup>336</sup> Richard Mintzlaff, testimony before the Judiciary Committee, January 23, 1978.

acknowledged their alcoholism and abuse, and they shared stories of wives and girlfriends who responded by becoming violent themselves.<sup>337</sup>

The Committee also heard from Eldin Ehrlich, the Director of the Department of Public Welfare. Under the terms of L.B. 623, Welfare would administer the provisions of the Protection from Domestic Abuse Act. Ehrlich acknowledged that some of the services indicated in the bill were outside the current purview of Welfare. To implement the Act, the Department would need an increase in staff, additional training for the current staff, and the ability to outsource services to agencies and programs already equipped to assist victims and their families.

Kurt Freibert, representing Dads of America, Inc., presented the only testimony in opposition to L.B. 623. Referencing the Reverend Billy Graham, Freibert argued that people needed to turn to God and churches rather than legislation and government interference when they have “family difficulties.” A few moments later, the strength of Freibert’s argument waned when he suggested that most clergy are not qualified with the expertise necessary to help abused men and women. Freibert blamed no-fault divorce for broken homes and, portrayed his gender-biased views when he claimed, “LB 623 gives incentive to women to run away from home, break up marriages, promote divorces, [and] destroy families.”<sup>338</sup> The most controversial portion of Freibert’s testimony was his assertion: “There are more abused and battered, mentally destroyed husbands, than women.”<sup>339</sup> Soon thereafter, the Committee ended Freibert’s testimony.

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<sup>337</sup> Debbie Reynolds, testimony before the Judiciary Committee, January 23, 1978.

<sup>338</sup> Kurt Freibert, Testimony before the Judiciary Committee, January 23, 1978.

<sup>339</sup> *Ibid.*

Two months after the Committee hearing, then Governor J. James Exon signed the bill into law. The bill was codified as Neb. Rev. Stat. §§ 42-901 to 42-931. In passing the Protection from Domestic Abuse Act, the Nebraska Legislature publicly declared that domestic violence, including sexual assault, was a statewide issue, and that the government would join advocacy groups in confronting and working to end the cycle of violence.

Another innovation was in the area of law enforcement training. Specifically, lawmakers introduced legislation in 1969 that would require those interested in law enforcement to receive standardized training prior to becoming fully certified officers.<sup>340</sup> The legislature mandated that the newly established Nebraska Law Enforcement Training Center (Training Center), under the supervision of the Police Standards Advisory Council (Council):

(1) test all law enforcement candidates on behalf of the council to ensure that they meet pre-certification and certification requirements, (2) oversee and monitor other training schools and training academies to ensure that pre-certification and certification requirements as set by the council are being met, and (3) conduct pre-certification programs, certification programs, and advanced law enforcement training programs as directed by the council.<sup>341</sup>

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<sup>340</sup> According to Training Center guidelines, individuals may apply to attend the Training Center prior to or after being hired by one of Nebraska's police departments. However, because space is limited in each training class, currently all seats are reserved for those who already work for a law enforcement agency. Interview with Brenda Urbanek, Deputy Director of the Nebraska Law Enforcement Training Center, March 3, 2015.

<sup>341</sup> Neb. Rev. Stat. § 81-1402. This provision was first introduced in 1969 (Laws 1969, c. 773, §, p. 2926), revised in 1971 (L.B. 929, § 2), and took its current form with a 2000 revision (L.B. 994, § 3). The Training Center is responsible for auditing police academies operated by the Lincoln Police Department, the Omaha Police Department, and the State Patrol. The Council develops the rules and regulations that govern admission criteria to any training academy. Such criteria include physical, mental, and emotional fitness, and the disclosure of any criminal history. See Neb. Rev. Stat. § 81-1410 (2000). The legislature passed earlier versions of the statute in 1969, 1988, and 1994. Beyond this initial certification, current law enforcement officers in Nebraska must annually complete a minimum of "twenty hours of continuing education courses in the areas of criminal justice and law enforcement" that are meant "to maintain or improve the skills of the law enforcement officer in carrying out his or her duties and responsibilities." Neb. Rev. Stat. § 81-1414.07.

The Council and Training Center had primary responsibility for the curriculum that candidates received. Nevertheless, when Nebraska senators passed the Protection from Domestic Abuse Act, that legislation required all law enforcement employees attend a training program on domestic violence. This program would “inform the officers of the problems of domestic abuse, procedures to deal with such problems, the Protection from Domestic Abuse Act, and the services and facilities available to abused family and household members.”<sup>342</sup>

The Training Center took action to incorporate such material in their curriculum for cadets. One of the challenges that instructors faced, even decades into the program, was to convince cadets and veteran officers that domestic violence constituted criminal behavior. Like many law enforcement personnel across the country, Nebraska officers maintained the position that what happened among family members in the home was private business.<sup>343</sup> To combat this perspective, the Training Center modified lesson plans to incorporate domestic violence education for cadets and veteran officers returning for continuing education credits. Training Center personnel coordinated these efforts with local victim advocates and the Nebraska Coalition to End Sexual and Domestic Violence to present interactive lesson on the myths and realities of domestic violence and sexual assault, best practices for questioning victims and investigating these crimes, and enhanced safety measures that law enforcement should employ when encountering an explosive situation.

Brenda Urbanek, Deputy Director of the Training Center, has spent more than thirty years in Nebraska law enforcement. As a new police officer in the 1980s, Urbanek

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<sup>342</sup> Neb. Rev. Stat. § 42-927.

<sup>343</sup> Interview with Brenda Urbanek.

was among the minority of women who entered the profession.<sup>344</sup> Because she was a female officer, Urbanek was often the one to interview victims of domestic violence and sexual assault. This paralleled the policy within the Lincoln Police Department beginning in the mid-1970s, whereby female officers always performed the questioning of victims.<sup>345</sup> From Urbanek's perspective, however, compassion for the victim is far more important than the gender of the interviewer during domestic violence and sexual assault cases. Urbanek was able to utilize this experience when she moved to a position as instructor at the Training Center twenty-five years ago. Since that time, she has been responsible for teaching the domestic violence/sexual assault segment of cadet training.

According to Urbanek, in recent years, program requirements have changed and instructors have adapted the content of their lessons to reflect changes in the law, court procedures, and social attitudes. To address these considerations, in-class and practical training for cadets increased to include 605 hours of training and assessment. A small fraction of those hours directly relate to issues involving domestic violence and sexual assault, but earlier lessons on investigative practices, questioning witnesses, defusing situations, and problem solving provide a foundation for those targeted discussions. In addition to legal and procedural training related to domestic violence and sexual assault, cadets learn about the impact these crimes have on children, the dynamics between victims and attackers, and the gendered nature of these crimes. Cadets attend a lesson on stalking and participate in mock trials that give them practical experience in providing

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<sup>344</sup> According to the Training Center website, females currently compose about ten percent of each training class, which is about the percentage of women in Nebraska law enforcement jobs. <http://nletc.nebraska.gov/>

<sup>345</sup> Sherry Fairar, Testimony before the Judiciary Committee, January 22, 1975. Fairar proposed that the use of female officers to interview victims of sexual assault or domestic violence led to an increase of reporting.

testimony at trial. Working with victim advocates, cadets role-play different scenarios that they may encounter at crime scenes and follow-up meetings with victims. This interactive approach allows them to hone their interview skills while developing an understanding of the different roles that members of the coordinated response team will play with victims. Ultimately, this understanding can serve to soften the traditional animosity that can exist between law enforcement, the criminal justice system, and victim advocates.<sup>346</sup>

The role of the Crime Commission has also adapted in the last two decades. In 1995, then Governor Earl Benjamin “Ben” Nelson “designated the Crime Commission as the state agency responsible for the administration of the federal STOP Violence Against Women Act (VAWA) Formula Block Grant Program.”<sup>347</sup> Since that time, the Crime Commission has been responsible for developing and administering Nebraska’s State Implementation Plan that sets forth how the state will utilize VAWA funds that it receives.<sup>348</sup> The mission of the Implementation Plan is as follows:

The criminal justice system in Nebraska in collaboration with victim services and other community agencies and individuals responding to all victims of domestic violence, dating violence, sexual assault and stalking in a consistent, coordinated and positive way that will make victims safer, hold offenders accountable and work to STOP the violence.<sup>349</sup>

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<sup>346</sup> Interview with Brenda Urbanek.

<sup>347</sup> See Nebraska’s Violence Against Women Act State Implementation Plans for 2007-2009 and 2010-2012. [http://www.ncc.nebraska.gov/documents/strategic\\_plans.htm](http://www.ncc.nebraska.gov/documents/strategic_plans.htm).

<sup>348</sup> Each Implementation Plan covers a three-year period. STOP grants award federal funding to states, which may then distribute money to programs at the state and local level that combat crimes against women and strengthen victim services. When distributing STOP grant funds, states must allocate twenty-five percent each for law enforcement and prosecutors, thirty percent for victim services, and five percent to courts, with the remaining fifteen percent available for discretionary distribution. <http://www.justice.gov/ovw/grant-programs>.

<sup>349</sup> Nebraska State Implementation Plan STOP Violence Against Women Act (VAWA) 2014-2016. [http://www.ncc.nebraska.gov/pdf/strategic\\_plans/2014\\_VAWA\\_State\\_Implementation.pdf](http://www.ncc.nebraska.gov/pdf/strategic_plans/2014_VAWA_State_Implementation.pdf). Similar mission statements appear in the text of earlier Implementation Plans.

Nebraska Implementation Plans going back to 2007 have identified seven primary areas of need in the state's efforts to improve the criminal justice system's response to DV/SA.<sup>350</sup> With input from statewide community meetings, the Crime Commission enumerated needs and solutions for problems that fell within those primary areas – those gaps most in need of support from VAWA funding. It is possible to narrow those “gaps” to three: a lack of consistent training, a lack of knowledge and understanding, and a lack of services.

The Crime Commission identified a lack of consistent training for coordinated response teams, “defined as a local group of representatives from law enforcement, prosecution, probation, victim services and other agencies who work together in a coordinated manner to improve the criminal justice system's response to women who are victims of domestic violence and sexual assault.”<sup>351</sup> The Crime Commission also noted a lack of knowledge about DV/SA and compassion for victims by government officials and members of the public. The Implementation Plan noted a perception among the legislature that DV/SA is not “violence against women,” but rather that “these [victims] are just folks caught in incidents.” Another concern raised was that Child Protective Services holds victims more accountable than offenders, a lingering example of victim blaming. The Implementation Plan also identified a lack of public awareness regarding the use of technology among school-age children leading to sexual assault and stalking; male domestic violence victims; and elderly victims of domestic violence. Finally, the

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<sup>350</sup> The three most recent plans cover the periods 2007-2009, 2010-2012, and 2014-2016. Research for each of these plans began one or two years in advance of the plan release. For example, research for the 2007-2009 plan began in October 2005 with a series of community meetings at various locations across the state. Congress reauthorized VAWA in 2013, after which time the Nebraska Crime Commission developed the state's implementation plan for the years 2014-2016.

<sup>351</sup> Nebraska's 2010-2012 Violence Against Women Act State Implementation Plan. [http://www.ncc.nebraska.gov/pdf/strategic\\_plans/2010-2012\\_VAWA\\_State\\_Implementation\\_Act.pdf](http://www.ncc.nebraska.gov/pdf/strategic_plans/2010-2012_VAWA_State_Implementation_Act.pdf).

Crime Commission identified a lack of services, particularly for those victims from rural areas and those within marginalized groups; for instance, members of the LGBT community, the hearing impaired, victims with mental health issues, non-documented immigrants, male victims, and victims living on tribal land.<sup>352</sup>

The Crime Commission recommended community-based and statewide coordinated efforts to resolve these shortcomings. In addition to legislative changes that would enhance penalties and consistent judicial response in dealing with offenders, the Crime Commission recommended increased education programs, greater collaboration between the criminal justice system and victim advocacy groups, and increased services for victims and victim families.<sup>353</sup> To achieve these goals, money from the STOP grant would fund new and expand existing domestic violence and sexual assault programs. Examples from three segments of society – legislative mandates regarding law enforcement, efforts of victim advocacy groups, and prevention programs within educational settings – serve as exemplars of collaborative endeavors to address and eradicate domestic violence and sexual assault within Nebraska.

Like other DV/SA organizations across America, RSACC evolved to meet the needs of victims in the community.<sup>354</sup> In addition to rape and domestic violence services, Voices of Hope provides assistance to others who have experienced relationship violence,

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<sup>352</sup> [http://www.ncc.nebraska.gov/documents/strategic\\_plans.htm](http://www.ncc.nebraska.gov/documents/strategic_plans.htm).

<sup>353</sup> *Ibid.*

<sup>354</sup> Voices of Hope reported that the total number of clients to whom they have assisted has gone up in recent years. For instance, 1,357 adults received assistance through face-to-face encounters in 2011, while that number increased to 1,926 by 2014. Callers to the crisis line increased from 7,761 to 8,600 during the same period. One challenge that the staff faces is how to interpret these numbers. Certainly, they might reflect an increase in violent crime in Lincoln, but at the same time, the increase could indicate that more individuals are aware of Voices of Hope and are more willing to seek help. The staff believes that it is the latter, which is in part due to more effective outreach programs and partnerships with Latino, Asian, and Native American cultural centers. Martin interview.

harassment, and stalking. They engage in programs that address safety issues: acquisition of restraining orders, changing locks, filing police reports, and anonymous reporting. The connection to the University of Nebraska has come full circle as well. A campus advocate, employed by Voices of Hope and contracted by the University of Nebraska, operates out of the Women's Center, providing campus-wide support: offering direct assistance to victims; educating student groups, residence hall staff, and campus police officers; and serving on the Campus Threat Assessment Group.<sup>355</sup>

In 2007, RSACC became Voices of Hope, believing that its name had become too narrow to describe all of the services offered. The new name was a joint effort by board members, staff, and clients. The board and staff selected the term "Voices" to identify their multiple roles speaking on behalf of victims and advocating to the community through educational programs. Clients added "Hope" as representative of the hope clients derived from the center and its programs. The decision to change the name was not unanimous. Critics of the new name argued that "Voices of Hope" did not clearly identify what the services the organization provided; rather, they stressed that domestic violence and sexual assault are still hidden crimes, and the new name cloaked the advocacy provided. With the support of donors and outreach programs, the "hidden" purpose of Voices of Hope never developed into a significant problem.<sup>356</sup>

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<sup>355</sup> *Ibid.*; Interview with Jan Deeds, Director of the Women's Center and Associate Director of Student Involvement at the University of Nebraska, April 29, 2015.

<sup>356</sup> According to statistics kept by Voices of Hope, between 350 and 450 women attend support groups at their facility each year. In recent years, the number of male victims who have contacted Voices of Hope has increased from five percent to more than eleven percent between 2009 and 2014. During the same period, the percentage of non-white clients has increased, due in part to an increase in the immigrant population and targeted outreach to those immigrant groups. The one service that has seen the greatest decline is a request for medical advocacy, dropping from 216 calls for assistance in 2012 to 124 calls in 2013. The staff attribute this decrease to the enforcement of HIPPA laws. Martin Interview.

Voices of Hope is one of twenty community-based domestic violence/sexual assault programs in Nebraska that receives support from the Nebraska Coalition to End Sexual and Domestic Violence (Coalition).<sup>357</sup> Like the organization that became Voices of Hope, the origins of the Coalition trace back to the mid-1970s when it began as a volunteer organization called the Nebraska Task Force on Domestic Violence. In 1987, the Coalition hired its first director, symbolizing a move away from an all-volunteer staff. It was during this period that the Task Force changed its name to the Nebraska Domestic Violence and Sexual Assault Coalition, emphasizing a conscious restructuring to include problems related to sexual assault. Reflecting a change in its mission statement, the Coalition adopted its current name in 2014.<sup>358</sup> The Coalition has several primary goals: to create a world where there is no more sexual assault or domestic violence, which involves changing the power structure that leads to domestic violence/sexual assault; to provide victims/survivors access to safety and services; to improve coordination between law enforcement, victim services, and hospital response teams; and to work with law enforcement and the state Department of Health and Human Services to adopt policies that will best serve victims and their families.<sup>359</sup>

Working to achieve these goals requires Coalition staff to collaborate with community-based programs and other organizations throughout the state. The Coalition provides statewide, regional, and local training for domestic violence/sexual assault program staff and volunteers to ensure that consistent, quality services are available

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<sup>357</sup> There are also four tribal programs serving members of the Santee Sioux Nation and the Omaha, Winnebago, and Ponca Tribes.

<sup>358</sup> Interview with Michelle Miller, Sexual Violence Program Coordinator, Nebraska Coalition to End Sexual Assault and Domestic Violence, April 8, 2015.

<sup>359</sup> Miller interview.

across the state. The Coalition also collaborates with agencies within the criminal justice system such as the Nebraska Law Enforcement Training Center, the Department of Corrections, and the Department of Probation. As explained by Michelle Zinke, Training and Resource Coordinator, the Coalition provides outreach assistance to other organizations, particularly those targeting underserved or marginalized members of the population. Currently, this includes the Nebraska Tribal Family Violence Coalition's housing/homelessness groups; Heartland Deaf Abuse Advocacy Services; three cultural centers in Lincoln; Nebraska's Court Appointed Special Advocate Association; and Outlinc, an organization that supports the LGBTQ population in Lincoln.<sup>360</sup> Additionally, the Coalition supports prevention programs that target Nebraska's youth. The Step Up and Speak Out campaign, for instance, seeks to reduce violence by "providing teens with clear and accurate information on all forms of violence – including sexual harassment, sexual assault, dating violence, and gender violence."<sup>361</sup> Collaboration with the Nebraska Department of Health and Human Services allows Coalition staff to deliver intervention and healthy relationship programming in Nebraska's public schools.<sup>362</sup> This level of collaboration allows the deliverance of domestic violence/sexual assault programming in communities across Nebraska that might otherwise not occur.

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<sup>360</sup> Interview with Michelle Zinke, Training and Resource Coordinator, Nebraska Coalition to End Sexual Assault and Domestic Violence, May 1, 2015.

<sup>361</sup> The Coalition created the Step Up and Speak Out program with support from the Verizon Foundation, illustrating an additional example of collaborative advocacy taking place in Nebraska. For more on this preventative program, see <http://www.stepupandpeakout.org>.

<sup>362</sup> According to Michelle Miller, funding for some of these programs comes from the Center for Disease Control and Prevention (CDC) as part of the CDC's Division of Violence Prevention. In 2011, the CDC released the results of the National Intimate Partner and Sexual Violence Survey, noting: "Intimate partner violence, sexual assault, and stalking are important and widespread public health problems in the United States." <http://www.cdc.gov/violenceprevention/nisvs>.

While Nebraska's dual-programming paradigm for domestic violence and sexual assault advocacy represents a common structure for a minority of states, the level at which its advocacy groups collaborate with community-based programs and other organizations throughout the state exemplifies collaborative efforts across the nation in the post-VAWA era. Nebraska's elimination of the marital rape exemption also stands in contrast to legislative action in other states. A nearly unanimous legislature rejected legal immunity for spousal rapists with a single statutory amendment in 1975. In 1986, the Nebraska Supreme Court definitively upheld the validity of that statute. Not all states criminalized marital rape in such a straightforward manner. The following two chapters will illustrate the alternate approaches utilized by California and South Carolina.

**CHAPTER 3**  
**THE BURDEN OF MARRIED WOMEN IN THE GOLDEN STATE:**  
**CALIFORNIA'S LONG STRUGGLE WITH SPOUSAL RAPE LAWS, 1979-2006**

On September 30, 1979 Dianna Green, a twenty-year-old resident of Tustin, California, was two weeks overdue with her first child. She and her Marine husband, Kevin, were known to friends and neighbors as having a volatile relationship. The police had responded to several previous requests to intervene at the Green residence. That night, Dianna was attacked; she was strangled, struck in the head with a blunt object, raped, and left for dead. At the hospital, doctors performed a Caesarean section only to find the baby dead upon delivery. Because of the blow to her head, Dianna fell into a coma.<sup>363</sup>

With little evidence discovered at the crime scene and no evidence of forced entry, the police suspected Dianna's husband. Green admitted during questioning that he and his wife had a marriage fraught with difficulty, and that both had resorted to physical confrontations. He conceded that earlier in the evening, Dianna had resisted his request for sex, but he denied raping and beating her. His alibi, which a witness later confirmed, was that he was across town purchasing burgers from a fast food restaurant. Green told the detectives that he had seen a young black man near the apartment complex as he left to get the take-out food, and that he saw this other man getting into a van and driving away when he returned.<sup>364</sup> While the police were confident that Green was guilty, without solid evidence to support their theory, they could not move the case forward. The

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<sup>363</sup> Jennifer Donovan, "When A Husband Rapes His Wife," *San Francisco Chronicle*, January 14, 1985; Heather Buchanan, "The Unreliable Eyewitnesses," *Crime Magazine*, September 16, 2013, <http://www.crimemagazine.com/unreliable-eyewitnesses>, accessed February 28, 2015; The Innocence Project: Kevin Green, <http://www.innocenceproject.org/cases-false-imprisonment/kevin-green>, accessed February 28, 2015.

<sup>364</sup> While the man Green described was African American and both Green and his wife were white, there is no evidence that Green's description of the man he saw was racially motivated.

case remained stalled until Dianna regained consciousness a month later. Doctors who examined Dianna quickly observed residual effects from the head trauma. Dianna suffered from amnesia and aphasia, a language impairment characterized by a loss of ability to understand or express speech. Upon her release from the hospital, Dianna moved in with her parents and began a lengthy period of speech rehabilitation. Approximately three months later, she contacted the police to tell them that she remembered that her husband was the one who attacked her.<sup>365</sup>

Green's trial began in October 1980. Still declaring his innocence, Green was convicted of second-degree murder for the death of the unborn child, the attempted murder of his wife, and assault with a deadly weapon. He received a sentence of fifteen years to life in prison.<sup>366</sup> Noticeably absent from the charges Green faced was the specific crime of rape or sexual assault. At least one account of the events reported that initially, prosecutors wanted to charge Green with spousal rape, but this was not possible. In 1979 California, the rape statute excluded sexual crimes committed by a man against his wife. Thus, the charge of assault with a deadly weapon covered the blow to the head, strangulation, and the sexual assault.<sup>367</sup> Green spent the next sixteen years in prison, during which time he received a dishonorable discharge from the Marine Corps and faced a civil suit brought by Dianna for the wrongful death of their unborn child.<sup>368</sup>

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<sup>365</sup> Donovan, "When A Husband Rapes His Wife"; Buchanan, "The Unreliable Eyewitnesses"; The Innocence Project: Kevin Green.

<sup>366</sup> Innocence Project: Kevin Green.

<sup>367</sup> Donovan, "When A Husband Rapes His Wife."

<sup>368</sup> In 1996, DNA testing not available in 1979 tied semen collected at the scene of Dianna Green's attack to convicted serial killer Gerald Parker. Parker, dubbed the "Bedroom Basher" because he entered his victims' bedrooms before raping and killing them, was responsible for the rape and murder of five women in Orange County, California during the 1970s. When Parker confessed to the physical and sexual assault of Dianna, the State had no choice but to overturn Green's conviction. Green eventually received \$620,000 in compensation from the State of California for the years he unjustly spent in prison. Nevertheless, Dianna still believes that her ex-husband was connected to her attack. She has stated on numerous occasions that

While the introduction of new evidence exonerated Kevin Green, the value of this case study as it played out between 1979 and 1996 helps to illustrate the state of the legal system concerning marital rape in California at that time. Police, prosecutors, the victim, and the public all believed that Green was guilty. The little evidence available and Dianna's testimony pointed to Green as the perpetrator. The attack occurred in 1979 when, due to a marital exemption in the law, spousal rape was not a crime in California. Therefore, prosecutors could only charge Kevin Green for the sexual assault of his wife under penal codes related to assault with a deadly weapon.

California has a complex history of policing and regulating those marginalized in society. On the one hand, there is the perception of the West Coast state being more liberal, forward thinking, accepting, and willing to provide equal protection to its citizens.<sup>369</sup> On the other hand, California – through law and public sentiment – has historically discriminated against those seen as foreign, different, or simply outside the dominant power structure. For instance, racism as a form of white, male hegemony was present from the early years of California statehood. Conflict between white settlers and Native Americans, Mexicans, and immigrants from China and Japan often related to control of property, economic resources, and access of minority men to white women.<sup>370</sup>

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Kevin had raped her when she rejected his overtures for sex that night. Parker gained access to their apartment and assaulted her when Green was getting take-out food. Daniel Yi, "Wrongly Convicted Man Settles Lawsuit Brought by Ex-Wife," *Los Angeles Times*, December 8, 1999.

<sup>369</sup> See, Albert L. Hurtado, *Intimate Frontiers: Sex, Gender, and Culture in Old California* (Albuquerque, NM: University of New Mexico Press, 1999); Miroslava Chávez-García, *Negotiating Conquest: Gender and Power in California, 1770s to 1880s* (Tucson, AZ: University of Arizona Press, 2004).

<sup>370</sup> A review of discrimination in California's past might begin with Tomás Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (Berkeley: University of California Press, 1994); Charles, Wollenberg, ed. *Ethnic Conflict in California History* (Los Angeles: Tinnon-Brown, Inc., 1970); Robert F. Heizer and Alan J. Almquist, *The Other Californians: Prejudice and Discrimination under Spain, Mexico, and the United States to 1920* (Berkeley: University of California Press, 1971); Roger Daniels and Spencer C. Olin, Jr., *Racism in California: A Reader in the History of Oppression* (New York: The Macmillan Company, 1972); Patricia Nelson Limerick, *Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton, 1987); Ronald T. Takaki, *Iron Cages: Race and Culture in*

Male control of women also played a part in California history, as it did in other parts of the country: men dominated the government, constructing laws related to citizenship, employment, voting rights, and jury service that had the effect of making women second-class citizens.

In the area of spousal rape laws, California has a complex history as well. California's legislative record with spousal rape stands in stark contrast to that of Nebraska. Nebraska's straightforward approach to eliminating distinctions between spousal and non-spousal rape occurred with a single legislative revision in 1975 and a single decision by the Nebraska Supreme Court in 1986.<sup>371</sup> In contrast, California legislators took twenty-seven years and eight amendments to reach virtually the same result. While California passed a series of laws protecting women from domestic violence and non-spousal rape during the height of the women's movement, it consistently hesitated to extend full protection to spousal rape victims. California was one of the earliest states to pass a spousal rape law. However, there were exceptions built into the statute that continued to distinguish spousal rape from non-spousal rape, resulting in disparate consequences for those who violated the laws. Because of such exceptions, for years California lagged behind other states in its protection of married women. Nonetheless, California's history of spousal rape legislation offers a valuable case study, illustrating several of the thematic controversies surrounding rape in marriage that played out across the nation in the last three decades of the twentieth century.

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*Nineteenth-Century America* (New York: Knopf, 1979); and Albert Hurtado, *Indian Survival on the California Frontier* (New Haven: Yale University Press, 1988).

<sup>371</sup> While it is true that Nebraska legislators have amended the sexual assault statute several times since 1975, none of those changes altered the underlying premise that spousal and non-spousal rape deserve the same treatment under the law.

Participants on both sides of the debate about spousal rape had to evaluate a series of questions. Taken as pairs, an affirmative response to one meant that the answer to the other necessarily had to be the negative. Did the Fourteenth Amendment's due process clause require that marital rape victims receive the same legal protection as non-spousal rape victims, or did the doctrine of marital privacy protect the marital bedroom from intrusion by governmental influence? Did the criminalization of spousal rape provide marital rape victims an appropriate remedy under the law or did marital rape laws encourage false reporting by vindictive wives seeking better settlements in divorce and child custody cases? Was the criminalization of rape in marriage necessary to protect the bodily autonomy of married women or were current assault and battery statutes inclusive enough to address sexual assault in marriage? The restricted options presented by such questions represented the conflict between women's advocates and anti-feminists whose perspectives reflected the beliefs espoused by the Religious Right in California and the rest of the nation.<sup>372</sup> As women's advocates promoted the criminalization of marital rape,

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<sup>372</sup> Susan Faludi explained that the successes of the second wave feminist movement met with "backlash" from the newly invigorated Religious Right in the late-1970s and 1980s. This emergence of this backlash was characterized by several events: the tense political climate surrounding attempts to ratify the Equal Rights Amendment; political, religious, and ideological hostility following the Supreme Court's 1973 decision in *Roe v. Wade*; the election of the conservative Republican Ronald Reagan as president; and the rise of conservative Christian organizations like Jerry Falwell's Moral Majority, Pat Robertson's Christian Coalition, and Focus on the Family, and the Family Research Council, both formed by James Dobson. See, Susan Faludi, *Backlash: The Undeclared War Against American Women* (New York, NY: Three Rivers Press, 2006).

anti-feminists presented both historical and modern justifications for maintaining the marital rape exemption.

This chapter traces four major themes in the legislative history of those laws to demonstrate that female victims of spousal rape, who because of their status as married women, faced marginalization and a denial of equal protection. The first theme analyzes California's first spousal rape law passed in 1979, considering the competing interests that surrounded the issue. Subsequent themes address a series of amendments regarding different stages in the execution and prosecution of the crime of spousal rape: a showing of a victim's resistance or lack of consent; prosecutorial discretion to indict spousal rape defendants on either misdemeanor or felony charges, an option not available in cases of non-spousal rape who were always faced felony charges; and a reporting requirement that effectively reduced the statute of limitations for spousal rape to thirty days, a mere fraction of that for non-spousal victims.

