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DOMESTIC VIOLENCE AND THE STATE: RESPONSES TO AND RATIONALES FOR SPOUSAL BATTERING, MARITAL RAPE & STALKING

KATHERINE M. SCHELONG*

I. INTRODUCTION

Although the home has traditionally been extolled as a safe haven and marriage as the most venerable of our institutions, the reality for women¹ is that they are at far greater risk of being assaulted in their own homes by a "loved one" than they are of being assaulted on the streets by a stranger.² In fact, it is recognized both nationally and internationally that women are routinely raped, beaten, assaulted, and stalked by current and former husbands or boyfriends.³

The statistics speak for themselves. In 1986 alone, a woman was the victim of rape or attempted rape every 3 1/2 minutes.⁴ Most rapes are committed by non-strangers, that is, husbands or dates.⁵ Additionally, approximately 200,000 people, the majority of whom are women, are harassed by stalkers each year.⁶ Most stalking is related to domestic violence and former intimate relationships.⁷ Ninety percent of women killed⁸ by husbands or boyfriends were stalked.⁹

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1. Although men can be victims of domestic violence and domestic violence can occur in gay and lesbian relationships, studies have shown that women in heterosexual relationships are victims of family violence at the rate of three times that of men and that of all crimes of domestic violence, ninety-one percent were women victimized by their husbands or ex-husbands. See PATSY A. KLAUS ET AL., BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE 4 (April 1994). Therefore, the scope of this paper is limited to male-female domestic violence.

2. Lynn Hecht Schafran, *Carol Stuart and the War on Women: What is the Legal Community's Response?*, 75 MASS. L. REV. 46, 47 (1990).

3. See Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36 (1993) (domestic violence is endemic to all societies, it is neither unusual nor an exception to normal family life).

4. Schafran, *supra* note 2, at 48.

5. *Id.*

6. Nina Schuyler, *No Place To Hide*, CAL. LAW., June 1993, at 18, 18.

7. Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 995 n.32 (1993).

8. Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 838 (1993). ("The FBI's 1990 Supplemental Homicide Report

Rape and assault victims usually see their attackers repeatedly before the crime occurs.¹⁰ In an analysis of the federal crime statistics from 1978-82, the National Coalition Against Domestic Violence found that a woman was assaulted by a partner every fifteen seconds.¹¹ In 1991 alone, 21,000 domestic crimes against women were reported to the police each week.¹² Domestic violence is the single greatest cause of injury to women each year.¹³ "More women are admitted to emergency rooms after being battered by their partners than are treated for muggings, car accidents and rapes combined."¹⁴ In addition, the severity of injuries inflicted upon victims of spousal assault is significantly greater than the injuries sustained by victims of assaults by strangers.¹⁵

Nonetheless, it is widely accepted that domestic violence is one of the most under-reported and under-estimated crimes in the United States today.¹⁶ Some studies maintain that the actual number of incidents in which a woman is battered could be as high as six million each year.¹⁷

reveals that while four percent of male homicide victims in 1990 were killed by their wives or girlfriends, a staggering thirty percent of female homicide victims were killed by their husbands or boyfriends.")

9. Guy, *supra* note 7, at 996.

10. *Id.*

11. Schafran, *supra* note 2, at 47.

12. Joseph R. Biden, *Domestic Violence a Crime, Not a Quarrel*, TRIAL, June 1993, at 56, 57 (statistics are based on an extensive survey of authorities across the nation conducted by the staff of the Senate Judiciary Committee). "Official government agencies charged with collecting crime data, like the FBI, do not specifically include domestic violence in their yearly national crime statistics." *Id.* at 57 n.5. Given that domestic violence, that is violence directed towards woman, is so prevalent in our society, one must wonder why these statistics are not gathered.

13. *See id.* at 56. Two U.S. surgeons general have stated domestic violence (not heart attacks, cancer, or strokes) is the greatest threat of injury to women in this country. *Id.* at 56 n.2 and accompanying text.

14. Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149, 149 (1990) (citing Sheila A. Feeney, *Getting the OP is Easy*, N.Y. DAILY NEWS, Sept. 3, 1989, at 54).