In 1979, California Penal Code (P.C.) § 261 defined rape as “sexual intercourse with a female not the wife of the perpetrator,” a fairly common definition utilized by many states. That same year, Assemblyman S. Floyd Mori introduced Assembly Bill (A.B.) 546, which would be codified as California Penal Code § 262, spousal rape.<sup>373</sup> In 1979, Mori was serving his fourth of six years as a California State Assemblyman. The child of Japanese immigrant parents, Mori was, and remains today, a strong supporter of many civil rights organizations and has received awards for his extensive community service.<sup>374</sup>

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<sup>373</sup> Governor Jerry Brown signed A.B. 546 into law on 22 September 1979.

<sup>374</sup> When elected to the California Assembly in 1975, Mori was one of the first two Japanese Americans to serve in the State Assembly. Following his time in the Assembly, Mori served as the Director of the Office

Mori's 1979 bill was not the state's first attempt at spousal rape legislation. Two years earlier, Mori had introduced spousal rape legislation that simply would have deleted the phrase "not the wife of the perpetrator" from section 261, similar to the philosophy Nebraska applied in its 1975 legislation. After Mori amended the bill to apply only to spouses who had legally separated or had applied for dissolution, it passed to the Assembly Criminal Justice Committee and was heard on the floor. The whole of the Assembly, however, declared the bill too limited and referred it back to the Criminal Justice Committee. Mori amended it back to its original form, only to have it die in committee. Assemblyman Mori introduced a similar bill in 1978, but it also failed to pass.

Assemblyman Mori summarized the need for the spousal rape law in his address to the Assembly Criminal Justice Committee on April 23, 1979. Mori reasoned: "marriage and the home should enhance the lives of the participants," as a place of love and security. However, he continued, the "incident of violence in the home is a major problem."<sup>375</sup> He promoted A.B. 546 as a "positive statement that all spouses are guaranteed protection against sexual pressure and abuse," requiring spouses to respect one another's sexual autonomy. He went on to explain that A.B. 546 would assure the public that the legislators of California would not tolerate abuse in marriage.<sup>376</sup>

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of International Trade in California, working extensively with Asian American groups and organizations. His tireless support of minority group interests have earned Mori such honors as the Coalition Building Award from the Sikh American Legal Defense and Educational Fund; the Voices of Courage Award from the Islamic Cultural Center in Fresno, California; the Distinguished Citizenship and Patriotism Award from the Pan Pacific American Leaders and Mentors; and the Order of the Rising Sun, Gold Rays with Rosette Award from the Government of Japan. Who's Who in Asian American Communities, <http://wwaac.com/floyd-mori/>, accessed September 27, 2015.

<sup>375</sup> Notes used by Assemblyman Mori in presentation of A.B. 546 before the Assembly Criminal Justice Committee on April 23, 1979.

<sup>376</sup> *Ibid.*

Mori made five substantive arguments in his address, each of which focuses on an issue of morality and/or legality with the status of California's laws. Mori's first argument reflected a time in early California history when racism prevailed, comparing the disparate treatment of Chinese immigrants to that forced upon married women in 1979 California. He argued: "In early California history, Asian Americans had no civil rights and were not recognized in courts of law. The attitude was, 'If, you don't like it, go back to China.' We now strip wives of their civil right to their own body and tell them, 'If you don't like it, get a divorce.'"<sup>377</sup> Through this comparison, Mori was arguing that the previous behavior was, in time, deemed morally and legally wrong; as such, the inequitable treatment of the spousal rape victim should also be recognized as morally and legally unacceptable.

In his second argument, Mori put the spousal rape victim front and center, challenging the male-centered nature of rape in Anglo-American history. Such a history encompassed several realities: rape was often considered a crime against male interest in a daughter or wife; to establish their innocence, male perpetrators often had a lower burden than their female victims had to prove that a crime was actually committed; and to date, married men had escaped prosecution for the sexual assault of their wives because of the legal unity represented by that union. Mori challenged the members of the Assembly to overcome this checkered past: "We are faced with a choice in which we can either protect the rape victim or the rapist. It's time we gave consideration to the victims and potential victims and to the children who are often the witnesses of such abuse."<sup>378</sup>

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<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*

Mori's third argument suggested the marital rape exemption denied equal protection under the law to married women.<sup>379</sup> Mori explained: "There is no compelling reason for a woman to give up her civil rights regarding sexual intercourse when she marries, while a woman who lives with a man for ten years [without marriage] maintains those rights."<sup>380</sup> Mori's approach foreshadowed the equal protection arguments that activists would raise in states across the country during the last two decades of the twentieth century.

The fourth argument is also quite telling. While there was and still is a perception of California being more liberal, forward thinking, and willing to provide equal protection to its citizens than more conservative parts of the country, the spousal rape statute provided an example of the Golden State trying to catch up with other states. Mori explained: "Oregon and Nebraska have deleted the marital exemption. Twenty-two states have partial exemptions addressing such circumstances as physical, mental or emotional injury, living arrangements, and legal actions."<sup>381</sup> This game of "keeping up with the Joneses" would be used as a justification for later amendments to P.C. § 262 (spousal rape).

Mori's fifth and final argument touched on a reality in many states' legal history. While statutes across the country, like California's, consistently defined rape as carnal

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<sup>379</sup> See, Robin West, "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment," *Florida Law Review* 45 (1990), 45-79; Stuart M. Litoff, "The Husband's Rape Exemption: An Equal Protection Alternative," *Western New England Law Review* 1 (1978), 409-427; Linda Jackson, "Marital Rape: A Higher Standard Is in Order," *William & Mary Journal of Women and the Law* 1 (1994), 183-216; Jill Elaine Hasday, "Contest and Consent: A Legal History of Marital Rape," *California Law Review* 8, no. 5 (2000), 1373-1505.

<sup>380</sup> In 1979, Mori could not know that a minority of states would later expand the exemption to include cohabitating boyfriends or expand the realm of immunity to apply to voluntary social (sexual) companions. See, Finklehor and Yllo, *License to Rape*.

<sup>381</sup> For more about the Oregon law, please see the introduction. The Nebraska law is the focus of Chapter 2.

knowledge or sexual intercourse with a female not the wife of the perpetrator, many states did provide for prosecution of a man who aided (or encouraged) another to rape his wife.<sup>382</sup> Mori reminded the members of the Assembly that under the 1979 “California law, a husband can be guilty of rape if he aids and abets a third person in raping his wife but not if he commits the crime himself.”<sup>383</sup>

Supporters of the 1979 bill spoke out against historical arguments like irrevocable consent, women as property, and violence in marriage. One line of argument, irrevocable consent, posited that “a woman does not give up her right to consent to sexual intercourse by virtue of marriage, and that the existing definition of rape treats married women in an unequal and unfair fashion.”<sup>384</sup> As noted by the Senate Democratic Caucus, “under present California law, even if a husband and wife separate, he can legally rape her. Yet if the couple does not get a marriage license, but he and she simply live together as husband and wife, she is protected by the rape law. This . . . is inequitable and insulting to married women and the institution of marriage.”<sup>385</sup> Assemblyman Mori furthered this idea, stating: “In this day and age of our quest to protect civil liberties and to promote equality under the law, it is an anachronism for the State to tell a woman that if she is legally married she gives up her right to be free from humiliation and violence of her personal being; yet, if she enters into a common-law marriage, she is treated as a first-class citizen.”<sup>386</sup> Each of these arguments highlights the disparate treatment that marital

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<sup>382</sup> See, *State v. Haines*, 51 La. Ann. 731, 25 So. 372 (1899); *Commonwealth v. Fogerty*, 74 Mass. 489 (1857); *People v. Chapman*, 62 Mich. 280 (1886); *State v. Comstock*, 46 Iowa 265 (1877); *People v. Meli*, 193 N.Y. Supp. 365 (1922); *State v. Dowell*, 106 N.C. 722, 11 S.E. 525 (1890).

<sup>383</sup> Notes used by Assemblyman Mori in presentation of A.B. 546 before the Assembly Criminal Justice Committee on April 23, 1979.

<sup>384</sup> Senate Committee on Judiciary summary of A.B. 546.

<sup>385</sup> Senate Democratic Caucus overview of A.B. 546

<sup>386</sup> Letter to Governor Jerry Brown from Assemblyman S. Floyd Mori, dated 14 September 1979.

rape victims faced for no legally justifiable reason, but rather solely because they were married to the man who raped them.

Another line of argument in favor of the new legislation was that the current law reflected archaic notions that the wife was a man's property to be used or abused as he saw fit. In support of the bill, the California National Organization for Women maintained that: "A.B. 546 . . . adds equity to California law; no longer could women be considered 'property' of their husbands and thusly denied legal protection from spousal rape."<sup>387</sup> Yet another line of reasoning in favor of the bill emphasized that rape is not about sex, it is a crime of violence, even in marriage, which is an argument designed to counter ideas about sex being an expectation in marriage. The San Francisco Neighborhood Legal Assistance Foundation argued this point: "Rape is rape regardless of the legal relationship of the persons involved. Often battered women suffer this type of abuse in addition to other physical and psychological battering. By declaring such abuse a crime, A.B. 546 states that our society will not tolerate or condone such violent behavior."<sup>388</sup> The Los Angeles Section of the National Council on Jewish Women also sent their views to the Senate Judiciary Committee and to Governor Jerry Brown, calling for a statute that standardized the crime of rape, regardless of a relationship between victim and perpetrator:

We believe that the nature of the crime of rape is the same no matter who the perpetrator and victim are, and that a marriage contract should not be a permit to commit violence. . . . Spousal rape is a fact, and victims should have full recourse to law. Current law denies wives the protection given to other women. It tells them that their only recourse from rape by their

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<sup>387</sup> Letter from the California National Organization for Women to Governor Jerry Brown, dated September 17, 1979.

<sup>388</sup> Letter to Senator Jerry Smith, Chairman of the Senate Judiciary Committee, from Claudia Hevel of the San Francisco Neighborhood Legal Assistance Foundation, dated August 17, 1979.

spouses is divorce. This new law would recognize that women do not cease to be individuals with human rights when they become wives.<sup>389</sup>

Each of the above-noted supporters of the marital rape bill challenged a traditional justification for insulating men from legal action if they had raped their wives. Supporters argued that the law should protect women as victims regardless of their marital status.

Opposition to A.B. 546 was as plentiful as the support. One line of opposition attempted to be sympathetic to the cause of domestic violence, but argued that it was an issue best left to family courts, rather than criminal courts. The California Attorneys for Criminal Justice (CACJ) took this approach: “The fundamental problem with deleting the spousal exemption from the rape statute is that it thrusts upon the criminal justice system a problem which more appropriately belongs in the courts dealing with domestic relations problems.”<sup>390</sup> This perspective was indicative of the attitude held by many in the criminal justice system – law enforcement officers, prosecutors, and jurists – that domestic violence in its many forms was simply a “family matter,” best handled with a cooling-off period or on-site counseling by the officers sent to the scene. When cases of domestic violence and sexual assault in marriage did make it to family court, which was not often, a judge was more likely to scold the male instigator for violent outbreaks in the home than to sentence him to any jail time. A promise by the accused that he would not do it again was often enough to appease the court.

Similarly, the CACJ, joined by the California Trial Lawyers Association (CTLA), acknowledged the importance of addressing domestic violence, but argued that a spousal rape statute was not the solution. They argued that passing such a law would “interject

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<sup>389</sup> A letter of support for A.B. 546 was sent to Governor Brown on August 27, 1979. Along with the letter was a copy of testimony prepared for the Senate Judiciary Committee.

<sup>390</sup> California Attorneys for Criminal Justice letter to the Senate Judiciary Committee dated July 12, 1979.

the criminal courts into the privacy of the marital bedroom.”<sup>391</sup> Four days after the CTLA expressed their concern, Assemblyman Mori countered: “Rape is not a sex act to be confused with consented sexual activity. Each couple is free to work out their own sexual relationship, and this bill is not going to affect that relationship. Rather, it applies when the marriage relationship had fallen apart and when trust and caring have ceased.”<sup>392</sup>

Similarly, the Los Angeles Section of the National Council on Jewish Women argued: “rape is not a sexual crime. It is a crime of violence. Marriage is a sexual relationship, but a sexual relationship does not negate the right [of a partner in that marriage] to consent or not to consent.”<sup>393</sup>

Earlier that year, an editorial in the *San Francisco Chronicle* had raised the same concern about A.B. 546 that the CACJ had: “The problem here is that such a law constitutes an invasion by the government of the marital bedroom; a place from which we have been largely successful in removing its prurient eye. Those old laws forbidding ‘crimes against nature’ even between married couples no longer operate. And we are the more civilized for that.”<sup>394</sup> Assemblyman Mori responded to the editorial with a letter of his own, arguing that A.B. 546 did not constitute “an invasion by the government of the

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<sup>391</sup> *Ibid.*; California Trial Lawyers Association letter to Governor Brown dated September 10, 1979.

<sup>392</sup> Mori letter to Governor Davis dated September 14, 1979.

<sup>393</sup> National Council on Jewish Women, Los Angeles Section, letter to Governor Davis dated August 27, 1979.

<sup>394</sup> Editorial, *San Francisco Chronicle*, June 25, 1979. The ‘crimes against nature’ in this context referred to sodomy and oral copulation that until 1975 were illegal in the state of California, even between consenting adults whether single or married. California Penal Code § 286, the state’s sodomy law, still punishes *unlawful* acts of sodomy, which involve force, violence or fear; acts of sodomy involving a person under the age of eighteen; sodomy with someone who is asleep or unconscious; or acts of sodomy with a person who is unable to give consent due to a mental disorder or intoxication. For a comprehensive review of America’s sodomy laws, see William N. Eskridge, *Dishonorable Passions: Sodomy Laws in America, 1861-2003* (New York, NY: Viking Adult, 2008). Notably, the ending date of Eskridge’s text corresponds to the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the case in which the Court struck down the sodomy law in Texas, holding that blanket anti-sodomy laws are unconstitutional. More specifically, the decision established the legal position that consensual and private homosexual sex is part of a substantive right to liberty as protected by the Fourteenth Amendment to the Constitution.

marital bedroom.” He added that, “There will be no proverbial policeman under every bed, nor would anyone know what goes on in the privacy of the home unless an occupant found it necessary to speak out.”<sup>395</sup> In further support, legislative analyst Patti Jo McKay noted: “the state has an obligation to protect all citizens from crimes of violence and this protection should not be withheld because the victim and the perpetrator were legally married at the time of the incident.”<sup>396</sup> If that meant responding to a claim of spousal rape in the marital home, that is what the criminal justice system should be obligated to do.

The CACJ and the CTLA raised another argument against Mori’s proposed bill, contending that current laws provided for recourse in a case of sexual assault by a spouse: assault and battery. Neither group referred to such an incident as sexual assault or spousal rape, preferring to use terms like assault, battery, or assault with a deadly weapon. One has to wonder if this preference was borne out of practicality or avoidance. From a practical perspective, the alternate charges of assault and battery had a long history in the legal system with plenty of case law behind them; at the same time, falling back on preexisting terms made it possible for these groups to avoid addressing the idea of rape in marriage. A private citizen, who identified himself only by first name, in a letter to Governor Brown, provided a more politically-charged example of this argument: “Legislative passage of this bill is just another example of the power that groups which claim to be oppressed have in this state. This bill is simply a device by feminists who look upon the penis as a tool of the oppressor to punish men with a bill that only applies to them. As such it should be vetoed and use of force in marital acts should be handled

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<sup>395</sup> Assemblyman S. Floyd Mori letter dated July 2, 1979.

<sup>396</sup> Patti Jo McKay, Enrolled Bill Report, Governor’s Chapter Bill Files, September 20, 1979.

under assault and battery laws.”<sup>397</sup> Of note, the letter’s semi-anonymous author does not deny that men sometimes use force in intimate relations with their wives. His only concern seems to be that feminists and their supporters in the legislature were acting “unreasonably vindictive” by holding men responsible for their behavior.

Countering the use of assault and battery statutes to prosecute spousal rapists, private citizen Barbara Debus sent a letter to the Senate Judiciary Committee, expressing her strong belief that the only present alternative to a spousal rape law was to prosecute the sexual assault as “a battery in which it is classified as ‘offensive touching.’” She went on to say that this option “is offensive to the dignity of women who have been raped by their husbands. . . . ‘Rape cannot be synonymous with touching . . . Rape is a very violent crime that violates a woman’s very being.’”<sup>398</sup> Another line of reasoning, introduced by Patti Jo McKay, suggested that the charge should fit the actual crime. Thus, if a man used force and violence to rape his wife, he “should be prosecuted for the actual crime that he committed. To say that a man should not be prosecuted for raping his wife is to adhere to that barbaric notion that a wife is a man’s property to do with as he pleases.”<sup>399</sup> This sentiment once again called for the overturning of archaic notions of women as chattel.

Yet another argument in opposition to A.B. 546, raised by private citizens like Mark Keeler, was that enforcing the bill’s provisions could present difficult problems of proof, thereby opening the floodgates for many false claims by vindictive wives. Keeler put it this way:

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<sup>397</sup> Undated, hand-written letter to Governor Brown from a man named John.

<sup>398</sup> Barbara Debus letter to the Senate Judiciary Committee dated July 5, 1979, in which she quoted California Assemblywoman Maxine Waters.

<sup>399</sup> Patti Jo McKay, Enrolled Bill report, Governor’s Chapter Bill Files, September 20, 1979.

This is the kind of charge that cannot honestly be proved. . . . Can a man deny he has had sex relations with his wife? Hardly. Nobody would believe him. Does the wife have bruises on her body which she claims he put there when he raped her? Of course she has bruises. The wife can bruise herself very easily, and without much pain. Women bruise very easily, very much easier than a man. The slightest bump produces a big black and blue spot on a woman. So it's easy for a wife to manufacture false evidence of a rape, and it's impossible for a husband to disprove.<sup>400</sup>

Had Keeler stopped after the first two sentences, his argument would have appeared more legitimate. Keeler fails to acknowledge that prosecutors have the discretion to decide when to file criminal charges and when the evidence is too inconclusive to support prosecution. This is the standard for any crime, and there is no evidence to suggest that prosecutors would establish a separate standard for spousal rape cases. In any event, the requirements of the bill undoubtedly would insure that some evidence other than the victim's testimony would be necessary for the case to advance to trial.<sup>401</sup>

Keeler was not satisfied with the legitimate proof argument. He added to it by charging: "women are not chattels today. They can easily walk out of their husbands' lives and get divorces if they wish."<sup>402</sup> In his view, to pass A.B. 546 would be giving women a vicious weapon with which to punish their husbands. Keeler does not consider the financial dependency of many women on their husbands and he never considers whether rape of a spouse is possible, whether the perpetrator of rape deserves punishment, or that women are victimized in this way.

A final strand of opposition raised a constitutional challenge to the law. Arguing that marriage is, for the most part, a religious rite, Joseph B. D. Saraceno contended that a

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<sup>400</sup> Mark Keeler letter to Governor Jerry Brown dated August 25, 1979. Additionally, an undated, anonymous letter sent to the Governor from someone in Albion, CA, claimed that the bill was a "set up for blackmail" supposedly by women who are angry with their husbands.

<sup>401</sup> See McKay analysis of 20 September 1979.

<sup>402</sup> *Ibid.*

bill making it a crime for husbands to rape their wives was not only a pagan law, but also a violation of the First Amendment establishment and free exercise clauses. He went on to explain:

Under Canon Law of the Catholic Church, marriage consent, is mutual consent, duly manifested, is a requirement for the Validity of a Marriage. Consent is, “an act of the will by which each party gives and accepts a perpetual and exclusive right over the body, for acts which are of themselves suitable for the generation of Children.” Consent is so essential to the validity of marriage that No Human Power can dispense from it or supply it if it is lacking.<sup>403</sup>

No matter how devout his beliefs, Saraceno failed to acknowledge that rights – even those provided in the Constitution and its amendments – are not absolute. Rights guaranteed under the Constitution will not allow a person to infringe unduly upon the rights of others, nor will they insulate absolutely a person’s criminal behavior.<sup>404</sup>

Amid the plethora of public support and opposition to A.B. 546, Governor Brown signed the bill into law on September 22, 1979.<sup>405</sup> The spousal rape law went into effect January 1, 1980.

Less than ten days later, Frank Martinez became “the first man in California to be charged under the new spousal rape law.”<sup>406</sup> On January 6, Martinez kidnapped a female employee of an El Monte automobile dealership while test-driving a van. The victim later testified that Martinez had sexually assaulted her in the ten hours he held her captive. The

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<sup>403</sup> Joseph B. D. Saraceno letter to Governor Brown dated September 6, 1979, which included a similar letter he had sent to the state Senate on 27 August 1979. Saraceno, while passionate in his beliefs, is speaking as an individual when addressing Governor Brown, not as a spokesperson for all Catholics or the Catholic Church at large.

<sup>404</sup> See, *United States v. Williams*, 553 U.S. 285 (2008)(holding that the solicitation or pandering of child pornography is not protected under the First Amendment); *District of Columbia v. Heller*, 554 U.S. 570 (2008)(limiting the Second Amendment right to bear arms); *Schenck v. United States*, 249 U.S. 47 (1919)(holding that words uttered during a time of war that created a ‘clear and present danger’ were not protected under the First Amendment); *Korematsu v. United States*, 323 U.S. 214 (1944)(in which the Court upheld the internment of those of Japanese descent by declaring that the nation’s right to protect against espionage during a time of war outweighed individual rights).

<sup>405</sup> The bill passed in the Assembly by a margin of 55 to 16. In the Senate, the vote was 27-6.

<sup>406</sup> Russell, *Rape in Marriage*, 366.

next day, Martinez went to the South El Monte home of his estranged wife, Rena, forced her into the van and drove off. When police officers arrested Martinez on January 8, Rena told police investigators that her husband had raped her four times. The Los Angeles County District Attorney's Office charged Martinez with four counts of spousal rape, five counts of (non-spousal) rape and one count of oral copulation with the other woman, two counts of kidnapping, and one count of grand theft.<sup>407</sup> Upon being found guilty, "Martinez was sentenced to 16 years in prison. . . . Without a spousal rape charge, Martinez might have received a sentence of four years for the battery and kidnap of his wife," explained Reggie Yates, the deputy district attorney for Los Angeles County who successfully prosecuted Martinez.<sup>408</sup>

The case of Frank Martinez, as well as other defendants charged and convicted that year, demonstrated a need for a spousal rape law in California. According to the Lodi, California, *News-Sentinel*, police arrested at least 15 men for the sexual assault of their wives in 1980. In most of the cases, the couples were living apart at the time of the offense and the alleged assaults were brutal.<sup>409</sup>

Despite arrests and prosecutions under the new spousal rape law, legislators and members of the public realized that the law had room for improvement. In the years that followed, California legislators amended P.C. § 262 eight times. These amendments better defined spousal rape to comport with the language of P.C. § 261 (rape) and addressed consent, sentencing, and reporting.<sup>410</sup>

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<sup>407</sup> Bill Hazlett, "Man Gets 16 Years in Spousal Rape," *Los Angeles Times*, November 23, 1980; Russell, *Rape in Marriage*.

<sup>408</sup> "New state law on rape still hot topic of dispute," *Lodi News-Sentinel*, December 29, 1980.

<sup>409</sup> *Ibid.*

<sup>410</sup> Amendments not relevant to the current discussion addressed restitution paid by those convicted of spousal rape. A 1992 amendment to § 262 (A.B. 2439, introduced by Assemblywoman Hilda Solis) addressed restitution by the perpetrator. As a condition of parole/probation, the individual would have to

## Consent

The first provision attracting legislative attention regarded consent by the victim, determined often by the extent to which the victim resisted the attack. Over the next fifteen years, legislators and victim advocates frequently faced off on the issue of consent. The eventual result was an amended statute recognizing the numerous reasons why a rape victim might not put up a fight and preventing a lack of resistance from protecting rapists. Notably, the pace by which the legislature reached such a standard for spousal rape victims was often out of step with that for non-spousal rape victims. Additionally, as the following example demonstrates, some instances of sexual violence endured by spousal victims did not meet the legal definition of spousal sexual assault until a 1995 amendment became operative.

Mrs. S., a seventy-three year old bedridden stroke victim, lived at home. Her husband was her primary caregiver. The home health aide that visited the family home observed marks on Mrs. S.'s wrists and ankles. Further examination revealed unexplained vaginal bleeding. When asked about these symptoms, Mrs. S. became agitated. The home health aide contacted elder protective services to report possible abuse. That agency dispatched a social worker to investigate. During the course of the interview, Mrs. S. revealed that several times a week her husband would tie her wrists and ankles to the bed and rape her. Upon learning this, the social worker attempted to have Mrs. S. moved to a nursing home. Mrs. S. refused, and because she was legally competent, social services respected her decision. However, the social worker continued to visit regularly, trying to

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provide payments to a woman's shelter and/or reimburse his victim for the cost of counseling and other expenses related to the spousal abuse. A 1996 amendment to § 262 (A.B. 2898, introduced by Assemblyman Bowler), also made changes to the administration of the California Victims of Crime Restitution Fund.

understand why Mrs. S. would remain with her husband. In time, Mrs. S. revealed that her husband was pressuring her to stay by threatening to rape the couple's granddaughters if she relocated. Mrs. S. truly believed that she was protecting her grandchildren by staying with her abusive husband.<sup>411</sup> Despite the heinous nature of her husband's behavior, under California law prosecutors could not classify the repeated sexual assaults endured by Mrs. S. as spousal rape until 1995. Mrs. S.'s situation highlights a number of issues demonstrating the complexity of consent.

Revisions to the spousal rape law began in 1980, the same year the bill went into effect. Responding to concern raised by the Santa Monica Hospital Rape Treatment Center, Assemblyman Mel Levine introduced Assembly Bill 2899, which sought to eliminate the resistance element in rape legislation that was used to demonstrate an absence of victim consent.<sup>412</sup> In 1980, to get a conviction for rape, a prosecutor had to prove either that the victim had resisted the attack and that resistance was overcome by force or violence, or that the victim had been prevented from resisting because of threats of great and immediate bodily harm that were accompanied by the apparent power of execution.<sup>413</sup> This last provision – apparent power of execution – later proved especially significant, as cases hinged on whether the victim's fear of imminent harm was

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<sup>411</sup> Laura X provided this case study to the California legislature in 1993. Laura X cited it as an excerpt from a chapter in *Elder Sexual Abuse: The Ultimate Taboo* by Holly Ramsey-Klawnsnik and Malcolm Holt, which was to be published by Jessica Kingsley Publishers. While both Ramsey-Klawnsnik and Holt went on scholarly careers with a focus on elder abuse and elder law, neither published a work with the title suggested by Laura X.

<sup>412</sup> Created in 1974, the Santa Monica Hospital Rape Treatment Center is now joint partners with the UCLA Medical Center. Nationally recognized for its treatment, prevention and education programs, the Rape Treatment Center has provided over 30,000 victims with comprehensive care at no charge over its forty-year lifespan. At the time Assemblyman Levine introduced A.B. 2899, the Treatment Center had served over 2,000 sexual assault victims.

<sup>413</sup> As applied in this situation, power of execution means that the victim believes that her attacker has the power to fulfill the threats that he is using to overcome any resistance she might exhibit. A.B. 2899 bill description as amended April 7, 1980.

reasonable. In other words, did the woman believe her husband had the ability to fulfill his threats?<sup>414</sup> From its inception, A.B. 2899 was meant to apply equally to both California Penal Codes §261 and §262. Thus, there was no distinction made for acts involving spousal rape.<sup>415</sup>

These proposed changes were significant, acknowledging that failure to resist does not indicate consent to acts of sexual violence. The revisions sought by A.B. 2899 were threefold. First, the bill would redefine rape under threat. Rather than demonstrating that the victim was unable to resist because of “threats of great bodily harm,” A.B. 2899 would require proof that the sexual assault was accomplished by means of “fear of unlawful bodily injury.” Second, A.B. 2899 would eliminate the requirement that the threat of injury be accompanied by the apparent power of execution and instead require merely that the victim be in fear. Third, the bill would expand the threats of injury to encompass threats to harm individuals other than the victim.<sup>416</sup> A woman whose children are asleep in a nearby room may not resist her attacker in an attempt to ensure the safety of those children. A victim who experiences shock may be immobilized by her fear and therefore unable to resist.

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<sup>414</sup> The language of A.B. 546 also purported to be gender neutral, applying to both male and female perpetrators. However, unanswered questions swarmed the state legislature as to the motive of this provision. Was it possible for wives to rape their husbands? Was the gender-neutral language simply an attempt to avoid equal protection challenges? Was it possible that rape, by definition, was a crime only against women in the way that child molestation was a crime committed against a child? These questions lingered long after Governor Brown signed A.B. 546 into law; some would be addressed in later amendments.

<sup>415</sup> Assembly Ways and Means Committee Staff Analysis dated May 12, 1980.

<sup>416</sup> The intent of the bill was to acknowledge that rapists might overcome their victims’ resistance by threatening to harm a loved one, often a child, sibling, parent, etc. A.B. 2899 bill description as amended April 7, 1980.

Assemblyman Levine's bill received local and statewide support.<sup>417</sup> One line of support for A.B. 2899 was that resistance is dangerous and can actually result in greater harm to the rape victim. The Los Angeles County Commission on the Status of Women pointed out that "resistance to attack may result in greater bodily harm or even death" for the victim.<sup>418</sup> The Santa Monica Hospital Rape Treatment Center cited two studies showing that the danger of physical injury – beyond that of the rape itself – actually doubles when the victim resists her attacker.<sup>419</sup> Los Angeles Talk Radio station KFWB News 98 issued an editorial in support of A.B. 2899. In that editorial, Vice President and General Manager Frank Oxarart stated: "all of the statistics show that there is a better chance of avoiding serious injury if the victim does not resist. But in California the law says that the victim must resist – or, the rape may not be prosecuted."<sup>420</sup>

Another argument in support of A.B. 2899 was that the current rape laws were discriminatory, treating rape victims differently than victims of other crimes. The Santa Monica Hospital Rape Treatment Center explained that the resistance provision in the rape statutes was "discriminatory because no other criminal law, including the similar

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<sup>417</sup> In addition to the Santa Monica Hospital Rape Treatment Center, who spearheaded the bill, the official record includes documented support from Women in Politics; the California Attorney General George Deukmejian; Los Angeles County; the National Organization for Women; Women Lawyers of Sacramento; the Los Angeles County Bar Association; the California District Attorneys Association; the *Los Angeles Times*; the *Herald Examiner*; Los Angeles District Attorney John Van de Camp; Los Angeles County Sheriff Peter Pitchess; Santa Monica Police Chief James F. Keane; the ACLU of Southern California; the YWCA of Southern California; and the American Association of University Women.

<sup>418</sup> Cited in a letter to Bob Wilson, Chair of the Senate Judiciary Committee, dated May 29, 1980, and signed by Jerald E. Wheat, Legislative Representative for the Board of Supervisors of Los Angeles County.

<sup>419</sup> See the editorial "Of Rape and Resistance in the Law," *Los Angeles Times*, April 6, 1980. The first was a report released by the U.S. Department of Justice, while the second was issued by the National Institute of Law Enforcement and Criminal Justice, the research, development and evaluation agency of the U.S. Department of Justice. The National Institute of Law Enforcement and Criminal Justice was renamed the National Institute of Justice in 1978; however, it is referred to here by its original name as it was in the *Times* editorial.

<sup>420</sup> Frank Oxarart, "Rape – You Shouldn't Have to Risk Your Life," Editorial issued on KFWB New 98, Los Angeles, July 11 and 12, 1980.

offenses of forcible sodomy and oral copulation, requires victim resistance as an element of the crime in any situation.”<sup>421</sup> To bring the rape statutes in line with the language defining other criminal offenses, Levine modeled A.B. 2899 after the “time tested robbery statute” that never included resistance as an element of the crime. To do otherwise, argued the Rape Treatment Center, would preserve the arbitrary distinction between rape and other violent crimes.<sup>422</sup> The Los Angeles County Bar Association came to the same conclusion after the Association’s *ad hoc* Rape Legislation Committee conducted a six-month study. The Committee’s detailed report concluded that the “victim resistance provisions in the rape statutes are discriminatory, antiquated, and may even promote a dangerous standard of behavior by victims in some situations.”<sup>423</sup> In a resolution adopted May 14, 1980, the Association’s Board of Trustees posited that the removal of the resistance requirement would “help to educate the public that a rape victim has the right not to resist an assailant, without guilt, just as she probably would do if she were being robbed.”<sup>424</sup> Frank Oxarart ended his KFWB editorial by boldly advocating jail time for rapists “regardless of whether the terrified victim risked her life to resist.”<sup>425</sup>

Advocates for A.B. 2899 also suggested that passage of the amendment might lead to greater reporting of and conviction for rape. California Attorney General George Deukmejian certainly believed that this was the case. He sent a letter to the members of

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<sup>421</sup> Undated letter to Senator Bob Wilson from Gail Abarbanel, Director, and Aileen Adams, Legal Counsel, for the Rape Treatment Center at Santa Monica Hospital.

<sup>422</sup> Letter to Assemblyman Mel Levine dated June 13, 1980 from Gail Abarbanel, Director, and Aileen Adams, Legal Counsel, for the Rape Treatment Center at Santa Monica Hospital.

<sup>423</sup> Letter to Bob Wilson, Chair of the Senate Judiciary Committee, dated June 5, 1980, and signed by John H. Brinsley, Trustee of the Los Angeles County Bar Association.

<sup>424</sup> Attached to the letter noted in the previous footnote was a copy of the Resolution.

<sup>425</sup> Oxarart, “Rape – You Shouldn’t Have to Risk Your Life.”

the state Senate Judiciary Committee explaining that at trial rape victims often face questioning by defense attorneys during cross-examination that require the victims to justify their lack of resistance. This could be a harrowing experience for a victim, suggesting that fault remains with a victim who has not put up enough of a fight to prevent the rape from occurring. Deukmejian suggested that removing the resistance requirement might help to minimize a rape victim's reluctance to report the crime and ease her fear of testifying at the subsequent trial.<sup>426</sup> If Deukmejian's suggestion was correct, the natural consequence of removing the resistance requirement would be an increase in reporting that would lead to a greater number of prosecutions for rape.<sup>427</sup> While an increase in reporting is important, it is noteworthy that other factors may influence a victim's willingness to report a crime. Therefore, the value of the proposed amendment cannot be judged solely on its potential to cause a boost in victim reporting.

Ultimately, A.B. 2899 faced no opposition, passing unanimously in both the Senate and Assembly. This certainly sets the bill apart from the 1979 spousal rape bill. However, one has to wonder if members of the California legislature would have readily accepted the bill if it applied only toward spousal rape rather than all cases of rape.

A 1981 amendment to California's general rape statute fine-tuned the definition of rape to further define consent. Under this amendment, rape included an act of intercourse that "is accomplished against the victim's will by threatening to retaliate in the future against the victim or another person, and there is a reasonable possibility that

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<sup>426</sup> Letter to All Members of the Senate Judiciary dated June 4, 1980 from California Attorney General George Deukmejian.

<sup>427</sup> See, Undated letter to Senator Bob Wilson from Gail Abarbanel, Director, and Aileen Adams, Legal Counsel, for the Rape Treatment Center at Santa Monica Hospital; Resolution of the Board of Trustees of the Los Angeles County Bar Association, adopted May 14, 1980.

the perpetrator will execute the threat.”<sup>428</sup> The bill further defined “threatening to retaliate” to encompass kidnapping or false imprisonment, the inflicting of extreme pain, causing serious bodily injury or death. Recognizing the incongruity between these statutes, Levine introduced Assembly Bill 3458, the purpose of which was to provide the same protection for wives from coerced sexual intercourse by threats of future violence as for all other victims.<sup>429</sup> The key questions before the California legislature were whether spousal rape should include coerced intercourse with a spouse by threat of future harm, and if so, whether the criminal justice system should treat that offense as a felony under the spousal rape law.

Again, while there was significant support for A.B. 3458, there was no opposition.<sup>430</sup> The bill moved through the Assembly and Senate with little debate before receiving unanimous approval in both houses. Governor Edmund G. Brown, Jr. received the bill on August 23, and signed it into law twenty-four days later. However, the law did not yet go far enough in addressing coercive circumstances in a marriage that may result in spousal rape.

In the 1990s, state legislators further revised the definition of spousal rape in recognition of a need to expand the understanding of threats to others and threats of future harm. Such amending was necessary, as can be seen in example of Mrs. S. presented earlier in this discussion. In 1994, legislation introduced by Senator Milton Marks and Assemblyman Diane Martinez, modified P.C. § 261 concerning the issue of

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<sup>428</sup> Assembly Committee on Criminal Justice report on A.B. 3458, as amended April 12, 1982.

<sup>429</sup> Assemblyman Mel Levine introduced Assembly Bill 1151 in 1981. The California District Attorneys Association sponsored the bill.

<sup>430</sup> In addition to the California District Attorneys Association who sponsored the bill, the official record includes documented support from the California Attorney General’s Office, the California Peace Officers Association, the National Organization for Women, the Woman Lawyers Association, the Legal Affairs Unit of the Governor’s Office, the Department of Corrections, and the State Finance Department.

consent.<sup>431</sup> Additional legislation passed that year “was designed to remove all remaining disparities between Penal Code Sections 261 and 262 as they are referenced in other sections of the law.”<sup>432</sup> Unfortunately, the two amendments relating to consent “inadvertently escaped the attention of” the bill designed to do just that. In 1995, S.B. 208, a bill introduced by State Senator Hilda Solis addressed this omission by forwarding the legislative intent “that survivors of rape receive the same protections, whether they are married to their perpetrators or not.”<sup>433</sup>

Once again attempting to bring the state’s rape laws into accord with the experiences of rape victims, S.B. 208 refined the definition of spousal rape to include two provisions, both of which related to victim consent. For the purpose of both rape statutes (§ 261 and § 262), consent meant “positive cooperation in act or attitude pursuant to an exercise of free will” where the individual must “act freely and voluntarily and have knowledge of the nature of the act or transgression involved.”<sup>434</sup> The first provision amended existing law “to include a situation where the accused knows or reasonably should have known that the victim is unable to resist because they are under the influence of an intoxicating or anesthetic substance, or a controlled substance.”<sup>435</sup> Previously, to negate victim consent, the prosecutor had to prove that the defendant was the one who had administered the substance.<sup>436</sup> The second provision added spousal rape to the list of

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<sup>431</sup> Senator Marks introduced S.B. 1351, while Assemblywoman Martinez introduced A.B. 85X.

<sup>432</sup> Senator Dan McCorquodale introduced S.B. 59, the bill calling for the conformity of Penal Code Sections 261 and 262.

<sup>433</sup> Letter to Governor Pete Wilson from Senator Hilda Solis dated July 12, 1995; Senator Hilda Solis, Assembly Committee on Public Safety Background Information SB 208, which explained the need for and the effect of the bill should it be voted into law.

<sup>434</sup> Senate Third Reading of S.B. 208. The Senate vote on the bill was 39-0.

<sup>435</sup> Charles L. Pattillo, Assembly Committee on Appropriations hearing notes, June 21, 1995.

<sup>436</sup> California rape statutes have consistently provided that submission is not consent when the defendant knows that the person is unconscious. Interestingly, this has not been the case in all states. In fact, House Bill 74, a 2015 bill in the Utah legislature, intended to clarify the state’s rape statute by making it clear that

sex offenses in which consent is at issue, noting that any evidence “that the victim suggested, requested, or otherwise communicated to the [perpetrator that he] use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.”<sup>437</sup> S.B. 208 passed unanimously in both the Senate and Assembly, followed by Governor Pete Wilson signing it into law.<sup>438</sup> The result was, at least for the purposes of consent, spousal and non-spousal rape were the same under California sexual assault laws.

### **Sentencing**

The second area of concern in the 1979 spousal rape law subject to controversy and eventual revision was the provision that allowed flexibility at the point of prosecution and sentencing. The law designated marital rape as a wobbler, meaning that those arrested for marital rape could be charged with either a felony or a misdemeanor, determined solely at the discretion of the prosecutor. If the defendant was charged with a felony, sentencing would follow in line with P. C. § 261 (rape), which carried a penalty of three, six, or eight years in state prison. In contrast, a defendant charged with a misdemeanor would face up to one year in county jail. Critics raised concern about the

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an unconscious person cannot give consent. The discussion of the bill raised concerns with at least two state lawmakers who considered the bright line rule too broad, suggesting that it should not always apply in the case of married couples or those with a prior relationship. Annie Knox, “Utah lawmaker questions whether sex with an unconscious person is rape ‘in every instance,’” *The Salt Lake City Tribune*, February 3, 2015; Glen Mills, “ABC 4 anchor gets personal while testifying for sexual assault consent bill,” Salt Lake City, [www.good4utah.com](http://www.good4utah.com), accessed March 1, 2015.

<sup>437</sup> Senate Third Reading of S.B. 208.

<sup>438</sup> Supporters of S.B. 208 included The California Alliance Against Domestic Violence; the California Attorney General; the California District Attorneys Office; Haven Women’s Center of Stanislaus; North County Counseling Associates; the California Chapter of the American College of Emergency Physicians; the Lost Angeles County District Attorney’s Office; the National Clearinghouse on Marital and Date Rape; the Commission on the Status of Women; the San Luis Obispo County Rape Crisis Center; Health Services Agency of Modesto; Educational Consulting Services, San Clemente; the Center Against Sexual Assault in Hemet; the Government Relations Oversight Committee; the North County Counseling Associates in Sunnyvale; the Bridge Counseling Center in Morgan Hill; and Women Escaping a Violent Environment.

misdemeanor option, seeing it as a fall back charge when the case was too weak for the prosecution to prove the felony offense. Others argued that this provision made it more likely that a vindictive spouse could use a rape charge for harassment purposes.

Additionally, the law provided that men convicted under the spousal rape statute would not have to register as sex offenders, although they could be referred for mentally disordered sex offender proceedings to determine if they were deemed sexually violent predators who should be committed to a mental facility for the protection of the public safety.

Events that occurred just two months after the law went into effect demonstrate the flexibility of the spousal rape law. In March 1980, Shasta County law enforcement officers in the northern California town of Redding arrested Hughlen “Cliff” Watkins on suspicion of “spousal rape, penetration with a foreign object, and sodomy” after receiving a call from his wife.<sup>439</sup> Catherine Watkins, who had called the police from a women’s shelter, reported, “her husband had choked her and forced her to have sex.” He then taunted her, challenging her to “call the cops if you want,” before “dropping off to sleep.”<sup>440</sup> Calling his bluff, Catherine sought the safety of the Shasta County Women’s Refuge, reported the rape to police, and filed for divorce from her husband.

After initially claiming his innocence, Watkins changed his plea to guilty, claiming that he did not want his children exposed to the controversy a public trial would cause. Even then, however, he was not convinced that what he had done was rape. After consideration, he decided that his actions “could be called ‘rape,’ *if it’s possible to rape*

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<sup>439</sup> Russell, *Rape in Marriage*, 367-68.

<sup>440</sup> *Ibid.* at 268; “Man gets sentence for raping his wife,” *The Daily Iowan*, September 3, 1980. The *Daily Iowan*, the daily newspaper of Iowa City, Iowa, was only one of many newspapers across the nation that printed the UPI story.

*your own wife.*” The Court sentenced Watkins to 240 days in county jail, which was slightly less than two-thirds the maximum sentence for misdemeanor spousal rape. He also received three years’ probation.<sup>441</sup> Had Watkins been charged with felony spousal rape rather than the misdemeanor charge, he could have faced up to eight years in prison. While the prosecutor acted within the discretion granted by P.C. § 262 when charging Watkins with the lesser crime of misdemeanor spousal rape, such decisions would later be called into question as activists challenged the legality of the wobbler provision.

Circumstances like the one highlighted above were a primary reason that then-Assemblywoman Hilda Solis worked to amend California Penal Code §262 in 1993. That year, Solis introduced Assembly Bill 187, the stated purpose of which was to amend the definition of spousal rape in order for it to match more closely the definition of rape.<sup>442</sup> Both public policy and constitutional considerations favored the passage of A.B. 187.<sup>443</sup> Within the California legislature, A.B. 187 was one of only two bills that the California Women’s Caucus officially endorsed in 1993, an occurrence requiring support from at least two-thirds of both Democratic and Republican members of the Caucus. The co-authorship of the bill by thirty legislators further illustrated this bipartisan support.<sup>444</sup> Public support of the bill was abundant.<sup>445</sup>

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<sup>441</sup> “Man gets sentence for raping his wife,” *The Daily Iowan*, September 3, 1980. Emphasis added by author.

<sup>442</sup> Senate Rules Committee, Third Reading of A.B. 187.

<sup>443</sup> As will be discussed later in this chapter, spousal rape laws would be faced with constitutional challenges beginning in the 1980s, with particular attention to equal protection rights under Fourteenth Amendment.

<sup>444</sup> Letter from Assemblywoman Solis to Governor Pete Wilson, dated September 3, 1993; Letter sent to John Burton, Member of the Assembly Public Safety Committee, from Alice Jordon, Associate Director of Marin Abused Women’s Services, dated February 19, 1993; City Council of West Hollywood resolution in support of A.B. 187, passed on March 1, 1993.

<sup>445</sup> Support for A.B. 187 came from myriad sources. Those not mentioned directly in the text include the California Alliance Against Domestic Violence; California Police Chiefs Association; California Police Officers Association; the American College of Obstetricians and Gynecologists, District IX; the State of California Commission on the Status of Women; the Hispanic American Police Command Officers

One objective of A.B. 187 was to eliminate the wobbler provision, thereby making all rape cases, including spousal rape, a felony, punishable by three, six, or eight years in state prison.<sup>446</sup> The League of Women Prosecutors promoted A.B. 187 as manner by which to “eliminate the disparity married women raped by their husbands experience under existing California law” since a “misdemeanor prosecution does not provide adequate sanctions for this crime.”<sup>447</sup> The Peace Officers Research Association of California supported the passage of A.B. 187, noting “The crime of rape should be the same whether the victim is, or isn’t, the spouse of the perpetrator,” promoting the elimination of the wobbler provision for spousal rape.<sup>448</sup>

The Los Angeles City Attorney’s Office also supported the elimination of the wobbler provision. The City Attorney’s Office sent a letter to Assemblyman Bob Epple, Chair of the Public Safety Committee, advocating the passage of A.B. 187. In that letter, Alana Bowman explained that when her office had prosecuted spousal rape cases before a jury, “the crime is incomprehensible as a rape when tried at the misdemeanor level.

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Association; Laura X, individually and as a representative of the National Clearinghouse on Marital and Date Rape; the World Institute of Disability; California Women’s Law Center; the Coalition for Family Equity; Los Angeles Women’s Leadership Network; the Junior League of California; Mountain View School District; Vera Valdiviez, Vice Mayor of the City of El Monte; Wayne Clayton, Chief of Police for the City of El Monte; the City of Azusa; Men Evolving Nonviolently; San Diego Domestic Violence Council; the Northern California Coalition for Battered Women and their Children; Marin Abused Women’s Services; Los Angeles Commission on Assaults Against Women; and Sandra Blair, Family Law Specialist.

<sup>446</sup> Senate Committee on Judiciary overview of A.B. 187 as used in the Committee hearing on June 29, 1993.

<sup>447</sup> Letter to Assemblyman Bob Epple, Chair of the Public Safety Committee, from Judith Levin, Co-Chair Legislative Committee, dated March 11, 1993. The League of Women Prosecutors represented female prosecutors from the offices of City Attorneys, District Attorneys, and the Attorney General. The previous year, the League of Women Prosecutors had sent a letter to Assemblywoman Roybal-Allard advocating a different tactic, one in which they proposed the complete elimination of P. C. § 262 and the amending of P. C. § 261 to include the married persons. Letter sent by Alana Bowman on February 25, 1992.

<sup>448</sup> Letter to Assemblyman Bob Epple, Chair of the Public Safety Committee, from Skip Murphy, President of the Peace Officers Research Association of California, dated February 16, 1993. A verbatim copy of this letter was sent to Hilda Solis on 16 February; a similar letter was sent to Robert Presley, Chair of the Senate Appropriations Committee, dated July 20, and to Senator Bill Lockyer on June 22.

Juries simply do not take the case seriously, believing that, if the rape had actually occurred, it would surely have been tried as a felony.”<sup>449</sup> She furthered her argument by questioning the logic of the wobbler provision. “Many California citizens choose to live together in domestic partnerships. If a rape occurs within this relationship, even though the parties have cohabitated for years, the crime must be filed as a felony. However, if a married couple separates but fail to obtain a divorce, a rape in that relationship could be filed as a misdemeanor.”<sup>450</sup> Bowman’s explanation highlighted the arbitrary nature of the wobbler provision, suggesting that it could result in very different outcomes for similar crimes because of nothing more than marital status, regardless of the living arrangements of rape victims and their abusers.

Three months later, Bowman sent a letter to Senator Bill Lockyer, Chair of the Senate Judiciary Committee, again as a representative of the Los Angeles City Attorney’s Office. In that letter, she described disparity of treatment for the victims of spousal rape when the state prosecutes the case as a misdemeanor, arguing that misdemeanor cases do not receive the time, effort, or resources that are available for felony prosecutions. “Misdemeanor prosecutors do not benefit from the resources enjoyed by felony prosecutors, especially the assistance of [District Attorney] staff investigators, to permit a thorough preparation for trial in these challenging cases.”<sup>451</sup> Bowman also argued that felony sentencing could reduce the number of future instances of rape and the need for prosecution. Notably, she did not promote the idea of rehabilitation for the rapist while in

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<sup>449</sup> Letter to Assemblyman Bob Epple, Chair of the Public Safety Committee, from Alana Bowman Deputy Los Angeles City Attorney, for James K. Hahn, City Attorney, dated March 11, 1993.

<sup>450</sup> *Ibid.*

<sup>451</sup> Letter to Senator Bill Lockyer, Chair of the Senate Judiciary Committee, from Alana Bowman, Deputy Los Angeles City Attorney, for James Hahn, City Attorney, dated June 10, 1993.

prison. Rather, she contended that incarceration itself prevented future crime and reduced the need for prosecution: “Prison terms prevent recidivism by this rapist just as appropriate prison terms prevent other categories of rapists from repeating their crimes; both spousal rapists and stranger rapists are among the highest recidivists.”<sup>452</sup> Bowman ended by arguing that passage of A.B. 187 “would simply extend to married persons the rights over their own bodies that non-marital persons possess under the existing rape statute.”

While the elimination of the wobbler provision sought to close the gap between general rape and spousal rape, A.B. 187 simultaneously created yet another distinction. The bill allowed for felony probation in spousal rape cases, a sentence not possible in the case of rape generally. Penal Code § 261 specified that rape is an offense for which felony probation may not be imposed. This provision within § 262 was the result of a compromise reached between lawmakers and the California District Attorneys Association (CDAA).<sup>453</sup>

Some supporters of A.B. 187 saw the elimination of the wobbler provision as tied to public education on rape. The Humboldt Women for Shelter (HWS) in Eureka, California, believed that A.B. 187 would “send a clear message that violence against any woman, regardless of marital status, will not be tolerated. It also supports a woman’s right to say ‘no’ and to have that ‘no’ acknowledged, regardless of marital status.” The HWS tied spousal rape to the broader issue of domestic violence, suggesting that the bill “would be a strong affirmation that safety begins in the home, pointing to the accelerating

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<sup>452</sup> *Ibid.*

<sup>453</sup> Senate Committee on Judiciary overview of A.B. 187 as used in the Committee hearing on June 29, 1993; Letter from Assemblywoman Solis to Governor Pete Wilson, dated September 3, 1993, encouraging him to sign the bill into law.

progress made by the California State Legislature regarding domestic violence and related issues.”<sup>454</sup> In defense of the bill, Tri-Valley Haven for Women maintained that A.B. 187 would send “a strong and clear message to the public that spousal rape is a serious crime that will not be tolerated or minimized,” by bringing “the definition of and penalties for spousal rape in line with those for other kinds of rape.”<sup>455</sup> The North County Rape Crisis and Child Protection Center promoted the use of A.B. 187 to dispel the long-held myth that husbands “have a ‘sexual right’ to their wives at any time. . . . [By] eliminating the distinction between rape and spousal rape, [A.B. 187] would not only help survivors of spousal rape in reporting the crime since they would know it will be considered a serious crime, but [would] also . . . help the general public to realize that rape is rape no matter who the offender is.”<sup>456</sup> Such sentiments echoed the message of other domestic violence and sexual assault advocates within California and across the country. However, each of these advocates acknowledged an important fact – simply passing a law making rape in marriage a crime does not mean that all potential victims (or perpetrators) will be cognizant of the legislation.

The personal story of Rana Lee illustrates the importance of educating the public about all forms of domestic violence, including spousal rape. Rana Lee grew up in an upper middle-class family in Boston. She met her first husband while a sophomore in college. The two were together for eighteen years, during which time Lee described her husband as emotionally but not physically abusive. Even so, she described incidents

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<sup>454</sup> Letter sent to Assemblyman Bob Epple, Chair of the Public Safety Committee from Sheri Johnson of Humboldt Women for Shelter, dated February 16, 1993.

<sup>455</sup> Undated letter sent to Assemblyman Bob Epple, Chair of the Public Safety Committee, from Vicki Gordon of Tri-Valley Haven for Women.

<sup>456</sup> Letter to Assemblywoman Hilda Solis from Rebecca O’Donnell Hauge, Hotline Coordinator, dated March 9, 1993. Hauge sent a similar letter to Bill Lockyer on July 15, 1993.

where he hit walls, broke doors, and threw things at Lee and their three children. Her parents encouraged her to find a way to make the marriage work. It was only after a move to Los Angeles and her husband's imprisonment for selling fraudulent futures that Lee found the courage to file for divorce. The year she divorced her first husband, Lee met the man who would become her second. At first, he appeared charming, saying that he would help her raise her children. Unfortunately, despite such promises, there would be no happily ever after. Instead, he introduced Lee to cocaine and excessive drinking.<sup>457</sup>

Physical violence and sexual abuse accompanied the drinking and drug use, which involved not only cocaine, but also marijuana and the prescription drug valium. Lee does not remember how many times her husband raped her, but she will never forget the first time:

On my wedding night, he threw me against the bathroom sink, pushed me onto my knees and forced me to perform humiliating, outrageous sex for hours, pulling my hair to the roots and slamming my head into the sink when I fought him. I begged him to stop, but he refused, dragging me to the bed and lying on me for what seemed ages. I fought, and I cried, and he laughed. He told me he was the boss and I now belonged to him, and he would hurt me and my children if I did not behave.<sup>458</sup>

For the next three and a half years, Lee suffered beatings and rape at the hands of her husband. Unaware at the time, Lee later learned that her husband also had raped her fourteen-year-old daughter. Finally, with the help of friends, Lee left her husband and relocated to the San Francisco Bay Area. Although P.C. § 262 had been in effect for two

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<sup>457</sup> "Women, Violence, and the Law," Hearing held before the Select Committee on Children, Youth, and Families, House of Representatives, One Hundredth Congress, first session, Washington, D.C., September 16, 1987.

<sup>458</sup> *Ibid.*; Donovan, "When A Husband Rapes His Wife," *supra*, note 2.

years, Lee did not report the crime to law enforcement. She did not know that she could.<sup>459</sup>

Despite the volatile relationships she endured, Lee considers herself a survivor. With the support of close friends and years of therapy, she was able to rebuild her life. She became a community education specialist, presenting programs on family violence to teenagers and hosting a radio talk show about domestic violence. In 1987, she testified before a U.S. House of Representatives subcommittee on the topic of “Women, Violence, and the Law.”<sup>460</sup> One message that she shared before the House subcommittee and in speaking engagements was the need for education. She testified that “most California women don’t know that marital rape is against the law there. . . . Women must be educated about their rights and the judicial system must ‘support the woman who presses charges – not discourage her.’”<sup>461</sup> Some variation of this message is what Lee shared in her prevention work with teenagers across the Bay Area, and with a national audience as she appeared on television news programs.<sup>462</sup> Each time she spoke before a new audience, she demonstrated that surviving domestic violence is possible with knowledge, support, and determination.

Assembly Bill 187 also addressed the issue of sentencing fairness related to disparities in mandated sex offender registration. When Assemblywoman Solis introduced A.B. 187, state law did not mandate that a convicted spousal rapist register with local law enforcement. However, the law required those convicted for other types of

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<sup>459</sup> *Ibid.*

<sup>460</sup> Jill Lawrence, “Battered wives charge double standard,” *The Telegraph*, Nashua, New Hampshire, September 18, 1987; “Women, Violence, and the Law,” House subcommittee hearing.

<sup>461</sup> Lawrence, “Battered wives charge double standard.”

<sup>462</sup> Lee appeared on a variety of broadcast news shows – the Today Show, Hour Magazine, and NBC Nightly News – to discuss her prevention work with teens. “Women, Violence, and the Law,” House subcommittee hearing.

sex offenses, including non-spousal rape, to register as sex offenders. A.B. 187 “would require persons convicted of spousal rape to register as a sex offender where the offense was accomplished by means of force or violence.”<sup>463</sup> The limitations imposed on the registration provision of A.B. 187 reflected an additional compromise between lawmakers and the CDAA. Once again, like the early wobbler statutes, the implication was that not all spousal rapists would face the same sanctions. Those sentenced only to felony probation, and no prison time, would be exempt from the sex offender registration requirement.<sup>464</sup>

Amid all of the support for A.B. 187’s attempt to unify punishments between non-spousal and spousal rape, four organizations raised similar objections to the bill. These groups wanted to empower prosecutors and judges with greater discretion to charge, try, and sentence spousal rapists rather than eliminating the wobbler provision. The California Public Defenders Association (CPDA) preferred that judges retain more independence in sentencing spousal rapists. As the CPDA saw it: “judges should be allowed discretion to view each case as unique, responding to the facts of that case and not what might be imagined in the Halls of the State Capitol.”<sup>465</sup> Members of the California Attorneys for Criminal Justice (CACJ) preferred prosecutors have the discretion to charge suspects with misdemeanors in some spousal rape cases, differentiating them from stranger rape.

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<sup>463</sup> Letter from Assemblywoman Solis to Governor Pete Wilson, dated September 3, 1993; Letter sent to Assemblyman Bob Epple, Chair of the Public Safety Committee, from Nancy K. D. Lemon, Co-Chair of the Family Law Committee of CAADV, dated March 4, 1993.

<sup>464</sup> Letter from Assemblywoman Solis to Governor Pete Wilson, dated September 3, 1993. Notably, the California District Attorneys Association had opposed A.B. 2220 (Roybal-Allard) the previous year until that bill was amended to reflect similar compromise to the portions involving the wobbler provision and sex offender registration. Letter to Assemblywoman Lucille Roybal-Allard by Michael Sweet, representative of the CDAA, on June 22, 1992.