15. *See* Barbara K. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 78 n.27 (1983) (citing Deirdre A. Gaguin, *Spouse Abuse: Data from the National Crime Survey*, 2 VICTIMOLOGY: INT'L J. 632, 640-41 (1977-78)).

16. *See* PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN 1 (1986) (an estimated 48% of domestic attacks against women go unreported); *see also* U.S. COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 1 (1982) [hereinafter RULE OF THUMB].

17. Stephen B. Reed, Note, *The Demise of Ozzie & Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 338 (1991) (citing Jane O'Reilly, *Wife Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23, 23).

Estimates suggest that in two-thirds of all marriages an episode of domestic violence will occur at least once.¹⁸

The history of domestic violence and marital rape reveals that these offenses have been sanctioned and perpetuated by the criminal justice system, itself a reflection of existing social attitudes. Although today there are laws allowing prosecution of a husband or boyfriend who abuses a wife or girlfriend,¹⁹ the legal system continues to treat these abusers differently from other people accused of assault and battery.²⁰ In many states marital rape is not treated as a crime, and in some states has been expanded to include rape by boyfriends and social companions.²¹ "[D]espite increased national attention, domestic violence . . . remains the most prevalent crime in our society."²² A review of data shows that the response to cases involving domestic abuse by the criminal justice system, from the police to the courts, has been ineffectual and inconsistent.

"[A] 1989 study in the nation's capital found that in over 85 percent of the domestic violence cases where a woman was found bleeding from wounds, police did not arrest her abuser."²³ Additionally, "[t]he U.S. Bureau of Justice Statistics reports that half the incidents of domestic violence classified as 'simple assaults' actually involved bodily harm as serious or more serious than ninety percent of all rapes, robberies and aggravated assaults."²⁴ Further, ninety percent of women killed by their abusers have called the police at least once and fifty percent have called

18. Christopher J. Klein, Note, *Will the § 1983 Equal Protection Claim Solve the Equal Protection Problem Faced by Victims of Domestic Violence? A Review of Balistreri, Watson, Hynson, and McKee*, 29 J. FAM. L. 635, 636 (1990-1991) (citing Evan Stark et al., *WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL*, (Monograph Series No. 7, National Clearing House on Domestic Violence 1981)).

19. *Id.*; Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 8 (1978).

20. Finesmith, *supra* note 15, at 75.

21. *See infra* p. 109-11.

22. Klein, *supra* note 18, at 636.

23. Biden, *supra* note 12, at 56 (citing Karen Baker et al., Joint Project, D.C. Coalition Against Domestic Violence & Women's Law & Public Policy Fellowship Prog. at Georgetown U. Law Center, Report on District of Columbia Police Response to Domestic Violence 44 (Nov. 3, 1989) (unpublished report, on file with Senate Commission on Judiciary)).

24. Schafran, *supra* note 2, at 47-48 (citing LANGAN ET AL., *supra* note 16, at 3).

five or more times.²⁵ Of all women murdered, one-fifth had been previously attacked by their killer.²⁶

The stereotypes, myths, and legal and social patterns that have influenced police response to domestic violence are manifested in the courts as well. As recently as the mid-1970s, every state exempted a husband from prosecution for the rape of his wife.²⁷ Studies show that in the majority of rape cases the better the victim knows the assailant, the less chance there is that the assailant will be prosecuted.²⁸ Studies have also found that rapes by acquaintances are two to five times less likely to result in an indictment than rapes by strangers.²⁹ Indeed, in most jurisdictions throughout the United States and the world,³⁰ spousal rape has been a husband's right.³¹ Legislation often raises a shield of legal defenses to protect men.³²

Women on the other hand have had fewer advantages: "Women victims may be doubly jeopardized if they try to protect themselves. A battered wife who kills her husband to protect the lives of her children or herself is more likely to be convicted of murder than the husband who beats his wife to death."³³ Some judges believe abused women are masochists or that they exaggerate the violence to punish "philandering husbands or boyfriends," while others cling to an ideal of family privacy.³⁴

25. Guy, *supra* note 7, at 996 (citing *Anti-Stalking Legislation, 1992: Hearings on S.2922 Before the Senate Judiciary Committee*, 102d Cong., 2d Sess. (1992) (unpublished statement of Sen. William Cohen)).