<sup>465</sup> Letter sent to Assemblyman Bob Epple, Chair of the Public Safety Committee, from David Nagler of Nossman, Guthner, Knox & Elliott, attorneys for the CPDA, dated March 12, 1993. Nagler sent copies of the letter to Assemblywoman Solis and the other members of the Public Safety Committee.

For example, a prosecutor might make such a choice when the victim is uncooperative “if it means her husband could be sent to state prison” and the case would otherwise have to be dismissed.<sup>466</sup> The CACJ indicated that it would support the remaining portions of A.B. 187 if amended to retain the wobbler provision of the spousal rape law. Such an amendment, however, would be counterproductive to the intent of the bill. The amendment would maintain the distinction between spousal rape and non-spousal rape, allowing the prosecutor the discretion to consider an act to be a misdemeanor that would be a felony if the victim were not the spouse of the perpetrator. Furthermore, it would fail to acknowledge that such discretion was not available for crimes charged under P.C. § 261, even though victims may be unwilling to cooperate with the prosecution of those crimes.

The Committee on Moral Concerns and the Traditional Values Coalition both opposed A.B. 187 because they found the bill to be overly broad as applied to married couples. Both groups relied on the traditional notions of consent as forwarded by Sir Matthew Hale: marriage requires consent of both parties, and that consent freely given includes a general presumption of mutual consent to sexual intercourse.<sup>467</sup> The Traditional Values Coalition contended: “Though a general presumption of consensual sex exists by the act of marriage, it is reasonable to assume that non-consensual sex could occur during a substance-altered state. While lack of good judgment is not a protected line of defense, neither spouse should be penalized for a normal act which may have or

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<sup>466</sup> Letter sent to Assemblywoman Solis from Melissa K. Nappan, Legislative Advocate for the California Attorneys for Criminal Justice, dated March 9, 1993.

<sup>467</sup> Senate Committee on Judiciary overview of A.B. 187 as used in the Committee hearing on June 29, 1993; Letter to Bill Lockyer from Rev. Louis P. Sheldon, Chairman of the Traditional Values Coalition, dated June 28, 1993. For more about Sir Matthew Hale’s position on irrevocable consent in marriage, please see the introduction and chapter 1.

would have occurred under more controlled marital circumstances.”<sup>468</sup> On a related note, the Committee on Moral Concerns argued: A.B. 187 “would make a husband (or wife) guilty of a felony if intercourse took place while one was ‘unconscious of the nature of the act.’ Such a mental state would most often occur from serious intoxication, and is not the best of circumstances, but within marriage it should not be a felony.” Notably, neither of these objections denied that rape might happen in marriage. Rather, they proposed to classify such actions as something other than felony rape because of the relationship between the parties.

Additionally, the Traditional Values Coalition expressed concern that the definition of spousal rape proposed by A.B. 187 presented the potential for manipulation or false reporting by spouses. As they explained: “There is nothing preventing one spouse, short of verifiable fraud, from deliberately staging or falsifying an incident of spousal rape. As many divorces are bitter with both sides holding a personal, emotional and financial stake in the outcome, one spouse could utilize the provision of AB 187 for retribution of real or perceived marital injustice or for financial leverage.”<sup>469</sup> While acknowledging that such manipulation was not the norm, the Traditional Values Coalition stressed that the potential did exist. They added that they fully supported individuals whose bodies had been violated, even “spouses who have been subjected to legitimate spousal rape.”<sup>470</sup> In the latter case, however, the Coalition believed that current laws would suffice.

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<sup>468</sup> Senate Committee on Judiciary overview of A.B. 187 as used in the Committee hearing on June 29, 1993.

<sup>469</sup> Letter to Bill Lockyer from Rev. Louis P. Sheldon.

<sup>470</sup> Notably, the Traditional Values Coalition did not clarify what they meant by “legitimate spousal rape” or how a prosecutor or judge should distinguish legitimate from illegitimate claims. Such terminology was not limited to the Coalition, to California, or to 1993. In 2012, Todd Akin, a member of the House of Representative from Missouri, made a comment about “legitimate rape” in a discussion about pregnancy

Despite opposition, the amendment to eliminate the wobbler provision provided by A.B. 187 became law following a 27 to 7 vote in the Senate and a vote of 68 to 3 in the Assembly. Governor Wilson signed the bill into law on September 29, 1993. Thereafter, spousal rape would be a felony.<sup>471</sup>

### **Reporting Requirements**

The third provision of the spousal rape law subject to several amendments addressed reporting requirements. When the spousal rape law was passed in 1979, the language of P.C. § 262 provided: “no arrest or prosecution for spousal rape may be made unless the act is reported to a peace officer or district attorney within 30 days after the act occurred.”<sup>472</sup> The implementation of such a reporting requirement created a virtual thirty-day statute of limitations because crimes reported after that time would not be prosecutable, putting victims of this crime at a serious disadvantage. In contrast, the statute of limitations for non-spousal rape was six years. As will be discussed later in this chapter, spousal rape was the only sexually-based offense that had a reporting requirement. The 1997 spousal rape case of Antonio Trujillo Garcia illustrates the importance of eliminating the reporting requirement.

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and abortion. The comment proved so controversial and inflammatory that Akin withdrew from the senatorial race. See, John Eligon and Michael Schwartz, “Senate Candidate Provokes Ire with ‘Legitimate Rape’ Comment,” *New York Times* August 19, 2012; Charlotte Adler, “Todd Akin Still Doesn’t Get What’s Wrong with Saying ‘Legitimate Rape,’” *Time* July 17, 2014.

<sup>471</sup> Despite the elimination of the wobbler provision in the spousal rape statute, other crimes involving intimate partner violence remain classified as wobblers in California. For instance, California Penal code § 273.5 makes it illegal to injure a spouse, cohabitant or fellow parent in an act of domestic violence. While the opening language of the statute indicates that this action constitutes a felony, a prosecutor has the discretion to determine whether to charge the defendant with a misdemeanor or felony, weighing such factors as the defendant’s criminal history, the severity of the offense, and the circumstances or details of the case. Furthermore, the statute gives judges the discretion to waive the mandatory prison sentence for a felony conviction. California Penal Code § 273.5(3).

<sup>472</sup> Senate Committee on Judiciary overview of S.B. 635.

Garcia had been married to E.G., who in 1995 separated from her husband after fourteen years of marriage. At that time, the court had issued a domestic violence temporary restraining order (TRO) that required Garcia to stay at least fifty yards away from E.G. and to provide at least twenty-four hours' notice to arrange visitation with their two children. Garcia violated the order twice the day he received the TRO by going to E.G.'s house. Once law enforcement officers located him, Garcia agreed to comply with the order. However, he did not. He threatened E.G., saying that she would "pay" if she did not take him back. Thereafter, Garcia frequently violated the TRO.<sup>473</sup>

On at least three occasions, E.G. called the police to report instances in which Garcia had violated the restraining order. The first occurred when he approached her at church, but that attempt was thwarted when an eleven-year-old female witness called the police. In the second instance, Garcia chased E.G. through a wooded area as she was returning home from work, but she escaped. The third time, Garcia went to E.G.'s house, banged on the window to get in, and again warned her that she would be sorry if she did not take him back. In this instance, the police came to the residence, found Garcia hiding in a crawl space, and arrested him.<sup>474</sup>

Thirty-eight days after his arrest, Garcia intensified his efforts to harass E.G. and to make true his promise to make her pay. As E.G. walked home from work, passing the same wooded area in which Garcia had chased her, she was struck from behind:

Someone placed a hand over her mouth and then gagged her with a handkerchief. Her hands were bound behind her back and she was knocked to the ground. E.G. then saw defendant and another man, whom she did not recognize, standing over her. The two men pulled her pants down and pulled her blouse up. Defendant then fondled her breasts and raped her. He turned to the other man and said, 'Now fucker this is your turn.... I don't like this woman.' The other man then raped her.

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<sup>473</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> 1324, 1325 (2001).

<sup>474</sup> *Ibid.*

The men laughed and threatened to have a gang of ‘[C]holos’ rape her if she reported the assault to the police. The men fled; she freed herself and walked home.<sup>475</sup>

Scared, E.G. returned home. After showering and feeding her children, she attended an evening class at a nearby school. Garcia showed up outside the classroom and verbally harassed E.G. She called the police; when they arrived, she noted the TRO and asked that the officers arrest Garcia. She did not report the rape.<sup>476</sup> E.G. filed for divorce the following month, but this did not end Garcia’s harassment. He was arrested twice more for violating the TRO, once for striking her in the face when in the company of another man, J.O.

A year later, she married J.O. She then confided in him about the rape. Thereafter, she reported the rape to the police, fifteen months after the rape had occurred. When Garcia was interviewed by the police, he first denied having sexual contact with E.G. after their separation, but later revised his statement to say that they had had consensual sex one time – a time that coincided with the date E.G. said she was raped. At trial, Garcia admitted:

[T]hat he did not want the separation and that he had violated the restraining order several times. He also admitted pleading guilty to three counts of violating the restraining order and one count of assault against her. Defendant denied raping E.G. or threatening her in any way. He said they had engaged in one act of consensual sex soon after they had separated . . . He also explained other violations of the restraining order as inadvertent, as when he saw E.G. . . . at the school because he was watching his son play soccer. He insisted the girl who testified to the incident at the church was lying, as was E.G. He also denied striking her in the face even though he had admitted pleading guilty to the assault.<sup>477</sup>

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<sup>475</sup> *Ibid.*, 1326.

<sup>476</sup> At trial, E.G. testified that her omission was the result of fear and embarrassment.

<sup>477</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> at 1327.

The jury found Garcia guilty. Garcia later appealed his conviction based upon the reporting requirement in place at the time of his trial.

When deliberating the 1979 spousal rape law, the California legislature relied on historical justifications to support the thirty-day reporting requirement, noting precedent from at least three sources. Interestingly, the sources relied upon were from thirteenth, fifteenth, and eighteenth-century England. The first piece of evidence came from the reign of King Henry II (r. 1216-1272), during which time the law required “that the woman should immediately after [the rape] go to the next town, and there make discovery to some credible persons of the injury she has suffered; and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage.”<sup>478</sup> According to Sir William Blackstone, eighteenth-century English jurist, the purpose of this requirement was to prevent malicious accusations.<sup>479</sup>

The second form of evidence dated from the rule of Edward IV (r. 1461-1470). During that period “a statute was adopted by Parliament requiring the rape to be reported within 40 days, and if the victim failed to report it within that period, the crime would be treated as a simple trespass,” reflecting the historical “woman as man’s property” viewpoint.<sup>480</sup> The third precedent came from the time of Blackstone. In 1769, there was no codified reporting limitation; however, Blackstone noted: “the jury will rarely give credit to a stale complaint,” suggesting that to be taken seriously, a victim’s report should be made sooner rather than later.<sup>481</sup> What is interesting about each of these examples is

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<sup>478</sup> *Ibid.*

<sup>479</sup> Blackstone is notable for his *Commentaries on the Laws of England*, published between 1765 and 1769. The content of those commentaries were highly influential to future laws in England and her territories, including the area that would become the United States.

<sup>480</sup> Senate Committee on Judiciary overview of S.B. 635.

<sup>481</sup> *Ibid.*

that during the five centuries they represent, rape in marriage was not a legal possibility. Thus, the references must have applied to instances of non-spousal rape. As such, when the California legislators chose to rely on the English examples, they made the conscious decision to apply them to a crime that did not exist when the precedent was established. In time, California legislators would acknowledge that each of these justifications was as outdated as those for irrevocable consent or the spousal rape exemption remaining in common law.

When California passed P.C. § 262 in 1979, American jurisdictions had started to question the reasonableness of the theory of irrevocable consent in marriage. In an attempt to bolster the confidence of jury members in spousal rape cases, California legislators conceived a modern justification for a reporting requirement for that crime. As approved by the legislature, the spousal rape law “added the 30-day reporting requirement to increase the probability that the reported act of spousal abuse actually occurred, and that the report was not merely an attempt by one spouse to injure another during a marital or post-marital conflict.”<sup>482</sup> On the surface, the requirement might appear to address a legitimate state concern – that is, the prevention of alleged victims filing fraudulent reports. However, upon closer review, the requirement effectively singled out as untrustworthy married women, promoting the image of vengeful, mercenary wives in search of better divorce settlements.<sup>483</sup> A statement made by an Oregon District Attorney

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<sup>482</sup> Senate Committee on Judiciary Report.

<sup>483</sup> In a letter from Jodie Berger, Coordinator of the Women’s History Research Center, to Senator McCorquodale dated April 23, 1983, Berger suggests that another fear that led to the reporting requirement was that women would claim rape by their husbands to support their request that Medicaid pay for abortions. Here she was referring to abortions that would have been illegal under the Hyde Amendment passed in 1976, a law passed by pro-life legislators in an attempt to limit the authority of *Roe v. Wade* (1973). The Hyde Amendment severely limited situations under which federal money could be used to fund abortions. The version of the law in force from 1981 through 1993 prohibited the use of federal funds for abortions except where carrying a fetus to term would endanger the life of the mother. In 1993, the “life of

asked about California's reporting requirement supported this proposition. Peter Sandrock concluded: "California added the 30-day reporting requirements less out of a concern for the problems of prosecution than out of the fear that unless some restrictions were enacted, vindictive women would use the charge as a weapon against their husbands."<sup>484</sup> At the time, legislators did not acknowledge the flaw in such reasoning. Any criminalization of an act might lead to false reporting; however, this of course is not a reason not to criminalize wrongdoing.

Activists saw the reporting requirement as an unrealistic barrier to the legitimate prosecution of spousal rape. They cited examples of cases where law enforcement could verify allegations of spousal rape; however, prosecutors could not pursue charges against perpetrators because the reporting time had passed.<sup>485</sup> In 1983, California State Senator Daniel McCorquodale addressed this concern when he introduced S.B. 635, the stated purpose of which was to "repeal the 30-day reporting requirement, and make an act of spousal rape (as with other sex crimes) prosecutable any time within six years after its commission . . . and to increase the number of prosecutions of spousal rape."<sup>486</sup> Support for the bill was plentiful and proponents championed their cause with three general arguments, while limited opposition relied on a single claim.

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the mother" exception was amended to also cover abortions where the pregnancy was the result of rape or incest. See, Pub. L. No. 94-439, §. 209, 90 Stat. 1418, 1434 (1976); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No.101-166, § 204, 103 STAT. 1177 (1989); Pub. L. No. 103-112, § 509, 107 STAT. 113 (1993).

<sup>484</sup> Letter to Kathy Wilcox of Senator McCorquodale's office from Peter F. Sandrock, Jr., District Attorney for Benton County, Oregon, dated May 9, 1983.

<sup>485</sup> Assembly Committee on Criminal Law and Public Safety overview of S.B. 635.

<sup>486</sup> Senate Committee on Judiciary Report. While the original intent of the bill was to eliminate the reporting requirement, that would not be the effect of the bill that was passed by the legislature and signed into law by then Governor George Deukmejian.

Supporters argued that the thirty-day reporting requirement stymied the original intent of the spousal rape law. The California Attorney General's Office (AGO) justified the elimination of the reporting requirement. That office explained that in passing P.C. § 262, the state legislature acknowledged that spousal rape can and does occur, and the legislative body had criminalized that conduct. Speaking directly to the reporting requirement, the AGO maintained that:

Having formally acknowledged and defined the crime of spousal rape, there is no justification for setting up different standards for arrest and prosecution; the 30-day requirement makes the crime seem needlessly suspect. SB 635 will put spousal rape on a footing with all forms of sexual assault.<sup>487</sup>

The judges of the Santa Clara County Municipal Court supported this sentiment.

Presiding Judge Nancy Hoffman explained that to impose a short reporting time for spousal rape is unreasonable when it did not exist for any other penal code violation. She went on to say the thirty-day reporting requirement “unfairly bars prosecutors from introducing evidence of attacks that fall outside the reporting period.”<sup>488</sup> Nine judges from that court contended that the “present 30-day reporting requirement is impractical and frustrates the effective implementation if [*sic*] the spousal rape law.”<sup>489</sup> In support of their assertion, the judges provided an example of an offender who had rendered his victim unconscious for a period greater than a month following an instance of spousal rape. Such a perpetrator would not be subject to prosecution under P.C. § 262.

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<sup>487</sup> Letter sent to Senator McCorquodale from Allen Sumner, Senior Assistant Attorney General, dated April 26, 1983. See also, “1983 Legislative Wrap-Up” in the *National Action Against Rape Newsletter*, which noted: “Passage of a law eliminating the marital rape reporting requirement is necessary to make the spousal rape law . . . effective.”

<sup>488</sup> Letter to Assemblyman John Vasconcellos, chair of the Assembly Ways & Means Committee, from Nancy Hoffman, presiding judge of the Santa Clara Municipal Court, dated August 15, 1983.

<sup>489</sup> Letter to Senator McCorquodale from the judges of the Municipal Court in Santa Clara County, dated May 27, 1983.

The Women's History Research Center also argued for the elimination of the reporting limit. The Center provided two examples where the thirty-day reporting requirement effectively barred prosecution for cases of spousal rape. The first example involved a victim who had suffered physical harm beyond rape by her husband. She "was in a coma for 1 month and was aphasiac afterwards, [and] also suffered permanent brain damage as a result of the sexual assault by her husband."<sup>490</sup> The second example involved a victim held hostage at gunpoint in her own home by her husband. The rapes she endured occurred continually over a long period. Her husband had previous convictions for child abuse and assault and sexually and physically assaulted his previous two wives. The court did convict the man; however, the charges against him involved at least ten fewer counts of spousal rape because the earlier instances occurred more than thirty days before the wife was able to inform law enforcement.<sup>491</sup> Such a result could not have been the intention of the California legislature when it passed the spousal rape bill in 1979.

Other supporters used an equal protection argument by placing spousal rape within the context of other sexual offenses. Senator McCorquodale began the discussion for this claim. In a statement given on April 26, 1983, McCorquodale explained the discrepancy between the prosecution of spousal rape and other legally recognized forms of sexual assault. He noted that it was not uncommon for a woman to endure several instances of spousal rape before she finally reported the crime, primarily because she feared reprisal that was more brutal from her abuser. When she did report the crime, she

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<sup>490</sup> Letter from Jodie Berger, Coordinator of the National Clearinghouse on Marital and Date Rape, to Senator McCorquodale dated April 21, 1983. The NCMD forwarded the letter to eight other California senators. The National Clearinghouse on Marital and Date Rape was a project developed and maintained by the Women's History Research Center. While the story presented by the Women's History Research Center is very similar to the Dianna Green case that opened this chapter, the Center did not identify the victim by name. Thus, this author cannot confirm that the individual mentioned by the Center was Dianna Green.

<sup>491</sup> *Ibid.*

found that earlier instances might not be prosecutable despite their legitimacy because of the reporting provision. In contrast, McCorquodale asserted: “No distinctions based upon marital relationships are made in any sexual assault other than rape. Therefore if the assaults include object rape, sodomy or oral copulation, prosecutions could be initiated upon the underlying incidents.”<sup>492</sup> In fact, the criminal laws related to those alternate actions “punish any non-consensual act, whether or not committed by the spouse of the victim, and contain no special reporting requirements for spouses.”<sup>493</sup> A press release issued by Senator McCorquodale’s office asserted: “This inconsistency in the law results in a dangerous lack of equal protection for victims of spousal rape.”<sup>494</sup> Once again, then, here was official recognition that California’s spousal rape statute treated victims married to their rapists differently than women who were sexually assaulted by a non-spouse.

As Lisa Di Silva, the coordinator of South County Rape Crisis Services, noted, American society has perpetuated several myths about sexual assault, including the widespread notion that a husband cannot rape his wife. Di Silva recognized California as one of the small minority of states who had by 1983 recognized rape in marriage as a crime. Nevertheless, she criticized the state for maintaining special conditions for the crime that did not exist for other sexual assaults. Di Silva argued: “By mandating a 30 day reporting requirement, the law is making exceptions in the case of spousal rape,”

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<sup>492</sup> McCorquodale statement on S.B. 635 given April 26, 1983.

<sup>493</sup> Senate Committee on Judiciary overview of S.B. 635. Notably, prior to 1975, California law prohibited all sodomy and oral copulation, regardless of the connection between the participants. When amended in 1975, the law legalized these acts between consenting adults, whether married or not. Thus, unlike rape, the laws regarding sodomy and oral copulation never made distinctions based on the marital status of those involved.

<sup>494</sup> Kathy Wilcox of Senator McCorquodale’s office issued press release regarding the bill April 27, 1983 that included this statement.

where there should be none. “Spousal rape, like other sexual assaults, is a violent crime, and needs to be recognized as such,” she concluded.<sup>495</sup>

The California Alliance Against Domestic Violence (CAADV), a statewide organization that represented over eighty domestic violence programs across California, offered support for the bill by highlighting the reasons that victims of spousal rape do not immediately report such violations. Speaking for CAADV, Janet Carter explained that the majority of women who seek assistance from domestic violence programs “do not seek legal protection from the physical abuse the first time it happens. It is only when they feel they have no other option available in order to protect themselves from further violence that they turn to the legal system.”<sup>496</sup> Carter went on to support the elimination of the reporting requirement, explaining that it would allow prosecutors in spousal rape trials to admit as evidence a history of repeated sexual violence. In doing so, Carter concluded that S.B. 635 “would be another step towards ensuring that our legal system protects everyone from violent crime, whether it occurs out on the street, or within the home.”<sup>497</sup>

California Women Lawyers provided additional support for the elimination of the reporting requirement, explaining that many victims do not report spousal rape promptly because they fear for themselves and/or their families. While the members of California Women Lawyers recognized that the “chances of a successful prosecution diminishes where there is a delay in reporting of the offense,” they acknowledged that the absence of the reporting requirement would not make prosecuting spousal rape unreasonably

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<sup>495</sup> Letter to the members of the Senate Judiciary Committee from Lisa Di Silva, Coordinator of Rape Crisis Services, dated April 20, 1983.

<sup>496</sup> Letter sent to Governor Deukmjian from Janet Carter, dated September 12, 1983.

<sup>497</sup> *Ibid.*

difficult. As with any other offense being investigated, prosecutors would have the opportunity to evaluate a case of spousal rape to determine whether there was sufficient evidence to move the case forward for trial.<sup>498</sup>

Opposition to S.B. 635 came from the Office of the State Public Defender and California Attorneys for Criminal Justice. Both groups argued that the reporting requirement provided “vital protection against groundless and vindictive charges . . . [brought in] retaliation for a marital dispute or to gain some leverage in a divorce or child custody case.”<sup>499</sup> Robert Scarlett, Deputy State Public Defender, maintained that the “area of spousal rape is one fraught with the possibility of false accusations and difficult credibility determinations,” making a reporting requirement necessary to protect the rights of the accused from such abuses.<sup>500</sup> The California Attorneys for Criminal Justice stated opposition to S.B. 635 followed similar reasoning.<sup>501</sup> What neither group seemed to acknowledge was that regardless of a reporting requirement, prosecutors still had the discretion to determine when there was sufficient evidence to bring a case to trial and when not to pursue a charge for lack of evidence.

Supporters of S.B. 635 were quick to rebut any opposition to the bill. The Los Angeles County District Attorney’s Office explained that the original reason for including a reporting requirement as part of the spousal rape law – the prevention of abuse of the criminal justice system by vindictive spouses – had “been discredited and the

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<sup>498</sup> Undated letter sent to Senator McCorquodale from Adriana Burger, legislative committee of California Women Lawyers; Letter sent to Governor Deukmejian from Adriana Burger, dated September 16, 1983.

<sup>499</sup> Assembly Committee on Criminal Law and Public Safety memo in preparation for a June 7, 1983 hearing.

<sup>500</sup> Letter sent to Senator McCorquodale from Robert Scarlett, Deputy State Public Defender, dated April 22, 1983.

<sup>501</sup> Letter sent to Senator McCorquodale from Michael Pinkerton, Legislative Advocate for California Attorneys for Criminal Justice, dated April 22, 1983; Second letter sent to Senator McCorquodale from Michael Pinkerton, dated June 16, 1983.

continuation of the what effectively constitutes a thirty-day statute of limitations flies in the face of reality.”<sup>502</sup> The statistics available in 1983 supported the position that wives were not exploiting P.C. § 262 to falsely accuse their husbands of rape. Of the fifty-two statewide arrests for spousal rape since the spousal rape law went into effect in January 1980, very few ended without going to trial. The conviction rate for those cases that went to trial was 75.5%, “a figure significantly higher than that of non-marital rape cases, believed to be 2% nationwide.”<sup>503</sup> Such numbers stand in stark contrast to those who feared that the passage of a spousal rape law would open the floodgates to false charges leveled by unhappy, bitter wives who sought revenge on their unwitting husbands.

The version of S.B. 635 that ultimately came before the Senate and Assembly for a vote was different than the one originally introduced by Senator McCorquodale. The first draft of the bill called for the complete elimination of the thirty-day reporting requirement. At one point in the process, a one-year reporting requirement was proposed; however, by July an amendment to the bill reduced the timing to ninety days.<sup>504</sup>

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<sup>502</sup> Letter sent to Senator McCorquodale from Robert Philibosian, Los Angeles County District Attorney, dated April 20, 1983.

<sup>503</sup> Letter to Senator McCorquodale from the judges of the Municipal Court in Santa Clara County, dated May 27, 1983; Letter from Jodie Berger to Senator McCorquodale dated April 21, 1983. While the 2% conviction rate may appear questionably low, it does track with data found on the websites for Rape Abuse & Incest National Network (RAINN) and the Bureau of Justice Statistics (BJS). While the two sites do not provide a perfect parallel, the data present relevant information that sheds light on rape statistics. RAINN describes why only two of every one hundred rapists will serve time in prison. According to their website, RAINN notes that for every one hundred rapes committed, victims only report thirty-two to the police. Of those, only seven result in an arrest. The police refer three of those cases to prosecutors, who are successful with felony convictions in two cases that result in prison time. The other ninety-eight face no consequences for their actions. <https://rainn.org/get-information/statistics/reporting-rates>. BJS offers a comparison of conviction rates for Part I, or Index offenses, in the United States and Great Britain between 1981 and 1996. Part I offenses include criminal homicide, rape, robbery, aggravated assault, burglary, motor vehicle theft, larceny-theft, and arson. All of these crimes were included in the BJS comparison except for larceny-theft and arson. <http://www.bjs.gov/content/pub/html/cjusew96/cpp.cfm>.

<sup>504</sup> Legislative Analysis of Senate Bill No. 635, August 18, 1983.

California legislators approved this version of the bill and Governor George Deukmejian signed it into law on September 28, 1983.

It would be ten years before the legislature further amended the reporting requirement of the spousal rape law. As noted earlier in the chapter, Assemblywoman Hilda Solis introduced Assembly Bill 187 in 1993 with the goal of abolishing the distinction between spousal rape and rape to the greatest extent possible. In relation to the reporting requirement, the proposed amendment, in its final form, would replace the ninety-day reporting requirement with an obligation to report within one year of the violation. However, the one-year requirement would not apply if evidence other than the victim's allegations would be admissible at trial. The statute of limitations for prosecution in such cases would remain at three years. Additionally, A.B. 187 would allow a victim to report the incident of spousal rape to a much wider pool of individuals than police officers and district attorneys.<sup>505</sup>

The primary debate surrounding the proposed change revived concern about groundless and vindictive charges levied by bitter and spiteful women against constitutional claims that the reporting requirement denied equal protection to victims of spousal rape. When considering the need for a reporting requirement, proponents argued that the six-year statute of limitations for non-spousal rape provides time for the identification of an unknown assailant. However, in spousal rape, the victim knows the perpetrator. Applying the longer statute of limitations to spousal rape could allow one spouse – all examples pointed to a wife – to use a threat of a rape charge sometime after

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<sup>505</sup> Senate Committee on Judiciary Report; Enrolled Bill Report, Department of Corrections, September 13, 1993.

the marriage has soured as advantage in a divorce settlement or a child custody case. In response to this argument, Los Angeles County District Attorney, Gil Garcetti, countered:

Of particular importance [with A.B. 187] is the elimination of the 90-day reporting requirement. Any such reporting requirement is offensive, serves only to single out spousal rape victims as less trustworthy than all other persons, and denies them equal protection of the laws. Moreover, because of the dynamics involved in domestic violence relationships, it is less likely that a rape victim will immediately report a spouse than a stranger to the police or the district attorney's office. Notwithstanding the fact that many spousal rape victims may seek medical treatment and/or therapy, or confide in friends rather than the police, a reporting requirement would bar subsequent charges without regard to the strengths or weaknesses of a case. . . . A reporting requirement simply codifies existing prejudices against victims of domestic abuse.<sup>506</sup>

While there was nothing particularly new in Garcetti's argument, as the district attorney for the most highly populated county and largest metropolitan region in California, his public endorsement of A.B. 187 carried a great amount of weight. Garcetti ended his statement by explaining that the language of A.B. 187 used the same language as the penal code provisions for other forms of sexual offenses. As such, the change to the spousal rape law would provide the protection due to all individuals, whether married or not, and would bring an end to prejudice against rape victims who are married to their rapists.<sup>507</sup>

Congresswoman Lucille Roybal-Allard provided her support for A.B. 187.<sup>508</sup> As viewed by Roybal-Allard, a serious question remained as to whether the spousal rape law

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<sup>506</sup> Letter to Assemblyman Bob Epple, Chair of the Public Safety Committee from Gil Garcetti, dated March 24, 1993.

<sup>507</sup> *Ibid.*

<sup>508</sup> In many ways, A.B. 187 paralleled a bill introduced by Assemblywoman Lucille Roybal-Allard in 1992. The governor signed the bill, A.B. 2220, but it never became operative because it was tied to a Senate bill the governor vetoed. There were two basic differences between these bills. First, A.B. 2220 "would have included the spousal rape of a person incapable of giving legal consent, because of a mental disorder or developmental or physical disability, as specified under circumstances of spousal rape." A.B. 187 did not have such a provision because legislators agreed that the general rape law already addressed this form of sexual assault, regardless of the relationship between victim and abuser. The second difference had to do with the timeframe in which a victim was able to report a crime. A.B. 2220 "would have made

could withstand constitutional scrutiny given that it continued to provide unequal protection for spousal rape victims. While the penalties were equivalent for spousal rape and non-spousal rape, Roybal-Allard noted the continuing significant difference in the statute of limitations for the two crimes:

The question raised in this connection is whether criminal statutes that deny victims of spousal rape important protections in the prosecution of a violent crime solely on the basis of gender and marital status would be constructed to be a denial of Equal Protection under the United States and California Constitutions. I respectfully submit that there is no rational basis or compelling state interest that would support that disparate treatment.<sup>509</sup>

Roybal-Allard also addressed the argument of frivolous lawsuits filed by mercenary women out to get their husbands. She argued that such claims were completely unfounded, suggesting: “that 93% of the spousal rape charges filed between 1980 and 1985 resulted in convictions,” a percentage that refutes the claim of unfounded law suits being filed under P.C. § 262. She concluded by positing: “To maintain requirements/distinctions that are unsupported with facts is to send a message that in California, spousal rape is seen as a lesser offense than non-spousal rape.”<sup>510</sup> Such a

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the statute of limitations for reporting spousal rape the same as non-spousal rape – six years.” In contrast, A.B. 187 provided a one-year reporting requirement that dated from the time of the alleged violation. Bill Analysis for A.B. 187 issued by the Office of Criminal Justice Planning.

<sup>509</sup> Letter to Assemblyman Bob Epple, Chairman of the Assembly Public Safety Committee, from Congresswoman Lucille Roybal-Allard, dated April 9, 1993. In her letter, Roybal-Allard refers to studies that documented a finding that spousal rape was often a manifest of the larger societal problem of domestic violence. See, Finklehor and Yllo, *License to Rape*; Diana Russell, *Rape in Marriage*; and Lenore E. Walker, *The Battered Woman*.

<sup>510</sup> *Ibid.* The Coalition for Family Equity, which represented twenty-eight different organizations across California, supported Roybal-Allard’s constitutional argument, noting: “the elimination of the 90-day reporting requirement is vital to this legislation, since limiting the reporting time denies them equal protection under the law.” Letter to Assemblyman Bob Epple, Chair of the Public Safety Committee, from Marilyn Kizziah, Chair of Coalition for Family Equity, dated March 30, 1993.

message, she asserted, would be bad for California's reputation in that twenty states had already eliminated the distinction between spousal rape and non-spousal rape.<sup>511</sup>

Assemblywoman Solis looked to Oregon for confirmation that elimination of the reporting requirement would not result in a flood of unsubstantiated cases. In 1977, Oregon's legislature eliminated the language of the state's rape statute that defined a rape victim as a "female person not married to the actor," resulting in a rape law that was "silent about the woman's relationship to the defendant" accused of raping her."<sup>512</sup> According to Peter Sandrock, Jr., District Attorney for Benton County, Oregon, Oregon learned three lessons following the 1977 amendment. First, spousal rape victims rarely report their husbands to authorities. "Benton County (pop. 70,000) has had fewer than six cases since 1977, an experience mirrored by other jurisdictions."<sup>513</sup> Second, those cases of spousal rape that women reported to authorities usually were extremely violent in nature, far more violent than most non-spousal rapes. Third, there was no evidence to suggest that women had abused the law. As Sandrock explained, it was "the seriousness of the reported cases, not the number, that justifies Oregon's Law."<sup>514</sup>

Evidence like that provided by Sandrock alleviated some unease held by members of the legislature, but did not eliminate it entirely. Passage of A.B. 187 resulted in three changes to the reporting requirement of P.C. § 262. The new law extended the reporting

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<sup>511</sup> Roybal-Allard sent Assemblywoman Hilda Solis a copy of the letter that she sent to Assemblyman Bob Epple. Notably, Solis would use much of the language of that letter when she addressed then Governor Pete Wilson, encouraging him to sign A.B. 187 into law.

<sup>512</sup> Letter to Assemblyman Richard Rainey, member of the Assembly Public Safety Committee, from Benton County, Oregon District Attorney Peter F. Sandrock, Jr., dated February 22, 1993. In the letter, Sandrock explained to Rainey that Assemblywoman Hilda Solis had asked him to comment on Oregon's experience with spousal rape prosecution. Sandrock sent copies of the letter to Assemblywoman Solis and the other members of the Assembly Public Safety Committee.

<sup>513</sup> *Ibid.*

<sup>514</sup> *Ibid.*

restriction to one year after the date of the violation instead of ninety days; however, the one-year requirement would not apply if evidence other than the victim's allegations would be admissible at trial. The statute of limitation for prosecution in such cases would remain at 3 years. Additionally, the statute drastically expanded the pool of whom a victim could contact to report the violation. No longer was reporting limited to a police officer or district attorney.<sup>515</sup>

In 2001, the California Court of Appeals for the Sixth District addressed a challenge to the provision of P.C. § 262 regarding corroborating evidence. In that appeal, the aforementioned Antonio Trujillo Garcia appealed his conviction for spousal rape, claiming that the trial court unfairly allowed corroborating evidence used to waive the reporting requirement in the case against him. The Court of Appeals disagreed and upheld his conviction. Garcia's case influenced the final amendment to P.C. § 262 in 2006.<sup>516</sup>

Garcia's appeal raised several challenges to the validity of his conviction for spousal rape; however, his challenges boiled down to the argument that E.G.'s allegation of the rape was not corroborated by independent evidence as required under P.C. § 262; and therefore, the State should not have pursued a prosecution due to the late reporting of the rape. Specifically, Garcia asserted that the trial court should have granted his motion to dismiss the charge against him due to insufficient corroborating evidence; the judge should have instructed the jury "to determine whether sufficient corroborating evidence

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<sup>515</sup> Under the amended law, the victim could report the incident to any of the following: medical personnel, a clergy member, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting attorney, a law enforcement officer, a firefighter.

<sup>516</sup> *People v. Garcia*, 89 Cal.App.4th at 1327 (2001). In an attempt to protect the identity of Garcia's wife/victim, the Court referred to her as E.G. For the same reason, the Court also referred to the man she married after her divorce from Garcia by his initials.

brought the prosecution within the statute of limitations”); and the evidence of his violations of the TRO were irrelevant and prejudicial, and therefore should not have been admissible at trial.<sup>517</sup>

On appeal, the Court reviewed the procedural actions of the trial court, specifically the decision to allow the introduction of evidence that would corroborate E.G.’s accusations. During pretrial motions, Garcia (through his attorney) moved to dismiss the charge of spousal rape on the grounds that E.G. had not reported the offense within a year of its occurrence. The prosecutor stipulated that the one-year reporting requirement had not been observed, but maintained that the reporting requirement did not apply since corroborating evidence was available to support the victim’s assertions.<sup>518</sup> In support of this assertion, the prosecutor noted Garcia’s repeated violations of the TRO and the statements he gave to police officers. The presiding judge found the evidence highly relevant and admissible, thereby denying the motion to dismiss. At the conclusion of the trial, Garcia renewed his motion to dismiss, but once again, the court denied his motion.

Garcia’s primary argument on appeal was that “the trial court erred in denying his motion to dismiss the charge of spousal rape based on the lack of corroborating evidence. He insists the evidence put forth by the prosecutor did not meet appropriate standards for corroborating evidence,” and therefore warranted a dismissal of the charge. Both parties to the appeal acknowledged that no case law existed that spoke directly to the issue of corroborating evidence in a spousal rape case; hence, the Court of Appeals had to

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<sup>517</sup> *Ibid.*, 1327-28.

<sup>518</sup> A stipulation is a voluntary agreement between opposing parties concerning a relevant point. In this case, the prosecutor was agreeing with the defense attorney that the victim did not report the rape until after the one-year statute of limitations had expired.

evaluate the situation in light of arguments that were indirectly or tangentially related to corroborating evidence in spousal rape cases. The Court of Appeals began its discussion with a review of *People v. Williams*, a 1997 case that involved corroborating testimony provided by an accomplice.<sup>519</sup> In that case, the California Supreme Court noted that evidence given by an accomplice need not corroborate every fact, but is:

‘sufficient if it does not require interpretation . . . [and] tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.’ . . . Moreover, evidence of corroboration is sufficient if it connects defendant with the crime, although such evidence ‘is slight and entitled, when standing by itself, to but little consideration.’<sup>520</sup>

The Court continued, stating: “[U]nless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably tend to connect a defendant with the commission of a crime,” the decision by the court or jury regarding the admission of corroborating evidence will not be overturned on appeal.<sup>521</sup>

The Court next addressed the type of evidence that a prosecutor could introduce as corroborating evidence. Garcia argued that only “physical evidence, witness statements, or the defendant’s statements made near the time of the crime” were appropriate to corroborate, and that such evidence was not present in his case.<sup>522</sup> The Court dismissed this argument because the cases Garcia relied upon did not address spousal rape – nor in fact, did they concern evidence in cases of domestic violence. Additionally, the Court

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<sup>519</sup> *People v. Williams*, 16 Cal. 4<sup>th</sup> 635 (1997).

<sup>520</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> at 1329.

<sup>521</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> at 1329-30, citing *People v. Szeto*, 29 Cal.3d 20, 27 (1981).

<sup>522</sup> To support this position, Garcia relied upon *People v. Navarro*, 126 Cal.App.3d 785 (1981); *People v. Adams*, 186 Cal.App.3d 75 (1986); *People v. Hollis*, 235 Cal.App.3d 1521 (1991); and *People v. Pena*, 7 Cal.App.4<sup>th</sup> 1294 (1992).

explained that the cases forwarded by Garcia involved situations where corroborating evidence was necessary to uphold a conviction, rather than “corroboration required for a prosecution to proceed,” which was the basis of Garcia’s appeal.<sup>523</sup>

The People’s arguments, with which the Court agreed, reasoned that the evidence introduced at trial was appropriate to corroborate E.G.’s claim of spousal rape, supporting the trial court’s decision not to grant Garcia’s motion to dismiss.<sup>524</sup> The People argued that cases brought under P.C. § 262 allowed evidence of other acts of sexual misconduct to be introduced as independent corroborating evidence.<sup>525</sup> Acknowledging that spousal rape was a form of domestic violence, the People further argued that prosecutors could introduce evidence of a defendant’s earlier instances of domestic violence to prove a disposition to commit such acts.<sup>526</sup> The People presented Garcia’s violations of the TRO as evidence of this disposition. The Court concurred that recent case law supported the People’s argument. In *People v. Yovanov*, the Court held: “when a defendant is charged with a sexual offense, evidence of his or her uncharged sexual misconduct is no longer subject to the general prohibition against character evidence.” Rather, when the Legislature enacted section 1108 of the Evidence Code, it “declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the

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<sup>523</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> at 1330.

<sup>524</sup> In its decision, the Court of Appeals refers to the State of California, the respondent on appeal, as the People. As such, the author will maintain this usage in further discussion of the case.

<sup>525</sup> Here, the People relied upon *People v. Yovanov*, 69 Cal.App.4<sup>th</sup> 392 (1999).

<sup>526</sup> The People argued that this position was supported with California Rules of Evidence § 803(g)(2)(B) and § 1109.

credibility of the witness.”<sup>527</sup> The California Supreme Court upheld the constitutionality of Evidence Code § 1108 in *People v. Falsetta*, in which it explained:

By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant’s possible disposition to commit sex crimes.<sup>528</sup>

The Court further reasoned that Garcia’s record of repeated violations of the TRO and admitted assault was admissible under Evidence Code § 1109, which “permits the introduction of evidence of the commission of prior acts of domestic violence in a criminal action charging the defendant with an offense involving domestic violence.”<sup>529</sup> Based upon the reasoning established in *Yovanov*, *Falsetta*, and *Brown*, the Court concluded that the trial court acted appropriately in using Garcia’s prior acts of domestic violence to corroborate E.G.’s allegations. Finding no error in the trial court’s actions, the Court affirmed Garcia’s conviction.

The Court’s decision in *Garcia* would stand as the State’s view on the reporting requirement until 2006 when Senator Sheila Kuehl introduced S.B. 1402, which sought to eliminate the reporting requirement of the spousal rape statute.<sup>530</sup> Kuehl presented the bill as a way to “ensure that all victims of rape are afforded equal protection under the law by eliminating an additional reporting requirement that only applies to marital rape.”<sup>531</sup> In

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<sup>527</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> at 1331, citing *People v. Yovanov*, which referred to *People v. Soto*, 64 Cal.App.4<sup>th</sup> 966 (1998).

<sup>528</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> at 1332, citing *People v. Falsetta*, 21 Cal. 4<sup>th</sup> 903 (1999). Such a legal position would have likely brought a very different result to the South Carolina case against Dale Crawford discussed at length in chapter 4.

<sup>529</sup> *People v. Garcia*, 89 Cal.App.4<sup>th</sup> at 1332, citing *People v. Brown*, 70 Cal.App.4<sup>th</sup> 1129 (2000).

<sup>530</sup> Senate Committee on Public Safety Overview of S.B. 1402 for the hearing scheduled for April 4, 2006.

<sup>531</sup> Letter to the members of the Senate Public Safety Committee from Barry Broad, representative of the California Public Defenders Association, dated March 23, 2006.

addressing this issue, the legislature had to evaluate a few key questions, among which was whether there was objective policy rationale for retaining a reporting requirement in the spousal rape statute which is not required for non-spousal rape. A second question was whether the reporting requirement imposed a practical obstacle to marital rape prosecutions, and if it did not, was it nevertheless a vestige of a legislative compromise nearly thirty years old which no longer is relevant or necessary.<sup>532</sup> Proponents of S.B. 1402 answered these questions: No, there was no objective policy reason to maintain the reporting requirement solely for spousal rape; yes, the reporting requirement served as a hindrance to spousal rape prosecutions; and yes, the reporting requirement embodied a compromise nearly three decades old that was archaic and no longer relevant.<sup>533</sup>

Support for S.B. 1402 was plentiful and strategically coordinated among interest groups across California. Letters poured in to Senator Kuehl, other members of the Senate and Assembly, and Governor Schwarzenegger; however, the verbiage of that correspondence often conformed to prescribed language.<sup>534</sup> The arguments presented fell into two broad categories: refutation of the spurned-wife-will-file-a-false-claim fear and a constitutional argument, neither a novel line of debate.

Proponents of S.B. 1402 reiterated arguments raised in support of A.B. 187 in 1993. Nancy Lemon, a lecturer at Boalt Hall School of Law and a lobbyist for marital rape reform explained that the “one-year reporting period effectively shortens the

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<sup>532</sup> Senate Committee on Public Safety Overview of S.B. 1402 for the hearing scheduled for April 4, 2006.

<sup>533</sup> Letter to Senator Kuehl from Mary Wiberg and Beth McGovern, executive council members of the State of California Commission on the Status of Women, dated March 24, 2006. A similar letter was sent as a Senate Floor Alert to all members of the California Senate on May 17, 2006.

<sup>534</sup> In some cases, the same form letter was sent to legislative officials or the governor on letterhead from fifteen or sixteen different organizations.

limitation period for bringing spousal rape prosecutions.”<sup>535</sup> She went on to say that while great efforts had been made to remove most distinctions between P.C. § 261 and § 262, the reporting requirement remained a glaring distinction. While both statutes operate with a six-year statute of limitations, “the reporting requirement under section 262 effectively diminishes that parameter to one year for spousal rape.” As she explained: “Besides misconceiving the nature of marital rape, the reporting provision of section 262, in Lemon’s view, serves as a legislative reflection of the myth that ‘vengeful wives will lie’ and that husbands, therefore, need protection.”<sup>536</sup> Lemon found both the disparity and the implication troubling, as did many others who supported S.B. 1402, and by extension the rights of spousal rape victims.

Proponents relied on constitutional arguments found in the language of *People v. Garcia*, where the court in *dicta* pronounced that the reporting provision in Section 262 ought to be repealed: “The Attorney General points out that California is one of the few states to impose such a reporting requirement and that several states recently have repealed similar statutory reporting requirements. The Attorney General also notes that other states have found any distinction between marital and nonmarital rape to be unconstitutional.”<sup>537</sup> The Court’s statement recommended that the time had come for California to eliminate the reporting requirement. The California Partnership to End Domestic Violence advanced this argument, explaining: “California is one of the few remaining states to impose a reporting requirement for spousal rape. The states of

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<sup>535</sup> Kuehl, Senate Committee on Public Safety Report for use in a hearing scheduled for March 29, 2006, in which she quotes from Lisa R. Eskow, “The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution,” *Stanford Law Review* 48, no. 3 (1996), 677-709.

<sup>536</sup> *Ibid.*

<sup>537</sup> Senate Committee on Public Safety Overview of S.B. 1402. Dictum is a statement of opinion considered authoritative, although not legally binding, because of the authority and dignity of the person who pronounced it. In this case, the authority belonged to the California Court of Appeals.

Pennsylvania and South Dakota recently repealed similar statutes. Courts in other states have found any distinction between marital and nonmarital rape to be unconstitutional.”<sup>538</sup> The constitutional arguments used by those states argued that any statute that treated victims of spousal rape differently than those of non-spousal rape denied spousal rape victims equal protection under the Fourteenth Amendment.<sup>539</sup>

Opposition for S.B. 1402 came from three primary sources: the California Public Defenders Association, California Attorneys for Criminal Justice, and California Alliance for Families and Children. While each addressed their opposition in distinct ways, they all focused on the continuing fear that innocent, unwitting men would find themselves charged falsely by unstable, greedy, vindictive wives. The California Public Defenders Association (CPDA) suggested a connection between increased divorce rates and women filing false claims of spousal rape:

Given the increase in the divorce rate and the resulting decrease in the standard of living for most women and their children, the specter of a woman threatening or falsely accusing her former spouse of rape is an unfortunate reality. The current law carefully and thoughtfully provides a system of checks and balances that protects both parties.<sup>540</sup>

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<sup>538</sup> Letter to Senator Carole Migden, Chair of the Senate Public Safety Committee, from Marivic Mabanag, Executive Director of California Partnership to End Domestic Violence, dated March 30, 2006.

<sup>539</sup> See footnote 362, *supra*, for articles addressing the arguments that used equal protection claims. According to the Senate Rules Committee, Third Reading of S.B. 1402, additional support for the bill came from California Coalition Against Sexual Assault; American Association of University Women; California District Attorney’s Office; California National Organization for Women; California Partnership to End Domestic Violence; Coalition to End Family Violence; Community Overcoming Relationship Abuse; Community Solutions; DOVES (Domestic Violence Education and Services; Family Services of Tulare County; Junior Leagues of California; Lambda Letters Project; Los Angeles County District Attorney’s Office; Marin Abused Women’s Services; Marajee Mason Center; North County Women’s Resource Center and Shelter; Office of the Attorney General; Santa Clara County Domestic Violence Advocacy Consortium; South Bay Community Services; South Lake Tahoe Women’s Center; STAND! Against Domestic Violence; Support Network for Battered Women; the Riley Center of St. Vincent de Paul Society; WEAVE, Inc., and YWCA of Glendale.

<sup>540</sup> Letter to the members of the Senate Public Safety Committee from Barry Broad, representative of the California Public Defenders Association, dated March 23, 2006.

Conspicuously absent from the CPDA assertion was any evidence of the validity of the statement. A lack of statistics or results of academic research on divorce rates and fraudulent spousal rape claims severely weakened the argument. The claim of increased divorce rates stands in stark contrast to the figures compiled by the United States National Center for Health Statistics, which indicated that in 2006, national divorce rates had reached a low point not evidenced since 1970. While divorce rates peaked in the decade between 1975 and 1985, after that time they began a slow, but constant decline.<sup>541</sup> Furthermore, while the CPDA did not offer evidence of false claims, proponents of S.B. 1402 relied on the evidence forwarded by prominent scholars in the field of domestic violence and rape in marriage.

On the surface, opposition raised by California Attorneys for Criminal Justice (CACJ) appeared to raise a reasonable constitutional claim, noting the need to balance victims' rights with the due process rights of the accused. At the same time, CACJ opposed any changes to the reporting requirement, for fear of unsupported claims being leveled by wives and prosecuted by the State:

The current requirements of witnesses or evidence provided by Penal Code section 262 still allow charges to be filed well past one year. The requirements carefully . . . ensure that only meritorious allegations are prosecuted. They also consistently encourage any victims to come forward to seek protection, counseling and/or criminal justice. Removal of these requirements will permit prosecution in cases with little or no supporting evidence, years after the alleged acts, and are very difficult accusations to defend. The existing balance in the statute carefully protects due process and the fair trials California is known to provide.<sup>542</sup>

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<sup>541</sup> United States Department of Commerce, Census Bureau, *Statistical Abstract of the United States* (Washington, D.C.: Government Printing Office, 2009), Table 77.

<sup>542</sup> Letter to Senator Sheila Kuehl from Ignacio Hernandez, Legislative Advocate for California Attorneys for Criminal Justice, dated March 22, 2006. In a similar letter dated June 12, 2006, Hernandez countered the bill with a suggestion to expand the pre-trial corroboration requirements from P.C. § 262 to other sexual assault offenses as a way to protect against wrongful convictions.

There are several flaws in the position taken by CACJ. While physical protection, counseling, and justice represent ideal assistance for spousal rape victims, what CACJ fails to take into account is the myriad reasons why victims of spousal abuse, whether physical or sexual, fail to seek protection or counseling. Victims fail to report abuse out of fear: fear that others will not believe their claims; fear that reporting will be futile; fear of losing their children; fear of financial instability; and fear of future abuse. A second weakness in the argument raised by CACJ is the failure to acknowledge that absent a reporting requirement, prosecutors still have the discretion to evaluate the validity of victim claims. Regardless of how promptly a victim reports a crime, a prosecutor will not move forward if there is not sufficient evidence to substantiate the claim.

The California Alliance for Families and Children (CAFC) opposed the bill for three reasons:

First, there is no evidence of a significant problem with the existing procedures – if it's not broke, don't fix it. Second, numerous independent researchers in the field have documented an already high rate of false allegations of rape, including spousal rape. . . . Third, eliminating the protections under (current law) will only contribute to the excessive conflict now in our family law courts where false allegations already occur in high conflict cases over custody and financial issues.<sup>543</sup>

In a March 23, 2006 letter to the Senate Committee on Public Safety, CAFC Executive Director Michael Robinson cited two prosecutors, Linda Fairstein from New York and Craig Silverman from Colorado, who maintained that about fifty percent of all rape allegations are false. He also referenced studies conducted in Indiana and Washington, D.C., which concluded that rape allegations are false twenty-four to forty percent of the time. Robinson also alluded to Phyllis Schlafly, long-time opponent of the feminist

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<sup>543</sup> Letter to the Senate Committee on Public Safety from Michael Robinson, Executive Director of California Alliance for Families and Children, dated March 23, 2006.

movement, who spoke out against spousal rape laws.<sup>544</sup> Committed as Robinson was to the validity of his sources, he did not address apparent weaknesses in their findings. There was no indication whether the reporting statistics he quoted even considered spousal rape victims. Additionally, he failed to account for the significantly lower rates of false reporting indicated by the Uniform Crime Report (UCR), published by the Federal Bureau of Investigation that called into question the results of his experts.<sup>545</sup> Even more troubling was Robinson's reference to the one-year reporting limit, which he dubbed a "modest requirement," the upholding of which resulted "in no harm to legitimate victims."<sup>546</sup>

Two weeks later as the bill moved forward with no apparent revisions, Robinson showed disappointment with the California legislature's apparent dismissal of CAFC's opposition to S.B. 1402. In an email to Cory Salzillo, Consultant to the Senate Committee on Public Safety, Robinson commented:

We are saddened to see that it appears that there was no real debate on Sheila's SB 1402 spousal rape. I also notices [*sic*] that the bill analysis quoted part of our position letter but left out the quotes by nationally known prosecutors on the suggest [*sic*]. . . . We are about to open Pandora's box even wider in family law destruction if this bill passes and is signed into law. Unfortunately, I am spread way to [*sic*] thin and was not able to make the hearing. We don't have the money that womens [*sic*] groups have because of feminist pork they get from government.<sup>547</sup>

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<sup>544</sup> *Ibid.*

<sup>545</sup> What Robinson could not foresee was the about-face Fairstein seemed to take just a year later. Recognizing Fairstein as an expert on rape prosecution, *ABC News* interviewed Fairstein about the 2006 Duke Lacrosse rape investigation. During the interview, she indicated: "you have to acknowledge that false accusations do happen — though they are less than 10 percent of reported rapes," a number far closer to the UCR numbers than what Robinson presented. Lara Setrakian, "Duke Lacrosse Case: America's Top Sex Crimes Expert Cites Serious Problems," *ABC News*, March 21, 2007. <http://abcnews.go.com/US/LegalCenter/story?id=2971265&page=1>.

<sup>546</sup> Robinson letter to Senate Committee on Public Safety, March 23, 2006.

<sup>547</sup> Email to Cory Salzillo sent by Michael Robinson on April 7, 2006. In 2006, Salzillo served as a Consultant to the Senate Committee on Public Safety. The following year, he became the Director of Legislation for the California District Attorneys Association. Currently, Salzillo is a lobbyist and Managing Director of Warner & Pank, LLC in Sacramento. Individuals, most notably Phyllis Schlafly, have used the term "feminist pork" pejoratively to reference federal funding under the Violence Against Women Act.

While such remarks reflected opponents' disenchantment with the progress of S.B. 1402 through the legislature, the comments suggested frustration with the women's movement in general and Senator Kuehl specifically, if Robinson's reference to Kuehl by first name only is any indication.<sup>548</sup> Overall, Robinson presented an unconvincing connection between protection for victims of spousal rape and the destruction of the family, all the while failing to acknowledge that evidence of sexual assault in a marriage in itself signals the breakdown of the family unit.

Despite the strong opposition posed by the California Public Defenders Association, California Attorneys for Criminal Justice, and California Alliance for Families and Children, S.B. 1402 passed unanimously in both houses of the California legislature. Governor Arnold Schwarzenegger received the bill on June 16, 2006. After consideration of position papers from both the Assembly and Senate and letters of support from no fewer than sixteen interest groups from around California, Schwarzenegger signed S.B. 1402 into law twelve days later, thereby eliminating the reporting and/or corroboration requirement for spousal rape prosecutions.<sup>549</sup>

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Their opposition to such funding stems from the belief that domestic violence statistics are incorrect and improperly skewed in favor of women, thereby discriminating against men. They further argue that the government, and by extension the programs it funds, should stay out of marital/family affairs. John Leo, "This Rape Legislation Would Dole Out Feminist Pork," *Orlando Sentinel*, July 13, 1993, [http://articles.orlandosentinel.com/1993-07-13/news/9307130484\\_1\\_feminist-theory-gender-feminist-analysis](http://articles.orlandosentinel.com/1993-07-13/news/9307130484_1_feminist-theory-gender-feminist-analysis); *The Phyllis Schlafly Report* 30, no. 5, December 1996, <https://www.ewtn.com/library/ISSUES/PS1296.TXT>; Phyllis Schlafly, "Time to Dispose of Radical Feminist Pork," *Human Events*, July 19, 2005, <http://humanevents.com/2005/07/19/time-to-dispose-of-radical-feminist-pork/>.

<sup>548</sup> Michael Robinson has been involved in California politics since 1972, as an advocate for family law reform. He has built a reputation for his efforts to shore up laws that protect men from paternity fraud and those that assist divorced men in child-custody disputes.

<sup>549</sup> The May 18, 2006 vote in the Senate was 33:0; the Assembly vote on June 15, 2006 was 70:0. Department of Finance Enrolled Bill Report, dated June 21, 2006.

The changes brought by S.B. 1402 symbolized the end of a struggle by women's rights advocates that had been ongoing for nearly thirty years. Beginning with the adoption of a spousal rape law in 1979, eight amendments were required to bring spousal rape legislation in line with non-spousal rape. Those amendments were possible only because of the dedication of legislators, both female and male, and dozens of interest groups across California that represented the interests of thousands of individuals who believed the time had come to treat all victims of rape with the same level of protection. Unlike Dianna Green, Mrs. S., Rena Martinez, Catherine Watkins, Rana Lee, and E.G., spousal rape victims now have recourse under California law that parallels that of non-spousal rape victims.

#### CHAPTER 4

### SEX, LIES, AND VIDEOTAPE: GETTING AWAY WITH RAPE IN MARRIAGE IN SOUTH CAROLINA

While earlier chapters have chronicled the progress of legislation aimed at protecting women from sexual assault within marriage, this chapter presents a step backward in that progress. A case of marital rape that should have ended in a conviction instead saw a rapist set free to continue his violent behavior. Integral to this account is a discussion of rape shield statutes, which emerged parallel to state marital rape laws.