26. See *id.* (citing *Morning Edition: Anti-Stalking Laws Considered by Virginia* (Nat'l Pub. Radio broadcast, Mar. 10, 1992, available in LEXIS, Nexis Library, News File)).

27. Leigh Bienen, *Rape III-National Development in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 185 (1980).

28. *Women, Violence, and the Law: Hearing Before the House Select Comm. on Children, Youth and Families*, 100th Cong., 1st Sess. 3 (1987) [hereinafter *Women, Violence and the Law*] (statement of Rep. George Miller).

29. *Id.* at 4 (fact sheet citing SUSAN ESTRICH, *REAL RAPE* (1987)).

30. See, e.g., *R v. R* [1991] 4 All E.R. 482 (abrogation of spousal rape exemption in England); Michael D. Freeman, *But If You Can't Rape Your Wife, Who(m) Can You Rape? The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 26 (1981)(discussion of spousal rape exemption in France); Susan Maidment, *Rape Between Spouses - A Case for Reform*, 8 FAM. LAW. 87, 89 (1978)(discussion of spousal rape exemption's recognition in England); Joanna L. McFayden, *Inter-Spousal Rape: The Need for Law Reform*, in *FAMILY VIOLENCE* 193 (John M. Eckelaar & Sanford N. Katz eds., 1978)(discussion of spousal rape exemption in Canada).

31. Martin D. Schwartz, *The Spousal Rape Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33, 33 (1982).

32. *Id.*

33. *Women, Violence and the Law*, *supra* note 28, at 2.

34. See Litsky, *supra* note 14, at 169-70; see also *RULE OF THUMB*, *supra* note 16, at 91.

When viewed in relation to the modern view that women are no longer chattel of men,³⁵ but are equal to men, the theories justifying rape, assault, and battery within the family should uniformly be condemned as archaic and wholly incompatible with current jurisprudence. Yet assault, battery, and rape in marriage continue to be sanctioned by law either through the lack of criminalization or the lack of arrest, prosecution, and sentencing. In order to appreciate the difficulties women face within the legal system one must realize that the problems are not simply inherent in or limited to the system.³⁶ The problems are associated with the broader issues in American life of sexism,³⁷ racism, and capitalism.³⁸ Therefore, to view domestic violence as episodic or random is to deny its full import.³⁹

II. HISTORICAL REVIEW OF DOMESTIC VIOLENCE

The history of domestic violence must be examined to understand the reality of domestic violence today in all its forms and subtleties.⁴⁰ The roots from which spousal abuse has grown and flourished lie in the subjugation of women in patriarchal societies⁴¹ and those institutions the

35. *Trammel v. United States*, 455 U.S. 40, 52 (1980).

36. Natalie J. Sokoloff & Barbara Raffel Price, *The Criminal Law & Women*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN* 10 (Barbara R. Price & Natalie J. Sokoloff eds., 1982).

37. "Sexism is not merely the prejudice of individuals; it is embedded in the very economic, legal, and social framework of life in the United States. The criminal justice system, as one part of that institutional framework, reflects the same sexist underpinning that is evidenced throughout capitalist society." Nicole Hahn Rafter & Elena M. Natalizia, *Marxist Feminism: Implications for Criminal Justice*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN* 465, 465 (Barbara R. Price & Natalie J. Sokoloff eds., 1982).

38. *Id.*

39. See generally Susan S. Edwards, *A Socio-legal Evaluation of Gender Ideologies in Domestic Violence Assault and Spousal Homicides*, 10 *VICTIMOLOGY: INT'L J.* 186, 186 (1985). See also Thomas & Beasley, *supra* note 3, at 60 (domestic violence is leveled at women because they are women in order to inhibit them from realizing their rights and as a means of maintaining their subordinate status).

40. R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 23 (1979). "In the workplace, in the home, on the street, men have significant power over women. This imbalance of power not only allows individual men to control individual women, it perpetuates itself in conditioning each subsequent generation of women and men to take their places in the predefined order." Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title II Of The Violence Against Women Act*, 80 *GEO. L.J.* 2197, 2206-07 (1992).

41. Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 *SUFFOLK U. L. REV.* 983, 983 (1989).

patriarchs created: law, language,⁴² religion, and marriage.⁴³ Such an examination reveals that in domestic relations the common bond was that women were the chattel of men. Thus, society's traditional view of a woman's "proper" role was built upon the systematic domination and subordination of women.⁴⁴

A. Early Western Civilization

The history of women's subordination dates back to the early Greeks and Romans and the nomadic period of the ancient Hebrews.⁴⁵ In these societies women were controlled by men.⁴⁶ A woman's value was connected to her sexuality and fertility.⁴⁷ Indicative of this value was a Hebrew husband's power to sentence his wife to death for adultery.⁴⁸ In early Roman society, women were classified as property.⁴⁹ Under Roman law, a man could beat, divorce, or murder his wife for offenses she committed that disparaged his honor or threatened his property rights.⁵⁰ Enforcement of these rights of control was considered a private matter.⁵¹

Even though in later Roman society some women entered the political, intellectual, and religious arenas, men retained their authority and control over their wives and daughters by, among other things, shaping the law.⁵² For example, a woman in the upper class had valid grounds for divorce only if her husband used unjustifiable and excessive violence.⁵³

42. "Language is socially constructed and [is] a facile manipulator of our understanding rather than a neutral descriptive tool." Joyce E. McConnell, *Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 252 n.254 (1992) (quoting Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 16 n.14 (1988)). In a society built upon bias towards men, biases inevitably exist in language that is man-made. Michelle Bograd, *Family Systems Approaches to Wife Battering: A Feminist Critique*, AMER. J. ORTHOPSYCHIATRY 558, 562 (1984).

43. "The victimization of one subjected to domestic violence or spousal homicide does not begin sequentially at the point of being battered, instead the victimology applied to that victim, shared in language, background expectancies, explanations, and understandings, exists already before the violence has been committed." Edwards, *supra* note 39, at 186.

44. DOBASH & DOBASH, *supra* note 40, at 33.

45. Salina Szechtman, *Wife Abuse: Women's Duties - Men's Rights*, 10 VICTIMOLOGY: INT'L J. 253, 254 (1985).

46. *Id.*

47. *Id.*

48. *Id.*

49. See DOBASH & DOBASH, *supra* note 40, at 34-36 (examining male domination of women in Roman society).

50. See *id.* at 36-37 (a wife's consumption of wine or adultery could result in punishment).

51. See *id.* at 38 (chastisement regarded as a domestic affair).

52. *Id.* at 38-40.

53. *Id.* at 38-39.

1. Early Christian Attitudes

The Old and New Testaments espouse and instruct the subservience of women.⁵⁴ The creation of Eve from the rib of Adam provided fertile ground for sermons proclaiming women's submissive role within the family.⁵⁵ A virtuous woman was docile, chaste, and passive.⁵⁶ A wife who failed to meet these standards was subject to death by mutilation or stoning.⁵⁷ In addition, conduct acceptable for men was denounced when committed by a woman.⁵⁸ According to Biblical law, rape was considered an encroachment of the father's or husband's property interest rather than a crime against the woman.⁵⁹

Through the twelfth century, the church's position toward women remained basically unchanged.⁶⁰ A medieval publication of canon law, relying on Roman law, argued that as the subjects of men, women should be deprived of all authority.⁶¹

A husband's right of chastisement, later sanctioned by Blackstone,⁶² can be traced to the late 1400s in Father Cherubino's *Rules of Marriage*.⁶³ The Rules ordained that "when a wife committed an offense against her husband, he should '[s]cold her sharply, bully and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly . . .'"⁶⁴ The endorsement of the *Rules of Marriage* by the Catholic Church furthered the institutional and societal subordination and degra-

54. See Sewell, *supra* note 41 at 986 (1989) (citing e.g., 1 *Corinthians* 11:3 (a man is to woman as Christ is to man); *Deuteronomy* 22:28-29 (a man who rapes a virgin shall pay her father compensation and marry her); *Genesis* 3:16 (Eve's temptation of Adam renders man woman's master)).