On June 2, 1992, *NBC's Dateline*, known for its true crime and human-interest stories, aired a segment titled "Husbands, Wives, and Rape." The focus of the episode was a marital rape case in South Carolina – a case prosecutors thought they could not lose.

Dale and Trish Crawford had been married just over a year in December 1991. While both had been married before and had children from their previous unions, Dale and Trish had known each other since they were in their early teens. Trish had described Dale to friends as "a gentle, kind, caring person," but on the evening of December 7, 1991, that view changed. That night, according to Trish, the police report, and the prosecution that would follow, Dale "tied [his wife's] hands, waist, and legs to [a] bed, taped her eyes and mouth shut, raped her and sexually assaulted her with foreign objects while threatening her with a knife."<sup>550</sup> By capturing the event on videotape, Dale unintentionally provided a visual testimony of what happened. After viewing the videotape, James Metts, a twenty-year veteran of the Lexington County Sheriff's Department, said it was clear that Dale forced Trish to have sex against her will.

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<sup>550</sup> *Dateline* transcript, June 2, 1992, 2, prepared by BurrellesLuce DVDs and Transcripts, acquired September 28, 2011 (hereafter, *Dateline*).

According to Metts, “It’s obvious . . . that she [was] not a willing participant . . . that she [was] really in a lot of pain.”<sup>551</sup>

In his own defense, Dale acknowledged tying up his wife and having sex with her that night, but he claimed that it was not against her will. Nevertheless, he became the first husband tried under South Carolina’s 1991 law that made rape between a husband and wife a crime. Months later, he maintained the position that he did not rape his wife. “Dale Crawford [said] that his wife said ‘no’ to sex, but that he knew she meant ‘yes.’”<sup>552</sup> During the trial, Dale testified that his wife had enjoyed sex games and that they had videotaped earlier lovemaking. Despite arguments by the prosecutor that the tape of the December 7 event showed rape, not a consensual sex game, it took the jury of eight women and four men less than an hour to find Dale not guilty – that regardless of Trish saying no, she was a willing participant in the events of that horrific night.<sup>553</sup>

At the time the Crawford case went to trial, forty-eight states had some kind of law that addressed marital rape. By 1992, only Oklahoma and North Carolina maintained the common law exemption that insulated a man from such a charge. One need not look too closely at the laws of some of those forty-eight states, including that of South Carolina, however, to question whether those laws were stringent enough. In over half of the states, “a woman [had] less legal protection from [sexual] assault if the attacker [was] her husband than if [he was] a stranger.”<sup>554</sup> In a minority of states, wife-victims were required to report the incident within thirty days or prosecution would forever be barred.

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<sup>551</sup> *Ibid.*, 3; Twila Decker, “Prosecutor: Man Taped Wife’s Rape Video is Evidence in Lexington Trial,” *The State* (Columbia, SC), April 16, 1992.

<sup>552</sup> *Dateline*, 3.

<sup>553</sup> Twila, Decker, “Jury: Man Didn’t Rape Wife; Graphic Videotape Depicted Sex Game, Jurors Agree,” *The State* (Columbia, SC), April 17, 1992; *Dateline*, 3-4.

<sup>554</sup> *Dateline*, 1, 6.

The laws of several states provided for spousal prosecution only when the victim and assailant were living apart under a written separation at the time of the alleged crime. A few states required evidence of force or use or threat of violence and that the victim believed that the perpetrator would carry out the threat against the victim or another person (generally, a child or other loved one).<sup>555</sup>

South Carolina's approach to spousal rape serves as a valuable case study. Not only was South Carolina one of the final states to pass a marital rape law, but when that law was passed, it provided marital rape victims less legal protection than non-spousal rape victims. In 1986, the National Organization for Women (NOW) released a study that ranked states based on how well or poorly their laws improved the status of women, considering the areas of employment, education, home and family, and community.<sup>556</sup> According to that report, South Carolina ranked dead last.<sup>557</sup> Concerned with how the NOW report would influence national public perception, making it difficult to "attract quality people and businesses" to their state, the South Carolina Commission on Women (SCCW) issued a response to the NOW report in 1990 (hereafter McSwain report). It was the hope of the SCCW that "the Governor will be able to use [the] report to identify those

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<sup>555</sup> Today, many states maintain the distinction between spousal rape and non-spousal rape, imposing different reporting requirements or requiring the prosecution to prove different elements of the crime if the victim is married to the defendant. See, for instance, the current laws in South Carolina and Oklahoma. South Carolina Code § 16-6-615 requires the "offending spouse's conduct . . . be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for" spousal sexual battery. When Oklahoma passed its marital rape law, it required a showing of force or threat of violence to meet the statutory elements of the crime: Oklahoma's Statute, 21 O.S. § 1111(B), provides that "rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or another."

<sup>556</sup> NOW Legal Defense and Education Fund and Renee Cherow-O'Leary, *The State-by-State Guide to Women's Legal Rights* (New York: McGraw-Hill, 1987).

<sup>557</sup> South Carolina Commission on Women Annual Report, 1989-1990, 6.

areas in which the legal status and economic opportunities for all South Carolina citizens may be improved, particularly for South Carolina women.”<sup>558</sup>

Four statements made in the McSwain report regarding marital rape in South Carolina are particularly telling. First, “Marital rape is the only form of family violence that is currently legal in South Carolina.” Second, a study by the Medical University of South Carolina cited in the report noted that “victims were physically injured in 46 percent of rapes committed by spouses, and 42 percent of the victims feared for their lives.” The third acknowledges that the “South Carolina marital rape statute [as it existed at the time] permits a man to sexually batter a woman if that woman [was] married to him and if she [had] not obtained a court order formally recognizing their living separately from each other.” The fourth statement indicated that South Carolina rape crisis centers estimated that only one in ten rapes are ever reported to the police.<sup>559</sup> Such admissions leave no room for interpretation. The culture of South Carolina perpetuated an environment in which there were very few resources available to marital rape victims.

The SCCW recommended that the current South Carolina law be amended, allowing a woman, without condition, to accuse her husband with rape (or as the language of the statute reads, criminal sexual conduct). The following year, in 1991, the South Carolina General Assembly passed the state’s first marital rape law. It is within this context that *Crawford* serves as a pivotal case for South Carolina. Not only was it the first case to be tried under South Carolina’s marital rape statute, but the outcome of that

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<sup>558</sup> Gayla S. L. McSwain, *The Legal Status of Women: An Analysis of the NOW Report and Comparison of Laws in South Carolina to Laws in Other States* (Columbia, South Carolina: South Carolina Commission on Women, 1990): 3-34. Available from Women & Social Movements in the United States, 1600-2000, Kathryn Kish Sklar and Thomas Dublin, eds.

<sup>559</sup> *Ibid.*, 9, 13, 14.

trial led to a 1994 amendment which addressed South Carolina's rape shield law in the context of marital rape.

However, in 1991 when State Representative Lucille Whipper introduced the bill that would make marital rape a crime; she knew that she was fighting an uphill battle. She explained that the bill was very important – a necessity if the state was ever going to change the idea that men are in charge of women and women's bodies. She acknowledged that marital rape bills in South Carolina faced opposition from legislators of both political parties who saw such legislation as a threat to male privilege.<sup>560</sup> More precisely, the proposed legislation faced opposition from the predominantly male state legislators who held 88.8 percent of the seats in the South Carolina legislature in 1991.<sup>561</sup> Whipper's 1991 legislative proposal was actually the sixth marital rape bill introduced in the state legislature.<sup>562</sup> In each of the previous years, the Senate had passed a similar bill, but those bills had died in the House. In 1991, however, when the vote came in the Senate, the House had already passed its own bill.<sup>563</sup>

Three main obstacles stood in the way of passing the marital rape bills introduced between 1986 and 1991: fear of false reporting, disbelief in the possibility of marital rape, and a misunderstanding of existing laws. First, opponents believed the passage of a marital rape bill would open the floodgates to such claims. Senator Ryan Shealy strongly opposed the bill, explaining, "sex is something that's expected, anticipated and presumed

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<sup>560</sup> Author's telephone interview with Lucille Whipper, September 19, 2011 (hereafter, Whipper interview).

<sup>561</sup> In 1991, women held 2 of 46 seats in the South Carolina State Senate and 17 of 124 seats in the South Carolina House of Representatives. Thus, they held only 11.2 percent of the seats in the state legislature that year. "Women in State Legislatures 1991" Center for the American Woman and Politics, National Information Bank on Women in Public Office, Eagleton Institute of Politics, Rutgers University (1991).

<sup>562</sup> "Marital Rape Bill Advances," *Herald-Journal*, Spartanburg, SC, January 23, 1991.

<sup>563</sup> Cindi Ross Scoppe, "Marital-Rape Bill Races Past Protests, Heads for Senate," *The State* (Columbia, SC), March 20, 1991.

when you get married.” He believed that a marital rape bill would “encourage women to file false reports after marital squabbles or when they seek divorces, custody of children or property settlements.”<sup>564</sup> Representative Phil Bradley also voiced concerns about false charges, noting that “once someone is charged with [marital rape], his life is totally ruined.”<sup>565</sup> Such fears were unfounded, however, as recent studies have shown that there are no more false reports of marital rape than for any other type of crime.<sup>566</sup> Nevertheless, the “issue of false reporting may be one of the most important barriers to successfully investigating and prosecuting sexual assault, especially with cases involving non-strangers.”<sup>567</sup>

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<sup>564</sup> “Spousal Rape Senate Bill Would Make It a Crime,” *The State* (Columbia, SC), February 9, 1988.

Notably, this attitude was alive and well in 2011. A state prosecutor interviewed about marital rape in South Carolina noted only two cases in recent memory that involved the charge of marital rape. The first would fit a skeptic’s definitions of “real rape,” in that it resulted in serious and permanent physical injury for the victim. The other, however, he described as a false charge in which the wife seduced her estranged husband, causing him to believe they were reconciling. In fact, according to the prosecutor, following their sexual encounter, she threatened to claim rape if he did not grant her the muscle car in their divorce settlement. Author interview with W. Allen Myrick, Assistant Deputy Attorney General, September 28, 2011.

<sup>565</sup> David Reed, “House Kills Bill to Make Marital Rape a Crime,” *The State* (Columbia, SC), June 1, 1988.

<sup>566</sup> Gilda Cobb-Hunter and Jo Anne St. Clair, “Marital Rape: The Only Form of Family Violence Legal in S.C.,” *The State* (Columbia, SC), 7 November 1990; South Carolina Commission on Women Report, 14. Reports from the late 1960s and early 1970s that relied upon police records and medical examiner data indicated that unfounded rape allegations occurred in two to twenty-five percent of cases. However, the Uniform Crime Report, published by the Federal Bureau of Investigation, indicated: “the unfounded rate for forcible rape remained about 8% from 1991 to 1997, while the average rate for other index crimes (i.e., property crimes, arson, robbery, and aggravated assault) was considerably lower, at about 2%.” This might lead some to believe that putative rape victims are less trustworthy than victims of other crimes. However, such a conclusion might be too simplistic. What was not discussed in the earlier reports is the fact that unfounded rates typically “include not only false complaints, but also cases dismissed for lack of physical evidence, uncooperative victims/witnesses, or because no suspect could be located.” Therefore, it should be acknowledged that the “unfounded rate for rape might be higher not necessarily because complainants are more apt to lie in rape than in other types of crime, but rather because evidentiary issues that impede prosecution are more common in rape compared to other crimes.” Heather D. Flowe, Ebbe B. Ebbesen and Anila Putcha-Bhagavatula, “Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women’s Sexual History on Rape Allegations,” *Law and Human Behavior* 31, no. 2 (2007), 161. Notably, recent studies that involve more rigorous research suggests that an accurate percentage of false rape reports is estimated to be between two and eight percent. See, for instance, Dr. Kimberly A. Lonsway, Sgt. Joanne Archambault, and Dr. David Lisak, “False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault,” *The Voice* 3, no. 1 (2009) (Published by the National District Attorneys Association’s National Center for the Prosecution of Violence Against Women).

<sup>567</sup> Lonsway, “False Reports,” 1.

Several misconceptions about rape and the behavior of rape victims reinforced the fear of false reporting. Most sexual assault cases involve victims who do not meet societal expectations of the characteristics of a typical sexual assault victim. One widely held belief is that most sexual assaults involve strangers wielding weapons who unwittingly leave a great amount of evidence behind, while the reality is that the majority of attacks are made by those known to the victim without the use of a weapon and without overt signs of physical injury. Another stereotype is that a rape victim will always cooperate fully with investigators and prosecutors, providing specific details that do not change. In reality, very few victims report an attack immediately, but rather wait hours, days, or weeks, if they report at all. Even then, details may change in subsequent retellings or a victim may recant her testimony all together. Inconsistent or incomplete testimony may be the result of trauma or confusion based on memory impairment, a victim believing that no one will believe her account, an attempt to protect the perpetrator if it is someone known to the victim, feelings of guilt or shame.<sup>568</sup> Unfortunately, many in society, including crime investigators and prosecutors, hold these stereotypes of rape victims. As long as those involved in the criminal justice process believe that most reports of sexual assault are false, “efforts to improve the criminal justice response to sexual assault will have only limited impact. Only those cases that look like our societal stereotype of ‘real rape’ will be successfully investigated and prosecuted.”<sup>569</sup>

The second obstacle to passing a marital rape law derived from a general disbelief in the possibility of rape in marriage. Senator J. M. “Bud” Long, the only member of the Senate Judiciary Committee to vote against the bill in 1991, stated: “Why in God’s name

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<sup>568</sup> *Ibid.*, 4-6.

<sup>569</sup> *Ibid.*, 10.

we're going to punish a man for having sex with his wife when she says, 'No, not tonight,' I don't know."<sup>570</sup> Long was not alone in his belief, nor were such ideas limited to South Carolina. In 1979, then California State Senator Bob Wilson questioned: "But if you can't rape your wife, who can you rape?"<sup>571</sup> Also that year, Charles Burt, defense attorney in Oregon's Rideout case, held the position that marital rape cases were frivolous and unnecessary: "It points out the absurdity of bringing the crime of rape as a law into marriage."<sup>572</sup> In 1981, in his testimony before the Senate Judiciary Committee, Alabama Senator Jeremiah Denton argued that rape in marriage was less serious than rape by a stranger. He noted: "Damn it, when you get married, you kind of expect you're going to get a little sex."<sup>573</sup> Such arguments demonstrated that when it came to weighing women's safety against male privilege, many men across the nation stood behind the right of free access to women's bodies.

The third obstacle to the law's passage was the belief that laws were already in existence that prosecutors could use in cases of marital rape. As noted by South Carolina Representative Charles Sharpe, there are "laws already on the books to govern that kind of thing . . . I just feel like this [new law] is not needed, and we need to stay out of a man's bedroom."<sup>574</sup> The common understanding of "laws already in existence" was assault and battery, a charge not specific to rape.<sup>575</sup> Such an attitude diminished the

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<sup>570</sup> Scoppe, "Panel Approves Marital Rape Bill."

<sup>571</sup> Michael D. A. Freeman, "But If You Can't Rape Your Wife, Who[m] Can You Rape?" The Marital Rape Exemption Re-examined," *Family Law Quarterly* 14, no. 1 (1981), 1.

<sup>572</sup> For a review of the Rideout case, please see the Introduction. Susan Barry, "Spousal Rape: The Uncommon Law," *American Bar Association Journal* 66, no. 9 (1980), 1091.

<sup>573</sup> Finkelhor and Yllo, *License to Rape*, 137.

<sup>574</sup> It is noteworthy that Sharpe saw it as a man's bedroom. His purposeful choice of words removes the possibility that the bedroom also belonged to the woman. Cindy Ross Scoppe, "Clock Running Out for House Action on Marital Rape Bill," *The State* (Columbia, SC), May 31, 1990.

<sup>575</sup> Scoppe, "Panel Approves Marital Rape Bill."

severity of marital rape by implying violent force was needed to meet the metric of “real rape.” This approach was not unique to South Carolina; in fact, it was a common argument used across the nation to oppose the elimination of the marital exemption. Advocates of the new law were quick to criticize the use of assault and battery to cover marital rape. Activists repeatedly explained rape was rape, no matter who committed it, and that is how the law should address marital rape. One aspect of their argument highlighted the penalty differential in sentencing: In South Carolina, the crime of criminal sexual conduct (rape) in the first degree carried a maximum thirty-year sentence, while assault and battery in the first degree carried only a ten-year maximum sentence.<sup>576</sup> The practical implication: a man who sexually assaults his wife and is charged with and convicted of criminal sexual conduct faces up to thirty years in prison. In contrast, if prosecutors charge the same individual with assault and battery for the sexual assault of his wife, a conviction will result in no more than ten years’ imprisonment. Thus, by categorizing marital rape as assault and battery, prosecutors could effectively limit sentencing of husband-rapists to one-third that of non-husband-rapists, undermining the seriousness of the act.

Nevertheless, according to Whipper, the social and political climate had changed enough by 1991 for the marital rape bill to pass, particularly because of lobbying efforts by women’s organizations. When asked why South Carolina took so long to pass the law and eliminate the absolute protection of married men, Whipper suggested that South Carolina “holds on to things for a long time, even when they are not good things.”<sup>577</sup>

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<sup>576</sup> S.C. Code § 16-3-652, criminal sexual conduct in the first degree; S.C. Code §16-3-600(C)(1), assault and battery in the first degree.

<sup>577</sup> Whipper interview.

Gilda Cobb-Hunter, an expert on the issue of combating domestic violence, reinforced this explanation. Cobb-Hunter hoped to see marital rape treated the same as other rape, but agreed that advocates of that position needed to remain realistic about what they could convince the General Assembly to pass. “We realize that we are in South Carolina,” she said several months before Governor Carroll Campbell signed the bill into law.<sup>578</sup> Thus, Cobb-Hunter and others had to settle for less than they hoped. The result was two separate statutes that applied to rape in marriage, depending on whether the couple was living together or not at the time of the offense. If the couple was still married, but legally separated, the criminal sexual conduct law applied, and a husband found guilty would face up to thirty years in prison. In contrast, if the couple shared a residence, the applicable crime was the new offense of spousal sexual battery, which required physical evidence of violence and only carried a sentence of up to ten years.<sup>579</sup>

This then was the status of the law when prosecutors charged Dale Crawford with “four counts of marital rape and one count of kidnapping.”<sup>580</sup> The verdict in that trial was instrumental to the 1994 changes to South Carolina’s rape shield law as it applied to marital rape. As noted in the chapter’s opening vignette, *Crawford* was a case that prosecutors thought they could not lose. Deputy Solicitor Knox McMahon, prosecutor for the case, referred to Crawford’s “videotape as a ‘lesson on How to Rape Your Wife.’” Visibly shaken by the verdict, McMahon went on to say, “If this isn’t marital rape . . . it

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<sup>578</sup> Scoppe, “Panel Approves Marital Rape Bill.” At the time of her statement, Gilda Cobb-Hunter ran a domestic violence organization in Orangeburg, South Carolina. In 1992, voters elected her to the South Carolina House of Representatives, a position she still holds in 2015.

<sup>579</sup> S.C. Code § 16-3-615, spousal sexual battery; “Marital Rape Bill Advances,” *Herald-Journal* (Spartanburg, SC), January 23, 1991; Cindi Ross Scoppe, “Marital Rape Bill Signed Spousal Sexual Abuse Requires Physical Proof,” *The State* (Columbia, SC), June 13, 1991.

<sup>580</sup> Twila Decker, “Prosecutor: Man Taped Wife’s Rape Video is Evidence in Lexington Trial,” *The State* (Columbia, SC), April 16, 1992.

doesn't exist."<sup>581</sup> When interviewed by *Dateline*, Sheriff James Metts admitted that he was shocked that the jury acquitted Crawford, explaining that the jury was unduly influenced by testimony regarding Trish's sexual past. According to Metts: "What they [the Crawfords] had done previously, or what they may do in the future, [was] not relevant to" the present case.<sup>582</sup>

How, then, could the jury reach a not-guilty verdict?<sup>583</sup> What *had* the jury heard that led them to such a surprising conclusion? Under South Carolina law at the time, the defense attorney could not introduce evidence of a rape victim's prior sexual behavior if her attacker was someone other than her spouse. However, when the charge was marital rape, "witnesses [could] testify about the victim's sexual history."<sup>584</sup> Ironically, in most cases, the prosecutor could not introduce evidence of the defendant's sexual history. What this meant in *Crawford* was that the jury heard Dale testify that "his wife enjoyed sex games and that they had made [a] videotape of their lovemaking in the past." They also heard Trish's ex-husband testify that she enjoyed "unconventional sex," and that she had allowed him to tie her up many times during sex. What the jury did not learn was that her ex-husband had a motive to paint a bad picture of her – they were in a battle for custody of their four-year-old child. Additionally, the judge would not let the prosecution

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<sup>581</sup> Decker, "Jury: Man Didn't Rape Wife"; *Dateline*, 4.

<sup>582</sup> *Dateline*, 4.

<sup>583</sup> In an interesting coincidence, the composition of the jury in *Crawford* and *Rideout* (Oregon, 1978) each included eight women and four men. In 1993, marital rape advocate Laura X rationalized the verdicts in each case, explained that John Rideout and Dale Crawford "were acquitted because the majority female juries in those cases had been conditioned to be judgmental of other women and to distance themselves from a rape victim out of fear of it happening to them." Laura X, "Accomplishing the Impossible: An Advocate's Notes From the Successful Campaign to Make Marital and Date Rape a crime in All 50 U.S. States and Other Countries," *Violence Against Women* 5, no. 9 (1999), 1072.

<sup>584</sup> Twila Decker, "A Show of Support Keep Faith, Accuser in Rape Trial Says," *The State* (Columbia, SC), April 22, 1992; Editorial, "Marital Rape Statute Should Be Amended," *The State* (Columbia, SC), April 23, 1992.

introduce testimony from Dale Crawford's ex-wife. Had she been able to testify, the jury would have heard that she, too, had been a victim, and that Dale had tied her up with a rope and raped her. Had Dale's sexual history been fair game like Trish's, the jury also would have learned of police reports alleging that Dale had assaulted Trish and his ex-wife many times.<sup>585</sup>

We will never know if this additional evidence would have swayed opinions of the jury members. What is clear, however, is that the not guilty verdict reverberated across South Carolina and the nation, causing many to question whether marital rape laws in that state – in fact, across the country – were adequate to protect a wife from sexual assault by her husband. Activists sounded a call to reform the marital rape law almost immediately. Those involved wanted to see revisions that would outlaw testimony on the victim's past sexual history; in other words, the promulgation and implementation of a rape shield law that protected victims of marital rape.<sup>586</sup>

In part due to public disbelief in the justice of Dale Crawford's acquittal, in 1994 South Carolina amended its rape shield law to include protection for victims of marital

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<sup>585</sup> *Dateline*, 4-5; Decker, "A Show of Support Keep Faith." It should be noted, however, that at the time Dale Crawford bound and raped his first wife, marital rape was not a prosecutable offense in South Carolina. This may have been one of the reasons that the judge did not allow the jury to hear testimony from Crawford's first wife. Other possible reasons relate to the South Carolina Rules of Evidence. Rule 404(a)(1) disallows the admission of evidence of a person's character to prove conduct, except when "a pertinent trait of the character offered by an accused, or by the prosecution to rebut the same." If, however, Crawford did not offer character evidence in his defense, the prosecutor could not have used his former wife's testimony to discredit his innocence and veracity. Rule 404(b) would also have prevented the prosecutor from using the first wife's testimony as "evidence of other crimes, wrongs, or acts . . . to prove" Crawford's character "in order to show action in conformity therewith." Finally, according to Rule 403, a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." At Dale Crawford's trial, potential testimony by his first wife illustrating a history of bondage and rape certainly would have been relevant to the charge he was facing. However, any defense attorney would argue that the nature of that testimony would severely prejudice the jury against the defendant.

<sup>586</sup> *Dateline*, 6.

rape. The amendment to South Carolina's rape shield provision was among the last in the nation and drew upon substantial legislative, judicial, and social history.

Historically, testimony about the sexual history of a rape victim during a trial emerged from the traditional view of rape as a crime that spoiled “the chastity and value of a woman by a man who had no legal claim to sex with her.”<sup>587</sup> Rape laws, then, were “designed to protect men from the destruction of their interests in women's bodies by other men, somewhat like the theft of household objects in a robbery.”<sup>588</sup> The echo of this perspective – the chastity and corresponding value of a woman – prevailed well into the twentieth century. We can see this in the case of rapes in which “only a victim who was ‘respectable’ and could show that she did not have a reputation for loose morals or casual sex stood a reasonable chance of seeing the conviction of her attacker.”<sup>589</sup>

The traditional use of a victim's sexual history as evidence was to show consent and to show a propensity for dishonesty. The practice of connecting consent with sexual experience followed the reasoning: “a sexually experienced woman supposedly casually selects sexual partners and was thus more likely to have consented to the act in question.”<sup>590</sup> In *People v. Abbot*, an 1838 New York case, the judge distinguished between a woman “who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity,” implying a natural consent from the first and refusal by the latter.<sup>591</sup>

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<sup>587</sup> Cuklanz, *Rape on Prime Time*, 30.

<sup>588</sup> *Ibid.*; Sakthi Murthy, “Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent,” *California Law Review* 79, no. 2 (1991), 549.

<sup>589</sup> *Ibid.*

<sup>590</sup> Murthy, “Rejecting Unreasonable Sexual Expectations,” 550; See, H. Lane Kneedler, “Sexual Assault Law Reform in Virginia: A Legislative History,” *Virginia Law Review* 68, no. 3 (1982), 459-505.

<sup>591</sup> *People v. Abbot*, 19 Wend. 192 (N.Y. 1838).

Seventy-seven years later, a Tennessee judge embraced the same reasoning, concluding: “No impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure.”<sup>592</sup> The belief that a sexually experienced woman was more likely to consent was still pervasive in the American legal system when the anti-rape movement arose in the 1970s.

Also prevalent was the belief that a woman who had sexual experience outside of marriage was inherently untruthful. As Vivian Berger, Columbia University law professor, explained in 1977: “A few courts believe that evidence of unchastity [sic] bears not only on the substantive issue of consent but also on the woman’s credibility; promiscuity imports dishonesty.”<sup>593</sup> While chastity – or lack thereof – reflected a female’s self-worth and honesty, sexual experience had no effect whatsoever on men’s veracity.<sup>594</sup> The questioned reliability of a woman’s testimony in a rape case traces back to a statement by Matthew Hale: “rape . . . is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused.”<sup>595</sup> Hale’s statement, emphasizing the unreliability of rape victim testimony, led to the legal assumption “that rape victims were more likely to be liars than other witnesses or victims.”<sup>596</sup> Legal writing on the credibility of rape victims in the twentieth century continued to challenge the character of women. In his widely respected legal treatise, *Evidence in Trial at Common Law*, legal scholar Henry Wigmore contended: “no judge should ever let a sex

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<sup>592</sup> *Lee v. State*, 132 Tenn. 655 (1915).

<sup>593</sup> Vivian Berger, “Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom,” *Columbia Law Review* 77, no. 1 (1977), 16.

<sup>594</sup> *Ibid.* In the notes accompanying page 16, Berger provides citations to cases in which the courts equated promiscuity with dishonesty.

<sup>595</sup> Matthew Hale, *History of Pleas to the Crown* (Philadelphia, PA: Robert H. Small, 1847), 635.

<sup>596</sup> Cuklanz, *Rape on Trial*, 19.

offense charge go to the jury unless the female complainant's social history and mental makeup have been examined . . . by a qualified physician.” Lisa M. Cuklanz, professor of Communication Studies at Boston College and notable scholar of gendered violence, explained that Wigmore's statement deepened the warning of Hale's pronouncement: “Hale's meaning was clearly echoed, but with intensified meaning. Now it was not simply the social circumstances that promoted false accusations of rape but also the actual psychological makeup of female victims.”<sup>597</sup> Challenging the female character in this manner furthered legal protection for men accused of rape.

Prior to rape shield laws, rape victims were fair game for defense attorney attempts to undermine their credibility, attempts that used the victim's intimate experiences as a form of character assassination. Sexual history evidence generally falls into three categories: testimony that describes specific instances of the victim's conduct, generally fact-based details of particular occurrences; opinions of the victim's sexual practices, where witnesses provide statements of their own beliefs about the victim's prior sexual activity; and evidence of the victim's reputation, or the community view of the victim's character and sexual experience.<sup>598</sup>

In the late 1970s, pressure for evidentiary reform came from an uneasy coalition between law enforcement officials and feminist organizations. Among the issues this unlikely alliance argued was that “sexual morality had changed since the adoption of the common-law doctrine which allowed evidence about the victim's unchaste character.”<sup>599</sup>

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<sup>597</sup> *Ibid.*, 20-21.

<sup>598</sup> Murthy, “Rejecting Unreasonable Sexual Expectations,” 549-50.

<sup>599</sup> Jason M. Price, “Constitutional Law – Sex, Lies, and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate,” *Western New England Law Review* 18, no. 2 (1996), 550.

By the time advocates proposed rape shield laws, many young women engaged in consensual sexual relations outside of marriage. Thus, both popular culture and action by the federal government supported efforts to reform the rules of evidence that governed trials.<sup>600</sup>

Significantly, the Food and Drug Administration's approval of the birth control pill as a form of contraception in 1960 fueled the emerging sexual revolution.<sup>601</sup> As a result, a growing number of unmarried women exercised the right to engage in recreational sex quite separate from procreation and marriage.