55. Sewell, *supra* note 41, at 986; see also *Genesis* 2:22.

56. Sewell, *supra* note 41, at 986.

57. See *id.*; see also *Deuteronomy* 25:11-12 (punishment for a wife who touched a man not her husband should be mutilation); *Deuteronomy* 22:13-21 (an unmarried woman not a virgin was stoned to death); ANSON SHUPE ET AL., *VIOLENT MEN, VIOLENT COUPLES* 87-89 (1987) (addressing violence against women in the Bible).

58. See generally Richard Lewis Tannen, *Setting the Agenda for the 1990s: The Historical Foundations of Gender Bias in the Law: A Context for Reconstruction*, 42 FLA. L. REV. 163, 174 (1990) (citing *Genesis* 38:24 (daughter-in-law who conceived a child out of wedlock was sentenced to death by burning by her father-in-law); *Genesis* 16:3-4 (Abraham impregnates his wife's maid)).

59. *Id.* at 175; see also *Deuteronomy* 22:28-29.

60. See Sewell, *supra* note 41, at 986; see also DOBASH & DOBASH, *supra* note 40, at 40 (according to Christian tenets, women were inferior).

61. Sewell, *supra* note 41, at 986; see also DOBASH & DOBASH, *supra* note 40, at 40.

62. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *444.

63. McConnell, *supra* note 42, at 232 n.144.

64. *Id.*

dation of women.⁶⁵ Thereafter, laws throughout Europe classified women as the property of their husbands or fathers.⁶⁶

2. English Common Law

During the feudal period from the ninth to the fifteenth century, inheritance and the protection of property were of paramount importance.⁶⁷ Because women were the bearers of children and viewed as unable to defend the land, they were excluded from land ownership.⁶⁸ According to the feudal doctrine of coverture, inasmuch as a wife was under the protection or "cover" of her husband, her legal identity was lost upon marriage.⁶⁹ Status and political power were acquired through the ownership of land.⁷⁰ Since women were denied both, they inescapably were inferior citizens.⁷¹

The unities theory, a derivative of the feudal doctrine of coverture, advanced the subjugation and subordination of women even further.⁷² This theory, articulated by Sir William Blackstone, held that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated [into her husband]."⁷³ Although the doctrine held that husband and wife became one upon marriage, in actuality "the one [was] the husband."⁷⁴ A wife could not enter into a contract, sue or be sued, own personal property, make a will, or deny her husband's sexual advances.⁷⁵ "The unities doctrine thus served to legitimate the propertization of women through marriage."⁷⁶ The rationale for the doctrine was that it supported the marital relationship and family harmony.⁷⁷

Blackstone further decreed that a husband was allowed to beat his wife. The basis for this right of chastisement lay in the doctrine of cover-

65. Sewell, *supra* note 41, at 986.

66. See McConnell, *supra* note 42, at 232 n.144.

67. Szechtman, *supra* note 45, at 254.

68. *Id.*

69. Sue E. Eisenberg & Patricia L. Micklow, *The Assaulted Wife: "Catch 22" Revisited*, 3 WOMEN'S RTS. L. REP. 138, 145 (1977-1978).

70. Szechtman, *supra* note 45, at 254.

71. *Id.*

72. Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986) [hereinafter *To Have & To Hold*].

73. *Id.*; United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

74. United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

75. See also *To Have & To Hold*, *supra* note 72, at 1256; Finesmith, *supra* note 15, at 80.

76. *To Have and To Hold*, *supra* note 72, at 1256.

77. Eisenberg & Micklow, *supra* note 69, at 146; Finesmith, *supra* note 15, at 80.

ture, which imputed a wife's misbehavior to her husband.⁷⁸ Chastisement was also justified as a means of maintaining family discipline and order.⁷⁹

Social practice, in actuality, encouraged rape both within and prior to marriage.⁸⁰ "The English customs of 'bride capture,' whereby a man staked his claim to a woman through rape, and 'stealing an heiress,' whereby a man kidnapped a woman into marriage, were ways for men to acquire valuable property and social status."⁸¹ Rape laws, therefore, developed to protect the property interests men had in their women, not to protect women themselves.⁸² The chattel theory held that women were first the chattel of their fathers and upon marriage became the chattel of their husbands.⁸³ Since his daughter's virginity was a valuable commodity, and the father had an interest in succession rights to propertied land, rape of an unmarried woman was considered theft of the father's property.⁸⁴ Rape of a married woman was theft of a husband's right to possession in his property.⁸⁵ Therefore, under the chattel theory, "prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property."⁸⁶ When a husband raped his wife he was merely using his property.⁸⁷

Another rationale for the marital rape exemption originated in the seventeenth century with the declaration of Lord Matthew Hale: "the husband cannot be guilty of a rape committed by himself on his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."⁸⁸ Although Hale cited no legal authority for this proposition,⁸⁹ the contract theory of "implied consent" has been the most commonly

78. 1 BLACKSTONE, *supra* note 62, at *444.

79. See DOBASH & DOBASH, *supra* note 40, at 60; RULE OF THUMB, *supra* note 16, at 2.

80. *To Have & To Hold*, *supra* note 72, at 1257.

81. *Id.*; see also SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 7, 15 (1975).

82. Sandra L. Ryder & Sheryl A. Kuzmenka, *Legal Rape: The Marital Rape Exemption*, 24 J. MARSHALL L. REV. 393, 394 (1991).

83. See Schwartz, *supra* note 31, at 36-37 (discussing women as chattel of their fathers and upon marriage as chattel of their husbands).

84. *Id.*

85. *Id.*

86. Ryder & Kuzmenka, *supra* note 82, at 394 (1991); Schwartz, *supra* note 31, at 37.

87. Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 309 (1977) [hereinafter *Marital Rape Exemption*].

88. 1 MATHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (S. Emlyn ed., 1778). See also *Marital Rape Exemption*, *supra* note 87, at 307 (United States' judicial recognition of the marital rape exemption was based on Hale's theory).

invoked justification for the marital rape exemption.⁹⁰ The law on marital rape clearly established a man's sexual entitlement to his wife. The exemption reinforced social practice, sanctioning female sexual subordination as a weapon in man's struggle for power: "Men's acquisition of women as property was thus regulated by laws on rape."⁹¹

With the advent of industrialization, the feudal system broke down.⁹² Subsistence came from wage labor performed outside the house, in the public sphere.⁹³ Although some women were allowed to work outside the home, they were forced to give their wages to their husbands.⁹⁴ Husbands, in turn, were charged with the obligation to support their wives.⁹⁵ The law, however, offered no protection for wives if this support was not provided:

Thus, with the aid of women's labor, men were able to accumulate capital; this, in turn, increased the latter's political power. As men gained more political power and capital, the division of labor between productive (meaning wage labor) and reproductive work, came to be accepted. However, reproductive labor (that is, childcare and maintenance, as well as housework) was not recognized as contributing to the generation of wealth or to a society's growth.⁹⁶

Hence, man's pursuit of his proper role increased his status and power, while a woman fulfilling her proper role increased her subjugation and subservience. This concept of public versus private foreshadowed the separate spheres theory, which today is used to justify the unequal treatment of women.⁹⁷

While the post-feudal period brought changes to society's political, economic, and religious institutions, these changes continued to foster

89. *State v. Smith*, 372 A.2d 386 (N.J. Super. Ct. Law Div. 1977), *aff'd per curiam*, 404 A.2d 331 (N.J. Super. Ct. App. Div. 1979), *rev'd*, 426 A.2d 38, 41 (N.J. 1981); *Ryder & Kuzmenka*, *supra* note 82, at 395.