Beginning in 1974, the resulting "rape shield laws were designed to protect rape victims from embarrassing questions about their private sexual lives," generally forbidding testimony about the victim's prior sexual history and ensuring "that the rape defendant, not the rape victim, was on trial."<sup>602</sup> Advocates suggested that the character assassination rape victims faced in open court weakened victim credibility and often

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<sup>600</sup> Two publications challenged the marriage-oriented ethic related to sex. In 1953, Hugh Hefner released the inaugural issue of *Playboy*, a magazine that promoted a "philosophy that rejected any limits on sexual expression and reserved for marriage the harshest of criticism. . . . and encouraged its readers to 'enjoy the pleasures the female has to offer without becoming emotionally involved.'" John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America, Second Edition* (Chicago: University of Chicago Press, 1997), 302-03. On the early history of *Playboy*, see Carrie Pitzulo, *Bachelors and Bunnies: The Sexual Politics of Playboy* (Chicago: University of Chicago Press, 2011). Hefner's message found an ally in Helen Gurley Brown, whose 1962 nationally best-selling book *Sex and the Single Girl*, "encouraged single women to enjoy sex before marriage," and introduced the American public to the swinging singles culture. Ruth Rosen, *The World Split Open: How the Modern Women's Movement Changed America* (New York: Penguin Books, 2006), 51, 319. In fact, Brown seemed to have as little use for marriage as Hefner did. Instead, she "advised women to enjoy the propositions that would come their way and to use sex as the 'powerful weapon' it was." D'Emilio and Freedman, *Intimate Matters*, 303-04.

<sup>601</sup> As a result of the Food and Drug Administration's approval of the birth control pill, a growing number of unmarried women exercised the right to engage in recreational sex quite separate from procreation and marriage. Sara M. Evans, *Born for Liberty: A History of Women in America* (New York: Free Press, 1997), 265-66; Rosen, *The World Split Open*, 55. Women's sexual freedom was expanded when the United States Supreme Court formalized the right of women (and men) to use contraception in *Griswold v. Connecticut* 381 U.S. 479 (1965) (as applied to married couples) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the right to unmarried adults). The year after *Eisenstadt* was handed down, the Court decided *Roe v. Wade*, 410 U.S. 113 (1973), recognizing a woman's right to abortion.

<sup>602</sup> Michelle J. Anderson, "Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates," *Hastings Law Journal* 54 (2003): 1522.

resulted in a high-level of acquittal rates in those cases that went to trial.<sup>603</sup> Opponents suggested that those same provisions prevented a defendant from presenting a full defense, specifically by restricting the right granted under the Sixth Amendment Confrontation Clause. As jurist Gerald E. Rosen explained, “To deprive the defendant of the right to present material evidence contradicting the victim is not only to deprive the defendant of his constitutional rights to cross-examine his accuser and to mount an effective defense, it is also to potentially undermine the jury’s fact-finding responsibilities.”<sup>604</sup> Despite such concern and any potential legal detriment to defendants, state legislatures began to pass rape shield laws in 1974.

Between 1974 and 1980, forty-five states and the federal government “made efforts to protect rape victims from the humiliation of public disclosure of the details of their prior sexual activities” in the form of rape shield laws. In all but one of these jurisdictions, legislators passed rape shield statutes; in the remaining state, an appellate court ruling instigated change.<sup>605</sup> According to the National Center for Victims of Crime, rape shield laws “limit the introduction of evidence about a victim’s sexual history, reputation or past conduct,” as a response to “the practice of discrediting victims by introducing irrelevant information about their chastity.”<sup>606</sup> Such laws were enacted to

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<sup>603</sup> Daniel Lowery, “The Sixth Amendment, The Preclusionary Sanction, and Rape Shield Laws: *Michigan v. Lucas* 11 S. Ct. 1743 (1991),” *University of Cincinnati Law Review* 61 (1992), 311 and accompanying notes.

<sup>604</sup> John Gibeaut, “Shield a Prosecution Sword: Rape Law Can Protect Accuser Who Has Reason to Lie,” *ABA Journal* 83, no. 12 (1997), 37, citing Judge Gerald E. Rosen’s opinion in *Boggs c. Brigano*, 82 F.3d 417 (1996). See also, Price, “Constitutional Law – Sex, Lies, and Rape Shield Statutes, 541-542.

<sup>605</sup> J. Alexander Tanford and Anthony J. Bocchino, “Rape Victim Shield Laws and the Sixth Amendment,” *University of Pennsylvania Law Review* 128 (1980), 544-602. According to Tanford and Bocchino, the five states that did not have statutes addressing rape shield by 1980 were Arizona, Connecticut, Maine, Utah, and Virginia.

<sup>606</sup> The National Center for Victims of Crime, [http://www.ncvc.org/ncvc/main.aspx?dbID=DB\\_FAQ:RapeShieldLaws927](http://www.ncvc.org/ncvc/main.aspx?dbID=DB_FAQ:RapeShieldLaws927) (accessed April 25, 2012).

serve five basic purposes: to protect the privacy of rape victims; to encourage victims to come forward; to enhance the accuracy of outcomes in rape trials by excluding irrelevant or prejudicial evidence; to serve as a deterrent to would-be rapists; and, to protect the autonomy of women.<sup>607</sup>

Before the enactment of rape shield statutes, victims often faced humiliating and intrusive questioning about the smallest details of their private lives. Facing such questions at trial would often exacerbate the trauma of the sexual assault, implying that the victim was somehow to blame for the rape. To avoid being “assaulted” a second time by criminal justice officials, many women were reluctant to report the crime and subject themselves to a barrage of personal questions in open court. Rape shield statutes attempted to insulate victims from this type of secondary violation. They also reflected the growing consensus that a woman’s sexual past has a low probative value in a rape trial.<sup>608</sup> Advocates for rape shield laws argued that the provisions keep jurors’ attention on the behavior of the defendant and away from the victim’s reputation, making it clear that the defendant, not the victim, is on trial.<sup>609</sup> As such, the statutes promoted the empowerment of women, giving them the freedom to embrace their choice of sexual lifestyle without the fear of diminishing the legal protection against unwanted sexual advances.

While most rape cases are governed by state law and heard in state courts, rape shield laws are embedded in the Federal Rules of Evidence as well. In late October 1978,

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<sup>607</sup> Murthy, “Rejecting Unreasonable Sexual Expectations,” 551-52.

<sup>608</sup> The term probative indicates a tendency to prove or disprove a disputed issue. See note 36 for a review of the mandate of Federal Rule of Evidence 403 that requires courts to weigh the probative value of relevant evidence against unfair prejudice such evidence may cause if introduced to a jury.

<sup>609</sup> Gibeaut, “Shield a Prosecution Sword,” 36; Murthy, “Rejecting Unreasonable Sexual Expectations,” 552.

then President Jimmy Carter signed into law H.R. 4727, which created Rule 412, the federal rape shield statute. In doing so, Carter issued a presidential statement regarding the purpose and value of Rule 412 as addressing the myriad concerns listed above and serving as a model for state and local criminal practices. In part, Carter noted:

This bill provides a model for state and local revision of criminal and case law. It is designed to end the public degradation of rape victims and, by protecting victims from humiliation, to encourage the reporting of rape. . . . Too often rape trials have been as humiliating as the sexual assault itself. By restricting testimony on the victim's prior sexual behavior to that genuinely relevant to the defense, the rape victims act will prevent a defendant from making the victim's private life an issue at trial.<sup>610</sup>

That is not to say, however, that H.R. 4727 passed without controversy. In fact, Rule 412, like many state rape shield statutes, was the result of lengthy conflict and debate between respected groups on both sides of the issue. The resulting legislation was more conservative in nature than some feminist activists would have liked, but it did reflect the mixed coalition that supported the bill – traditionally conservative law-and-order types and liberal feminists. As adopted, Rule 412 prevented the introduction of opinion and reputation evidence of the rape victim's sexual history, thereby quashing the notion that once a woman consents to sexual activity, she has given up the right to withhold consent in the future.

Like many state rape shield laws, including South Carolina's amended 1994 statute, the exclusions provided by Rule 412 are not absolute, but rather include exceptions to the protective nature of the law. As related to criminal proceedings, Rule 412(b) provides that a court may allow into evidence testimony:

of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or

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<sup>610</sup> President's Statement on Signing H.R. 4727 into Law, 14 Weekly Comp. Pres. Doc. 1902 (Nov. 6, 1978).

other physical evidence . . . [or] evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor.<sup>611</sup>

Such exclusions demonstrate the delicate, but necessary balance between protecting a victim's privacy and maintaining the legal rights of a rape defendant.

Even if evidence falls into one of these two categories, for a party to utilize these exceptions, he or she must abide by the terms of Rule 412(c), which sets forth a notice-and-hearing requirement. If a party intends to offer such evidence, a motion detailing the evidence and the purpose for which it will be used must be filed at least fourteen days prior to trial. A copy of the motion must be delivered to all parties; the victim must also receive notice. Before any evidence of this type may be admitted, the court must then hold an *in camera* hearing, providing both the victim and interested parties the opportunity to present information regarding the motion.<sup>612</sup> The court must then determine whether the proffered evidence is both relevant and more probative than prejudicial.<sup>613</sup> In instances where defense attorneys did not follow these procedural requirements, federal courts ruled against parties attempting to introduce evidence of a victim's sexual conduct.<sup>614</sup>

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<sup>611</sup> Rule 412 provides a separate provision for civil cases, which allows the admission of evidence offered to prove a victim's sexual behavior or predisposition if its probative value exceeds the danger of harm to the victim. Additionally, evidence of a victim's reputation may be introduced by the defense if the victim has placed her reputation in controversy. Fed. R. Evid. 412(b)(2).

<sup>612</sup> *In camera* is the Latin term for "in chambers." Thus, *in camera* hearings take place in the judge's private chambers or in a courtroom after the bailiff has cleared it of all spectators and jurors.

<sup>613</sup> See note 58 for a description of Fed. R. Evid. 403, which sets forth the balance between probative and prejudicial evidence at trial. Fed. R. Evid. 412(c). While the default time requirement is 14 days prior to trial, the statute provides the court the discretion to adjust the timing in the interest of justice. See Murthy, "Rejecting Unreasonable Sexual Expectations," 555.

<sup>614</sup> See, *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091 (2002); *Alexander v. Virgin Islands*, 2014 WL 323063 (V.I., 2014).

In 1974, Michigan became the first state to enact a rape shield statute as part of an effort to improve the treatment of rape victims. Additional reform efforts “included establishing a scale of degrees of criminal sexual conduct, doing away with the requirement that the prosecution show resistance by the victim, and eradicating interspousal immunity to charges of criminal sexual conduct.”<sup>615</sup> The Michigan law prohibits the use of character evidence in rape trials, including a victim’s sexual history, except for “[e]vidence of the victim’s past sexual conduct” with the defendant or evidence “of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.” For a defendant to enter such evidence at trial, he must first file a written motion and offer proof of its veracity, after which time the judge may hold an *in camera* hearing to determine if the “proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.”<sup>616</sup>

Twenty years later, when South Carolina amended its rape shield law, legislators adopted this language nearly verbatim.<sup>617</sup> In fact, a large majority of states followed

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<sup>615</sup> Lowery, “The Sixth Amendment, The Preclusionary Sanction, and Rape Shield Laws,” note 84. As Lowery explains, related state reform efforts “dispensed with the requirement that the complainant’s testimony be corroborated and with the mandatory jury instruction that her testimony be scrutinized with caution. Innovations outside the courtroom included [the establishment of] rape-crisis counseling centers, mandatory emergency treatment for post-rape victims, reimbursement schemes for victim’s medical expenses, and programs to raise the consciousness of police and prosecutors in their treatment of rape victims.”

<sup>616</sup> Mich. Comp. Laws Ann. § 750.520j. Additionally, Michigan Rules of Evidence 404 (2011) addresses character evidence, stating that it is not admissible to prove conduct. However, like the aforementioned statute, there are some exceptions. Rule 404(a)(3) provides exceptions for character of the accused, victims of alleged homicide, witnesses, and alleged victims of sexual conduct crimes. It states that “In a prosecution for criminal sexual conduct, evidence of the alleged victim’s past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the origin of semen, pregnancy, or disease.” While Rule 404 does not address *in camera* hearings or inflammatory or prejudicial evidence, Rule 403 does provide for the exclusion of relevant evidence on the grounds of prejudice.

<sup>617</sup> S.C. Code § 16-3-659.1(1). Notably, this statute does not require that it show that the victim had been raped by another person, simply that she had sexual relations with someone other than the defendant (the presence of semen not belonging to the defendant) and that such an interaction may have resulted in a pregnancy or the transfer of a sexually transmitted disease.

Michigan's lead, but some carved out specific uses for the admission of character evidence. Delaware, for instance, prohibits the use of "opinion evidence, reputation evidence and evidence of specific instances of the complaining witness' sexual conduct" for the purpose of proving consent by the alleged victim of rape.<sup>618</sup> At the same time, the Delaware statute provides that similar evidence *may* be introduced to attack the credibility of the complaining witness.<sup>619</sup> Nevada law allows the admission of "evidence of any previous sexual conduct of the victim [of sexual assault] to prove the victim's consent."<sup>620</sup> However, evidence of the victim's prior sexual conduct to prove her credibility as witness is inadmissible unless "the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecutor or victim."<sup>621</sup> New York law prohibits the admission of a victim's sexual conduct in a sexual offense case, except in four situations where the court determines that the evidence is "relevant and admissible in the interest of justice." The exception that sets New York apart from other states is where the proffered evidence would prove or tend to prove that that victim had been convicted of prostitution, falsely suggesting that one who engages in prostitution will not or cannot withhold consent.<sup>622</sup>

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<sup>618</sup> Del. Code Ann. Title 11, § 3509(a)(2010). The original 1979 statute provided the same prohibition.

<sup>619</sup> Del. Code Ann. Title 11, §§ 3508 and 3509(d)(2010), provided that the relevance is not outweighed by prejudice. Again, the 1979 statute included similar provisions.

<sup>620</sup> Nev. Rev. Stat. § 48.069 (2010). Earlier versions of this statute provided similar allowance of evidence.

<sup>621</sup> Nev. Rev. Stat. § 50.090 (2010). Earlier versions of this statute provided similar limitations on the admission of evidence to challenge the victim's credibility.

<sup>622</sup> N. Y. Crim. Proc. Law § 60.42 (2010). The 2010 statute and its earlier 1987 version specifies that a conviction for prostitution must have occurred in the three years prior to the incident which is the subject of the prosecution for the exception to be applicable.

While there was (and remains) wide variation to state rape shield laws, nearly every state's rape shield law contains an exception in one form or another that relates to the prior sexual behavior between the victim and the defendant. The implication of such an exception is that "evidence of prior sexual behavior between a rape defendant and a complainant was relevant and admissible when he claimed the defense of consent."<sup>623</sup> Whether intended or not, the implementation of the exception had the effect of resuscitating Matthew Hale's assumption that a woman, having once "given her body" to a man, thereafter continues to consent to sexual intercourse. Thus, a man charged with raping a woman with whom he had a previous intimate relationship may not enjoy immunity from prosecution, but "he does have the benefit of presenting evidence of their sexual history to prove his defense of consent."<sup>624</sup> The extent of this benefit can be great, in that it often deters women from reporting rape when their attacker is a current or former intimate partner.

When South Carolina amended its rape shield law to cover marital rape in 1994, it too had exceptions. According to the relevant statute, "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible."<sup>625</sup> However, it allowed for plenty of exceptions that a defense attorney could rely on to make sure the jury heard about the victim's sexual history. The judge's determination of admissibility of such evidence would arise following an *in camera* hearing.<sup>626</sup> The *in camera* hearing

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<sup>623</sup> Anderson, "Marital Immunity," 1524, indicating that by 2003, 48 states and the District of Columbia had passed some sort of rape shield law either by statute or judicial decree; *See also*, Michelle J. Anderson, "From Chastity Requirement to Sexual License: Sexual Consent and a New Rape Shield Law," *George Washington Law Review* 70 (2002), particularly pages 81-6.

<sup>624</sup> Anderson, "Marital Immunity," 1522-23.

<sup>625</sup> S.C. Code § 16-3-659.1.

<sup>626</sup> S.C. Code § 16-3-659.1(2).

and the judge's discretion would appear to protect the victim from unnecessary intrusions into her personal life that would constitute inflammatory or prejudicial testimony that could erroneously sway the opinions of the jury. Still, there was one type of evidence for which the statute did not protect the witness: "Evidence of specific instances of sexual activity which would constitute adultery and would be admissible under rules of evidence to impeach the credibility of the [victim] witness may not be excluded."<sup>627</sup> This provision alludes back to the proposition derived from eighteenth-century legal treatises that promiscuity imports dishonesty, suggesting that a woman who cheats on her husband is fundamentally dishonest and is thus more likely to lie about rape.<sup>628</sup>

Notably, the exclusionary nature of rape shield laws is controversial because of the competing interests involved. The court must balance the privacy interests of the rape victim with the due process rights of the defendant. As noted above, legislators designed rape shield statutes to insulate the sexual assault victim from invasive and humiliating questioning about her sexual history. Advocates believe that excluding such testimony would reduce gender bias in the courtroom, especially as related to determinations of consent where the sexual assault victim acted passively rather than resisting (putting up a fight).<sup>629</sup> This would encourage more victims to report sexual assault. Opponents suggest that those same provisions prevented a defendant from presenting a full defense, specifically by restricting the right granted under the Sixth Amendment.<sup>630</sup> One result of

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<sup>627</sup> S.C. Code § 16-3-659.1(1).

<sup>628</sup> Julia Simon-Kerr, "Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment," *The Yale Law Journal* 117, no. 8 (2008), 1856-1860. The provision in the statute would also seem to reflect the "medieval misogynistic view that once women had sex they desired it always, and this insatiability exculpated their rapists." Barbara A. Hanawalt, *'Of Good and Ill Repute': Gender and Social Control in Medieval England* (Oxford: Oxford University Press., 1998), 127.

<sup>629</sup> Price, "Constitutional Law – Sex, Lies, and Rape Shield Statutes," 550.

<sup>630</sup> The Sixth Amendment guarantees to the accused the right to present witness in his own behalf and to cross-examine witnesses called to testify against his interest. In federal cases, defendants may rely upon the

balancing the interests of the victim and the defendant is that the jury may still hear about the sexual history of the victim despite rape shield provisions if the defense can successfully persuade the judge that the proposed evidence is relevant to establishing his innocence.

Since the late 1970s, the Federal Courts have addressed the balancing act required when rape shield laws conflict with the Sixth Amendment Confrontation Clause. One early case was *United States v. Kasto*, issued prior to Rule 412 going into effect.<sup>631</sup> The underlining events of the case occurred in the spring of 1977 when Beth Renee Jennings, an Iowa State University student, participated in an exchange program on the Cheyenne River Indian Reservation in South Dakota. Late one evening, Abraham Kasto awakened Jennings.<sup>632</sup> After talking for about forty-five minutes, Kasto asked Jennings to take a ride with him. A few minutes into their ride, Kasto stopped the truck. At that time, Jennings asked Kasto to take her home. Instead, Kasto pulled Jennings out of the vehicle and raped her. He then took Jennings to his home where he raped her two more times. Thereafter, she fled the house; a neighbor took her to the hospital to seek treatment for injuries and to report the sexual assault.<sup>633</sup> The police subsequently arrested Kasto on charges of rape.

Prior to trial, the government filed a motion asking for the court to prohibit the defense from introducing testimony – or making any reference at all – to any sexual activities that Jennings may have had with men other than Kasto and from making any

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Sixth Amendment to enforce this right; in state cases, protection arises under the Fourteenth Amendment Due Process Clause, through which the Supreme Court has incorporated the Sixth Amendment protections.

<sup>631</sup> *United States v. Kasto*, 584 F.2d 268, 271-72 (8<sup>th</sup> Cir. 1978). It is notable that the rapes in question took place on American Indian reservation lands. As a result, the trial occurred in a federal district court.

<sup>632</sup> The reservation's YMCA had co-sponsored the exchange program. When Jennings first met Kasto, she learned that he was a representative of the YMCA.

<sup>633</sup> *Kasto*, 584 F.2d at 270.

reference to the form of birth control Jennings used. Notably, the “District Court granted the motion on the basis that a rape victim’s reputation for unchastity and evidence of their specific acts of sexual intercourse with men other than the defendant are irrelevant to either her general credibility as a witness or to the issue of her consent to intercourse with the defendant on the date charged.”<sup>634</sup> At the end of the trial, Kasto appealed his conviction to the United States Court of Appeals for the Eighth Circuit, challenging the District Court’s order that prevented the aforementioned evidence. Kasto argued that by denying him the opportunity to introduce evidence of unchaste behavior on the part of Jennings, he was unable to mount a complete defense under the terms of the Sixth Amendment and the application of Fed. R. Evid. 401 and 402.<sup>635</sup> In its opinion, the Eighth Circuit stated:

[A]bsent circumstances which enhance its probative value, evidence of a rape victim’s unchastity, whether in the form of testimony concerning her general reputation or direct or cross-examination testimony concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion charged to outweigh its highly prejudicial effect.<sup>636</sup>

“[C]ircumstances which enhance probative value” might include such evidence as the presence of semen, pregnancy, or the victim’s physical condition indicating intercourse, or where the evidence tends to establish bias, prejudice, or an ulterior motive surrounding the charge of rape. The Court went on to conclude:

Our examination of the record in the instant case satisfies us that the ruling by the District Court prohibiting any reference to any sexual activity

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<sup>634</sup> *Ibid.*

<sup>635</sup> According to Rules 401 and 402 of the Federal Rules of Evidence, all relevant evidence is admissible at trial, unless otherwise prevented by a federal law or rule. Relevant evidence is that which has a tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action.

<sup>636</sup> *Kasto*, 271-72.

which Jennings may have had with men other than Kasto, and to the fact that she was wearing an intrauterine contraceptive device at the time of the incident, was not an abuse of discretion. Any relevance which this evidence may have had to the issue of her consent to sexual relations with Kasto was outweighed by its prejudicial effect.<sup>637</sup>

The Court thereafter affirmed the judgment of the District Court, thereby upholding Kasto's conviction.

In 1991, the United States Supreme Court heard a case based on notice-and-hearing requirements of Michigan's rape shield statute. *Michigan v. Lucas* involved a defendant/appellant who had been convicted of two counts of criminal sexual misconduct for using a knife to force his ex-girlfriend into his apartment, where he beat her and forced her to engage in several nonconsensual sex acts.<sup>638</sup> At the time of the violation, Michigan had an operating rape shield law that provided, in part, that if a defendant proposes to introduce evidence of a prior sexual relationship between himself and the victim, he must file a written motion to offer proof of that relationship within ten days of his arraignment. Within its discretion, the court would then hold an *in camera* hearing to determine whether the proposed evidence is admissible.<sup>639</sup> At trial, Lucas' lawyer asked to be able to introduce evidence of a prior relationship between his client and the victim, despite a failure to file a written motion to do so. The trial court denied the motion and proceeded with a bench trial. The court did not find Lucas' defense of consent persuasive. Thereafter, the court found him guilty and sentenced him to a prison term of forty-four to one hundred and eighty months.

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<sup>637</sup> *Ibid.*, 272.

<sup>638</sup> *Michigan v. Lucas*, 500 U.S. 145 (1991).

<sup>639</sup> Michigan Compiled Laws § 750.520j.

When Lucas appealed, the Michigan Court of Appeals reversed the lower court's decision, holding that the notice-and-hearing requirements of Michigan's rape shield statute was "unconstitutional in all cases where it was used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant."<sup>640</sup> The United States Supreme Court granted *certiorari* to review whether the Michigan Court of Appeals' decision was consistent with Sixth Amendment jurisprudence. The Supreme Court began its analysis with a review of prior cases in which it had upheld notice requirements in similar situations. Anecdotally, the court explained that notice requirements by themselves did not violate a defendant's decision to call witnesses, but rather simply accelerated the timing of that disclosure. Acceleration of this type was not a constitutional violation, the Court stated, because a criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played."<sup>641</sup> In a later decision, the Court explained that notice requirements enhanced the fairness of the adversarial system by increasing the evidence available to both parties.<sup>642</sup> In light of this string of cases, the Court found that the Michigan Court of Appeals erred in adopting their *per se* rule that the notice-and-hearing requirement violated the Sixth Amendment as related to the rape shield law.<sup>643</sup> In doing so, the Court acknowledged a defendant's Sixth Amendment rights "to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" Those restrictions, however, "may not be arbitrary or disproportionate to

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<sup>640</sup> *Michigan v. Lucas* at 148.

<sup>641</sup> *Michigan v. Lucas* at 150.

<sup>642</sup> *Michigan v. Lucas* at 150 (citing *Williams v. Florida*, 399 U.S. 78 (1970) and *Wardius v. Oregon*, 412 U.S. 470 (1973)). See also, *U.S. v. Nobles*, 422 U.S. 225 (1975) and *Taylor v. Illinois*, 484 U.S. 400 (1988), in which the Court held that probative evidence could be prohibited in some circumstances when a criminal defendant failed to observe a valid discovery rule.

<sup>643</sup> *Michigan v. Lucas* at 152.

the purposes they are designed to serve. In applying its evidentiary rules a [court] must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.”<sup>644</sup>

The following year, the Ninth Circuit Court of Appeals upheld Alaska's rape shield law in a case that clearly balanced the interests of the victim and the defendant. In *Wood v. Alaska*, an Alaska state court had convicted the defendant/appellant of first-degree sexual assault.<sup>645</sup> Kenneth Wood and the victim, referred to only as M.G., offered contradicting accounts of their relationship at the time of the incident. Wood claimed that he and the victim had been in a tumultuous relationship that wavered between fighting and make-up sex. In contrast, M.G. claimed that their relationship had always been platonic. Before trial, the state moved for, and was granted, a protective order under Alaska's rape shield statute to prevent Wood from introducing evidence of M.G.'s prior sexual conduct.<sup>646</sup> Following his conviction, Wood appealed on the grounds that the exclusion of M.G.'s prior sexual conduct violated his Sixth Amendment right to confront witnesses against him and to present an adequate defense. The Alaska Court of Appeals upheld the conviction, concluding: “the trial court did not abuse its discretion in excluding the evidence because it had limited probative value, and whatever value it had was outweighed by its probable prejudicial effect.”<sup>647</sup> Wood then appealed to the Ninth Circuit Court of Appeals, basing the appeal once again on alleged violations of his Sixth Amendment rights to confront and cross-examine witnesses against him.

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<sup>644</sup> *Rock v. Arkansas*, 483 US. 44, 55-56 (1987). See, Price at 554-55, where Price applies this reasoning to the use of rape shield statutes.

<sup>645</sup> *Wood v. Alaska*, 957 F.2d 1544 (9<sup>th</sup> Cir. 1992).

<sup>646</sup> *Wood v. Alaska* at 1546. According to Alaska's rape shield statute, the court was required to determine, in an *in camera* hearing, the admissibility of evidence of prior sexual conduct.

<sup>647</sup> *Wood v. Alaska* at 1547.

The evidence the jury had not heard was that M.G. had previously posed for *Penthouse*, had appeared in X-rated movies and other sexual performances, and that she had shared her experiences with Wood, showing him the *Penthouse* photographs. In its decision, the Ninth Circuit weighed the interests of both victim and defendant, noting that while elements of M.G.'s past sexual conduct might be relevant to the case at hand, even:

relevant evidence can be excluded in certain circumstances. The right to present relevant testimony “may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.” . . . [A] state has a legitimate interest in protecting rape victims against unwarranted invasions of privacy and harassment regarding their sexual conduct. Also, “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”<sup>648</sup>

Based on these legal grounds, the Ninth Circuit affirmed the lower court’s decision, explaining that Wood had not successfully proven a violation to his Sixth Amendment rights. The Court reasoned that the relevant facts were more prejudicial than probative, contending that if the jury members had heard the facts of M.G.’s sexual history the jury might:

feel hostility for her as an immoral woman, and it could base its decision on that hostility rather than on the actual facts of the case. The proffered evidence in this case is particularly prejudicial because it indicates not only that M.G. had extramarital sex, but also that she posed nude and had sex both for money and for the purpose of making pornography. Because many people consider prostitution and pornography to be particularly offensive, there is a significant possibility that jurors would be influenced by their impression of M.G. as an immoral woman. They could also conclude, contrary to the rape law, that a woman with her sexual past cannot be raped, or that she somehow deserved to be raped after engaging in these sexual activities. In light of these considerations, we conclude that the risk of confusion and prejudice is substantial.<sup>649</sup>

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<sup>648</sup> *Wood v. Alaska* at 1549, where the Court drew heavily on the language of *Michigan v. Lucas*, discussed above (internal citations omitted).

<sup>649</sup> *Ibid.*, 1552-53.

By making such a statement, the court ensured that the jury focused on the facts at hand and not the victim's past, fulfilling the purpose of Alaska's rape shield statute.

As these three cases demonstrate, when hearing cases involving Federal Rule of Evidence 412, federal courts have been sensitive to the apparent conflict between the interests of the victim and the Sixth Amendment rights of the accused. In *Kasto*, *Lucas*, and *Wood*, the Court used a balancing test to protect the privacy of the victim, while maintaining the right of the accused to launch a complete defense by introducing evidence to contradict the statements of the victim. The Courts concluded that when the evidence proposed by the defense had no probative value or would unduly prejudice the jury against the victim, that evidence would not be allowed. Following these examples, in recent years, federal courts and many state courts have acted more consistently with regard to rape cases, providing more protection to and justice for victims.

In contrast, South Carolina continues to demonstrate attitudes that privilege accused (marital) rapists over victims. While it is true that there have been some amendments to laws relating to criminal domestic violence, criminal sexual conduct, and spousal sexual battery since 1994, the more important question is whether these laws are in fact protecting women and eliminating rape in marriage. Research conducted in Columbia, South Carolina in 2011 suggests that when it comes to protecting its female residents from marital rape, the Palmetto State falls short. Four common themes emerged from interviews with current and past legislators, state prosecutors, and those who work with victims of sexual assault and domestic violence. These common themes explain South Carolina's hesitation in implementing protective measures for women that match dominant views in other states.

First, according to many female legislators and social advocates, South Carolina remains a patriarchal environment controlled by wealthy, white, heterosexual men of privilege. This social structure, which has prevailed since statehood, often marginalizes women, children, and minorities.<sup>650</sup> Rebecca Williams, Policy and Prevention Specialist for the South Carolina Coalition Against Domestic Violence and Sexual Assault, explained that there is within this culture, a deeply rooted and prevailing attitude that the family is a closed environment; what happens within the family is private and closed to public observation.<sup>651</sup> Gilda Cobb-Hunter explained this in 1994, when she said: “in an area like family violence, because it is so personal, and it is so private . . . you have a lot of folks who are just opposed to government intervening in their bedroom.”<sup>652</sup>

As described by Ginny Waller, Executive Director of the Sexual Trauma Services of the Midlands in Columbia, South Carolina, the majority of people in South Carolina do not consider sexual violence to be an appropriate topic for conversation. People simply do not like to talk about it or acknowledge that there is a problem with sexual assault at all. If that is the attitude about sexual assault in general, addressing marital rape will be far more difficult.<sup>653</sup>

Waller went on to stress that things would not change simply because state legislators passed a new law. Lasting change will require educating the population and changing deeply ingrained attitudes if any real change is going to happen. To this end,

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<sup>650</sup> Author interview with Rebecca Williams, Policy and Prevention Specialist for the South Carolina Coalition Against Domestic Violence and Sexual Assault, 28 September 2011 (hereafter, Williams interview); Whipper interview.

<sup>651</sup> Williams interview.

<sup>652</sup> Lisa Greene, “Man Guilty of Raping His Wife Jury ‘Sends a Message,’ Makes History With Verdict,” *The State* (Columbia, SC), February 3, 1994.

<sup>653</sup> Author interview with Ginny Waller, Executive Director of the Sexual Trauma Services of the Midlands, September 27, 2011 (hereafter Waller interview).

Waller explained that those groups most influenced by lessons on sexual assault and domestic violence include students, those in the medical field, and law enforcement officers.<sup>654</sup> Another avenue of education was possible because of a STOP grant funded by the Violence Against Women Act. The grant funds a position within the South Carolina Attorney General's Office (AGO), staffed by prosecutor Kelly Wilson Hall. In an interview, Hall explained the multifaceted responsibilities of her job: in addition to prosecuting cases involving domestic violence, criminal sexual conduct, and other crimes against women, she is responsible for state-wide training of law enforcement officers, victims' advocates, and judges on the protocol established by the AGO to deal with domestic violence and sexual assault.<sup>655</sup>

Finally, while the state legislature passed the marital rape law in 1991, the criminal justice system has rarely utilized the statute to protect victims. While Hall accepted the job with the AGO with the understanding that she would prosecute domestic violence cases, she indicated that after three years in that position, not a single spousal sexual battery case had crossed her desk.<sup>656</sup> Hall offered a few theories. She suggested that law enforcement officers arresting suspects do so on other charges – i.e. criminal domestic violence. Second, she believed that women simply do not report incidents of rape in their marriages. This, she said, could reflect their dependence on their abuser. She also postulated that they do not see marital rape as a crime; rather, they see sex as a part of marriage, even when the man uses force. Those interviewed, whether from the criminal justice system or victim advocacy groups, all echoed Hall's explanations. In

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<sup>654</sup> Waller interview.

<sup>655</sup> Author interview with Kelly Wilson Hall, Assistant Attorney General, September 28, 2011.

<sup>656</sup> Hall interview.

fact, only Assistant Deputy Attorney General W. Allen Myrick knew first-hand of a case of marital rape prosecuted as such.<sup>657</sup> Instead, Suzanne Mays, a sex crimes prosecutor in Lexington, South Carolina, indicated that very few marital rape cases have come to her attention – perhaps one or two in fifteen years of practice. Mays suggested that criminal domestic violence of a high and aggravated nature is a more common charge. Marital rape, explained Mays, is simply more difficult to prosecute, and prosecutors choose a more likely conviction over risking a full acquittal.<sup>658</sup> The decision to pursue prosecution for criminal domestic violence has sentencing implications that downplay the harm to marital rape victims. Spousal sexual battery (marital rape) carries a sentence of up to ten years. In contrast, a defendant convicted for a first offense of criminal domestic violence faces a sentence of a fine of \$1,000 to \$2,500 *or* imprisonment for up to thirty days. A second conviction carries a sentence of a fine of \$2,500 to \$5,000 *and* imprisonment for between thirty days and one year. For a third conviction, a defendant faces between one and five years in prison.<sup>659</sup> This decision by law enforcement and prosecutors may be based on practical and efficient considerations: there is a greater likelihood of a conviction for criminal domestic violence, and a conviction is better than an acquittal, even when the conviction is for a crime carrying a lesser sentence.

Each of the above responses points to the long-standing political culture of South Carolina. Daniel Elazar has described South Carolina's political climate as one steeped in

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<sup>657</sup> See note 547 in this chapter for Myrick's comparison of a "real" marital rape case to a situation involving a manipulative and vindictive woman falsely claiming marital rape.

<sup>658</sup> Author telephone interview with Suzanne Mays, September 28, 2011.

<sup>659</sup> Author interview with Tameika Isaac Devine, attorney and Columbia City Council Member, September 23, 2011; See, S.C. Code § 16-25-20. Only when the crime involves a deadly weapon, results in serious bodily injury to the victim, or is an assault that would reasonably cause a person to fear imminent serious bodily injury or death, does the sentence for criminal domestic violence carry a sentence of 1-10 years. See S.C. Code § 16-25-65, criminal domestic violence of a high and aggravated nature.

traditionalistic culture that holds tightly to a paternalistic and elitist conception of the state, and one which passes legislation that “places a great deal of importance upon privilege of the elite, and upon maintaining programs that serve the interest of this group.”<sup>660</sup> This culture attempts to use government in very limited ways, seeing “the development of a bureaucratic structure as a threat to the value of interpersonal relationships.”<sup>661</sup> The laws of South Carolina relating to domestic violence reflect the dominance of the traditionalistic political subculture in at least three ways. First, family courts, rather than higher courts, have jurisdiction over the issuing and enforcement of orders of protection against domestic assault, suggesting that such matters are not of grave legal concern. Second, these orders, or in fact the criminal domestic violence laws, do not protect those persons in non-cohabitating or same-sex relationships, “suggesting that traditionalistic views do not support such protection because this would be a threat to traditional social ideas and statutes.”<sup>662</sup> Third, domestic assault (including sexual assault) is statutorily defined, prosecuted, and sentenced separately from regular assault – often less severely – which reinforces the desire of traditionalist subcultures to maintain traditional patterns even when doing so is contrary to legal and cultural changes occurring elsewhere in the nation.<sup>663</sup>

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<sup>660</sup> Daniel J. Elazar, *The American Mosaic: The Impact of Space, Time, and Culture on American Politics* (Boulder, CO: Westview Press, Inc., 1994), 235.

<sup>661</sup> Rebecca Williams, “STOP Formula Grant Administration and the Effects of Political Culture: A Comparative Case Study of Massachusetts, Minnesota, South Carolina and Washington,” (Master’s Thesis, University of South Carolina, 2007), 7.

<sup>662</sup> *Ibid.*, 29. This discussion intentionally addresses criminal domestic violence statutes rather than spousal sexual battery since criminal domestic violence charges are those pursued by the criminal justice system even when marital rape was part of the domestic violence instance under review. In light of the recent Supreme Court decision that legalized same-sex marriage, *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), it remains to be seen if criminal domestic violence and spousal sexual battery laws in South Carolina – or similar laws in other jurisdictions – will be used to protect victims in same-sex relationships.

<sup>663</sup> South Carolina has a long history of acting independently from the rest of the nation, particularly in cases where federal law challenges state’s rights. In 1832, John C. Calhoun resigned as Vice President of the United States citing differences with President Andrew Jackson and filled a Senate vacancy, allowing

Unfortunately, the state of South Carolina's laws allowed Dale Crawford to go free and, unsurprisingly his pattern of marital rape and domestic violence continued. In late 2004, Dale Crawford was once again the focus of legal and media attention. While twelve years had passed since he had been acquitted of raping his then wife Trish, details of that event resurfaced as Crawford faced criminal charges, this time for kidnapping, murder, and rape in Virginia. On November 22, 2004, police found the body of Sarah Louise Crawford, Dale's third wife, in a Charlottesville, Virginia motel room, four days after she had gone missing.<sup>664</sup> Dale Crawford quickly became the prime suspect as evidence of the couple's volatile relationship came to light. Two years before they married in 1999, a court had convicted Crawford of assault and battery against Sarah. At the time of her death, Sarah had a restraining order against her husband and had recently moved out of their marital home. Crawford had threatened Sarah when she moved her belongings from their house.<sup>665</sup>

When the case moved to trial, the jury was not allowed to hear about the earlier charges involving Trish since Dale had been acquitted of that crime. However, they did hear testimony that Crawford had purchased a handgun and bullets in the weeks prior to Sarah's murder. Witnesses testified that police had found Sarah's blood on the seat

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him to serve South Carolina in Congress to promote states' rights against perceived encroachment by the federal government. South Carolina was the first state to secede from the Union, thereby triggering the beginning of the Civil War in 1861. Southern Democrats, including those in South Carolina, had at best a tepid relationship with Franklin Roosevelt's New Deal Programs in the 1930s and 1940s. Many in South Carolina took an oppositional stance against the activist Warren Court during the Civil Rights Movement.<sup>664</sup> Courtney Stuart, "Capital offense: Jury sends a message," *The Hook* of Charlottesville, Virginia, February 15, 2007. <http://www.readthehook.com/85347/cover-capital-offense-jury-sends-message>. Accessed December 18, 2014. Jack Kuenzie, "Man formerly charged with marital rape now charged with murder of third wife," WISTV of Columbia, South Carolina, November 26, 2004. <http://www.wistv.com/story/2612294/man-formerly-charged-with-marital-rape-now-charged-with-murder-of-third-wife>. Accessed December 28, 2014.

<sup>665</sup> Stuart, "Capital offense."

covers of her car. Prosecutors suggested that Sarah had been shot in the northern Virginia city of Manassas and then driven to Charlottesville, over ninety minutes away. The medical examiner testified that given her injuries, Sarah may have lived an hour after being shot, but that she would have been paralyzed instantly. Finally, forensic experts testified that there was less than one in six billion odds that the semen found on Sarah's body came from someone other than Crawford. The jury heard from investigators that Crawford had driven Sarah's car to Florida shortly after she had been killed, and that he told family members in Gainesville that he was in the area on vacation, mentioning nothing about Sarah's death. Finally, the jury heard of Crawford's interview by the police, in which he contradicted himself several times about the events and timing of those events leading up to his wife's death.

After eight hours of deliberations, the jury of six men and six women found Crawford guilty of the "willful, deliberate, and premeditated killing of Sarah Crawford." In fact, they found him guilty of six of the seven counts he faced, including "abducting, killing, and raping her, stealing her car, and using a firearm in the commission of an abduction. The one not guilty verdict – the use of a firearm in the commission of rape – was perhaps an even grimmer indictment of Crawford's actions."<sup>666</sup> The finding of not guilty on this count was because the jury concluded that the rape occurred after Sarah was dead, making the use of the weapon unnecessary. The court sentenced Crawford to two consecutive life sentences plus sixty-seven years.

For the next seven years, Crawford appealed his conviction. The result of those appeals closely resembled a ping-pong match in which he prevailed and then lost ground.

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<sup>666</sup> *Ibid.*

The appeals, which finally reached the Virginia Supreme Court, argued that Crawford's Sixth Amendment right under the confrontation clause had been violated. Evidence introduced at his original trial included an affidavit accompanying Sarah's petition for a restraining order against Crawford. In her affidavit, Sarah had told police officers that her husband had "told [her] that [she] must want to die. He also said that he [understood] why husbands kill their wives."<sup>667</sup> Crawford's attorney argued that since his client was unable to cross-examine Sarah, the court should not have allowed her recorded testimony from the affidavit to be introduced at trial. Thus, the argument continued, his conviction hinged on inadmissible evidence, requiring that his conviction be overturned. In 2008, a three-judge panel of the Virginia Court of Appeals reversed his convictions on all charges except the stealing of Sarah's car. The following year, the Court of Appeals, reversed the three-judge opinion, upholding the original convictions and the admission of the affidavit. Crawford's attorney filed a subsequent appeal with the Virginia Supreme Court, which agreed to hear the appeal.<sup>668</sup> The Court released its decision in January 2011, upholding Crawford's original convictions. The Court reasoned that while the admission of the affidavit technically violated his Sixth Amendment rights, the violation was "harmless beyond a reasonable doubt."<sup>669</sup> The Court went on to explain that the case against Crawford was strong without the affidavit and would have nevertheless led to a conviction in the absence of the affidavit.

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<sup>667</sup> Brian Chidester, "State court hears Crawford appeal," *C-Ville Weekly*, June 1, 2010. [http://www.c-ville.com/State\\_court\\_hears\\_Crawford\\_appeal/#.VLGksyvF98E](http://www.c-ville.com/State_court_hears_Crawford_appeal/#.VLGksyvF98E). Accessed December 28, 2014.

<sup>668</sup> *Ibid.*

<sup>669</sup> Tasha Kates, "Court upholds Crawford murder conviction," *The Daily Progress*, January 13, 2011. [http://www.dailyprogress.com/news/court-upholds-crawford-murder-conviction/article\\_0ec42b4e-dd07-5306-981e-f0d8f4bd99af.html?mode=jqm](http://www.dailyprogress.com/news/court-upholds-crawford-murder-conviction/article_0ec42b4e-dd07-5306-981e-f0d8f4bd99af.html?mode=jqm). Accessed December 28, 2014.

While the opinion of the Virginia Supreme Court represented the upholding of justice, questions linger about the crimes committed by Dale Crawford. Had he been convicted of raping his second wife, Trish, would Sarah Crawford still be alive? Had that rape case been heard in a Virginia state court – or the court of a state other than South Carolina – would it have led to a conviction, thereby protecting women like Sarah from the violence of Dale Crawford? If Crawford faced charges of marital rape in South Carolina today, would the jury reach a different verdict?

**CONCLUSION**  
**HOW FAR WE HAVE COME: OR, “THE IDEA THAT COERCION MIGHT OCCUR BETWEEN HUSBAND AND WIFE REQUIRES ACCEPTING THE IDEA THAT WIVES ARE INDEPENDENT PEOPLE WITH RIGHTS OVER THEIR OWN BODIES.”<sup>670</sup>**

Marital rape is a concept that many find difficult to comprehend. The confusion often takes one of two paths: disbelief that marital intimacy would rise to the level of rape or an inability to comprehend how the law could have insulated a husband from prosecution for compelling his wife to have sex against her will. Then there are individuals who maintain the belief that rape in marriage is not possible because of the concept of irrevocable consent. This belief forms the basis for the “legitimacy” of the marital rape exemption. This project has evaluated the argument from both sides of the debate, as it analyzes the criminalization of marital rape in the United States in the years between 1975 and 1993. The evidence demonstrates that the decision to remove the common law protection for husbands was the result of coordinated effort by legislators, jurists, activists, and community participants.

Despite jurisdictional variation, by the end of the twentieth century, all fifty states had eliminated the marital rape exemption. However, even a cursory review of those laws suggests that victims of marital rape are not provided the same protections, nor are their abusers subject to the same level of punishment, from one state to the next. Furthermore, in a number of states, the criminal justice system continues to address spousal rape differently than non-spousal rape. The primary differences are evident in reporting requirements, the statutorily-defined elements of the crime, and sentencing requirements.

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<sup>670</sup> This sentiment comes from Finkelhor and Yllo, *License to Rape*, 90.

Notwithstanding the number of men arrested and convicted for raping their wives, support for a marital rape exemption remains. In the past year, over twenty years since the last state eliminated the marital rape exemption, several events have called into controversy universal acceptance of the suppositions found in the above title: sexual coercion might occur in marriage and that a woman's right over her own body includes the right to say no to marital sex. Those events, separately and collectively, revive the theory of irrevocable consent. They also provide evidence that there is a need for further development in social and legal attitudes toward rape in marriage.

Michael Cohen, attorney and top aide for businessman turned presidential-hopeful, Donald Trump, raised controversy on July 27, 2015, when he responded to rape allegations brought against Trump regarding an incident in 1989. Trump's ex-wife, Ivana, described the episode as rape in a deposition given during the couple's divorce case in the early 1990s. She later clarified her statement and rescinded the assertion that rape had occurred. Journalists breathed new life into the episode after Trump announced his run for the 2016 Republican presidential nomination. Cohen defended his boss: "You're talking about the frontrunner for the GOP, presidential candidate, as well as a private individual who never raped anybody. And, of course, understand that by the very definition, you can't rape your spouse."<sup>671</sup> Thinking that he was adding credibility to his argument, Cohen argued: "there's very clear case law," to support this position. What Cohen didn't consider was that New York, the state in which Trump resided in 1989 and in which his divorce was filed, struck down their marital rape exemption in the 1984 case

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<sup>671</sup> Tanya Basu, "Donald Trump Lawyer Sorry for Saying 'You Can't Rape Your Spouse,'" *Time*, July 28, 2015, <http://time.com/3974560/donald-trump-rape-ivana-michael-cohen/>.

*People v. Liberta*, thirty-one years prior to Cohen’s statement.<sup>672</sup> Cohen has since apologized for his comments and the difficulties he might have caused for Trump’s campaign.

Unlike Cohen, the Christian blogger who posts under the pseudonym Larry Solomon remains unapologetic for posts that have spurred significant controversy. The stated purpose of Solomon’s blog, BiblicalGenderRoles.com, is to advise couples on how to follow biblical gender-role standards. In an October 2015 post, Solomon contended that men “should not tolerate refusal” when their wives say no to sex. Throughout his blog, Solomon presents his unique version of women-blaming for sexual difficulties within marriage. He claimed in a post titled “How a Husband Can Enjoy Sex That is Grudgingly Given by His Wife,” that sex within marriage is a wife’s duty, and to refuse that duty or to fulfill grudgingly that duty is sinful.<sup>673</sup> Solomon had argued in an earlier post titled “Christian Husbands – You Don’t Pay For the Milk When You Own the Cow!” that, from a biblical perspective, there is no such thing as marital rape. A wife’s body belongs to her husband, he insists, and a wife should present any request for deferment – not refusal – of sex in a humble and gentle way.<sup>674</sup>

Addressing men’s motivation for marital intimacy, Solomon explained that men want to connect both physically and emotionally with their wives during sex. Yet, a woman who seems uninterested in her husband’s sexual demands makes that emotional

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<sup>672</sup> *People v. Liberta*, 64 N.Y. 2d 152 (1984).

<sup>673</sup> Larry Solomon, “How a Husband Can Enjoy Sex That is Grudgingly Given by His Wife,” October 18, 2015, <http://biblicalgenderroles.com/2015/10/18/how-a-husband-can-enjoy-sex-that-is-grudgingly-given-by-his-wife/>.

<sup>674</sup> Larry Solomon, “Christian Husbands – You Don’t Pay For the Milk When You Own the Cow!” April 28, 2015, <http://biblicalgenderroles.com/2015/04/28/christian-husbands-you-dont-pay-for-the-milk-when-you-own-the-cow/>.

connection impossible. Instead of cautioning his male readers to postpone marital intimacy until their wives are interested participants, Solomon suggested that they “ignore [their wives’] lack of desire and have sex . . . anyway.”<sup>675</sup> To avoid potential emotional conflict of their own in such situations, Solomon suggested that husbands concentrate wholly on the physical connection. The way to do this, Solomon suggested, was to “Focus your eyes on her body, not her face. Focus on the visual pleasure you receive from looking at her body and physical pleasure you receive from being inside your wife.”<sup>676</sup>

While Solomon claimed that his comments do not endorse marital rape, his critics are not convinced. Some critics have demonstrated their disbelief by responding to his blogs with links to domestic violence and sexual assault laws. Others have attempted to reach a wider audience through alternate blogs and online news magazines.<sup>677</sup> Solomon responded by posting another article on his blog, “The Frustrated Feminist Wife,” in an attempt to match wits with those critics he referred to as “Rape Accusers.”<sup>678</sup> With neither side backing down, the debate continues.

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<sup>675</sup> Emily James, “Christian Website Sparks Fury for Advising Husbands to Avoid Wives' Faces During Sex If Their Spouses Don't Want Intercourse - After Saying There's No Such Thing As Marital Rape,” October 27, 2015. <http://www.dailymail.co.uk/femail/article-3291687/Christian-website-claims-nothing-marital-rape-advises-husbands-avoid-wives-faces-sex-spouses-sinfully-not-mood-intercourse.html>

<sup>676</sup> *Ibid.* In his remarks, Solomon compared a wife who is an unenthusiastic participant to the mythological, monstrous Medusa: “So like the men who could not look at Medusa’s face otherwise they would be killed, realize that if you look on your wife’s face when she is displaying a sinful attitude toward sex it will kill your sexual pleasure.” Solomon, “How a Husband Can Enjoy Sex.”

<sup>677</sup> David Edwards, “Christian Website: Don’t Look at Your Wife’s Face During Sex to Enjoy It Even When She Resists,” *Rawstory*, October 26, 2015, <http://www.rawstory.com/2015/10/christian-website-dont-look-at-your-wives-face-during-sex-to-enjoy-it-even-when-she-resists/>; Rachel Vorona Cote, “Christian Website Advises Avoiding Wife’s Face if She’s Not Into Sex,” *Jezebel*, October 26, 2015, <http://jezebel.com/christian-website-advises-avoiding-wives-face-if-shes-n-1738825759>; James, “Christian website sparks fury”; Hilary Hanson, “If Your Wife Hates Sex, Just Don't Look At Her Face, Says Christian Blogger,” *Huffinton Post*, October 27, 2015, [http://www.huffingtonpost.com/entry/if-your-wife-hates-sex-just-dont-look-at-her-face-says-christian-blogger\\_562fe79fe4b0c66bae59f710](http://www.huffingtonpost.com/entry/if-your-wife-hates-sex-just-dont-look-at-her-face-says-christian-blogger_562fe79fe4b0c66bae59f710).

<sup>678</sup> Larry Solomon, “The Frustrated Feminist Wife,” May 31, 2015, <http://biblicalgenderroles.com/2015/05/31/the-frustrated-feminist-wife/>.

Given the swiftness and quantity of opposing responses, Cohen and Solomon represent the minority within American society. As such, it is improbable their views on the possibility of rape in marriage will have an impact on statutory provisions that have criminalized spousal rape. Certainly, controversies will arise that challenge our current notion about rape and which actions the law will define as rape, even between individuals who are married. In fact, as the following example illustrates, future amendments to spousal rape laws will likely involve nuanced interpretations of the laws and their application to specific situations not previously considered.

In August 2014, Henry Rayhons, 78, was charged with third-degree sexual assault of his wife Donna, who suffered from dementia/Alzheimer's disease. Following instructions from daughters of a previous marriage, Donna was living in a residential care facility when the alleged sexual assault occurred. A care plan developed by facility employees, Donna's daughters, and her treating physician, recommended cessation of activities that might result in undue stress or physical harm to Donna. In mid-May 2014, care facility personnel reviewed the care plan with Rayhons and informed him that his wife was no longer able to consent to sexual activity. Events leading to Rayhons' arrest began when Donna's daughters shared their concerns with health care providers, alleging inappropriate sexual contact between Henry and Donna. After care facility staff informed the police about the daughters' suspicions, a formal investigation ensued. At issue in the case was whether Donna had the mental wherewithal to consent to sexual activity.<sup>679</sup>

While the majority of recent debates about consent and sexual assault have revolved

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<sup>679</sup> Relevant to the Rayhons' case, the Iowa sexual assault statute provides: "a person commits sexual abuse in the third degree when the person performs a sex act . . . [when] the act is between persons who are not at the time cohabiting as husband and wife . . . [and] the act is performed while the other person is mentally incapacitated, physically incapacitated, or physically helpless." Iowa Code § 709.4.

around the influence of drugs, alcohol, and the culture on college campuses, Rayhons's trial presented a unique examination of the aspect of consent: "When is a previously consenting spouse suffering from dementia no longer able to say yes to sex?"<sup>680</sup> The jury found Rayhons not guilty, yet it is uncertain why they reached that verdict. They may have concluded that Donna did give consent, despite her severe cognitive impairment, or that the prosecutor had not proven the charges against Rayhons. In the alternative, ambiguity within the state statute may have influenced the jury's decision. Iowa law defines sex with a person suffering from a "mental defect or incapacity" as sexual assault but provides no guidance about what is meant by the term "mental defect."<sup>681</sup>

Experts suggest that the "conclusion of the trial is unlikely to end the national conversation the case launched about sex and dementia."<sup>682</sup> As the life expectancy for Americans continues to increase and rates of dementia rise, medical, ethical, and legal issue of consent will become even more significant. The complexity of dementia make legal assessment of consent difficult. Symptoms fluctuate unpredictably. A patient might be lucid in the morning, yet impaired that same afternoon. What is appropriate one day might be inappropriate the next, depending on the patient's condition. A lack of consensus within the medical field further complicates this uncertainty. Even among Alzheimer's experts, there is no agreement on whether the disease really does preclude

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<sup>680</sup> Sarah Kaplan, "In an Iowa Courtroom, an Astonishing Case of Sex and Alzheimer's," *Washington Post*, April 7, 2015, accessed October 10, 2015, <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/07/in-an-iowa-courtroom-an-astonishing-case-of-sex-and-alzheimers/>.

<sup>681</sup> Sarah Kaplan, "Former Iowa Legislator Henry Rayhons, 78, Found Not Guilty of Sexually Abusing Wife with Alzheimer's," *Washington Post*, April 23, 2015, accessed October 10, 2015, <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/23/former-iowa-legislator-henry-rayhons-78-found-not-guilty-of-sexually-abusing-wife-with-alzheimers/>.

<sup>682</sup> *Ibid.*

people from being able to give consent. It is possible for a physician to conclude that a patient is too cognitively impaired to consent to any sexual activity, while at the same time acknowledging that physical intimacy can benefit dementia patients by calming agitation and easing loneliness.<sup>683</sup>

The current controversy surrounding consent and dementia patients will not be the only concern that causes society to reinterpret the legal definition of (spousal) rape. The people of this nation – whether legislators, activists, or simply interested citizens – will certainly be called upon to address future nuanced conditions that arise and demand subtle clarifications.

As with any project, there are additional avenues of inquiry about social attitudes and legal analysis regarding spousal rape that remain to be considered in further research. The influence, if any, which race and ethnicity had on the promulgation of spousal rape laws is one area fruitful for investigation. For instance, Laura X argued that African American legislators in California, Ohio, and South Carolina “suffered paternalism by unsupportive white male liberals who said that marital rape was only a problem in the African American community . . . [that] would be cured by ending poverty for African Americans.”<sup>684</sup> While such evaluation may not have made it into the legislative history of other jurisdictions, the possibility is ripe for further investigation. Further examination of domestic violence and sexual assault activism in relation to that of LGBT activism would also provide an opportunity for critical analysis, especially in light of Supreme Court

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<sup>683</sup> Kaplan, “In an Iowa Courtroom”; Pam Belluck, “Sex, Dementia and a Husband on Trial at Age 78,” *New York Times*, April 13, 2015, accessed October 10, 2015, [http://www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html?\\_r=0](http://www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html?_r=0)

<sup>684</sup> Laura X, “Accomplishing the Impossible: An Advocate’s Notes From the Successful Campaign to Make Marital and Date Rape a Crime in All 50 U.S. States and Other Countries,” *Violence Against Women* 5, no. 9 (1999), 1072.

decisions that have held anti-sodomy law unconstitutional and invalidated state laws that banned same sex marriage.<sup>685</sup> Popular culture both influences and reflects changes in societal norms and expectations. Therefore, a close reading of novels, movies, and music that reference sexual assault and physical violence within marriage would provide yet another lens by which to evaluate changing social and legal views on spousal rape.

While there are clearly still questions to be asked and critical analyses to be made, this study demonstrates several of the important victories that women made in terms of personal autonomy that led to the criminalization of rape in marriage. Over the course of nearly one hundred and fifty years, those hard won victories were dependent on the dedication of women's advocates, the determination of legislators, the activism of jurists, and the support of an involved public. Social and legal attitudes toward spousal rape – actually, sexual assault in general – have resulted in greater legal protection for the rights of married women. The elimination of the marital rape exemption, better trained law enforcement, increased services provided by advocates, and a more informed public all promote the legitimacy of marital rape claims. This sense of legitimacy promotes the belief that victims today will receive more support and justice than did Greta Rideout, Diana Willis, Dianna Green, and Trish Crawford.

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<sup>685</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

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