90. *See To Have & To Hold*, *supra* note 72, at 1256. Hale also intimated that women could easily fabricate rape charges, a concern that has evolved into the "cry-rape" syndrome (if marital rape is illegal then wives will fabricate charges against their husbands), a modern rationale for the exemption. *See Ryder & Kuzmenka*, *supra* note 82, at 395; *see also Marital Rape Exemption*, *supra* note 87, at 314-15.

91. *To Have and to Hold*, *supra* note 72, at 1257.

92. *Szechtman*, *supra* note 45, at 254.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 254-55.

97. *See infra* part II.B.2.

male domination within the family.⁹⁸ However, the type and extent of physical punishment a husband could inflict upon his wife was restricted.⁹⁹ A husband too harsh in his punishment could be ridiculed by his neighbors.¹⁰⁰ Nevertheless, such disapproval was mild in contrast to societal condemnation of disobedient wives.¹⁰¹

B. Early American Response To Domestic Violence

1. Colonial Period

Believing family violence was a threat to the settlement's orderliness and stability, the Puritans disavowed its use.¹⁰² In the mid-1600's, Massachusetts Bay¹⁰³ and Plymouth Bay¹⁰⁴ colonies enacted laws proscribing wife abuse.¹⁰⁵ These laws, however, were not rigorously enforced.¹⁰⁶ Despite charges of abuse, Colonial courts preferred to reconcile couples.¹⁰⁷ Puritans excused a husband's assault if he could justify the beating.¹⁰⁸ Any disapproval of domestic violence was weakened by the pressure placed on Colonial courts to follow English jurisprudence.¹⁰⁹

In reality, a man's/husband's position of power and authority was never really jeopardized. Indeed, the Declaration of Independence proclaims: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain

98. See DOBASH & DOBASH, *supra* note 40, at 48 (addressing economic, political, and religious institutional changes in the modern era).

99. See *id.* at 56 (discussing societal limitations on a husband's right of chastisement).

100. See *id.* at 58 (an excessively abusive husband was subject to public disgrace).

101. Sewell, *supra* note 41, at 987. See DOBASH & DOBASH, *supra* note 40, at 59 (women accused of infidelity were subject to public whipping or dunking).

102. See generally ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 17 (1987) (addressing domestic violence in puritan settlements). Family violence was considered sinful; however, women who didn't behave properly were often charged with witchcraft. *Id.* at 19.

103. See GEORGE A. ERNST, THE LAW OF MARRIED WOMEN IN MASSACHUSETTS 66 (1897) (*The Body of Liberties*, passed in Massachusetts Bay in 1641, forbade wife abuse unless it was in self-defense).

104. See JOHN A. GOODWIN, THE PILGRIM REPUBLIC 597 n.1 (1920) (law enacted in Plymouth Bay in 1671 punished wife abuse with fines or corporal punishment).

105. See PLECK, *supra* note 102, at 21 (examining the first domestic abuse laws). See also Sewell, *supra* note 41, at 988-89.

106. See *id.* at 25 (regardless of the laws and abusive behavior, Puritans honored a husband's role as head of the household).

107. See *id.* at 23 (a Puritan court offered little protection for an abused wife at the expense of separating the family).

108. *Id.* at 24-25. See also Sewell, *supra* note 41, at 989 n.53 and accompanying text.

109. See PLECK, *supra* note 102, at 19. See also Sewell, *supra* note 41, at 989.

unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."¹¹⁰ Neither the Declaration of Independence nor the United States Constitution were intended to include humankind,¹¹¹ rather they proclaim the rights of man and embalm his entitlements.¹¹² Our Founding Fathers explicitly denied "full personhood" to women.¹¹³

2. Nineteenth Century America

As long as it did not conflict with the Constitution or state statutes, the new states generally incorporated the British common law as it existed after the Revolutionary War.¹¹⁴ As a result, Blackstone's *Commentaries* and English law had a significant impact on the American legal system.¹¹⁵ For example, in 1824 the Supreme Court of Mississippi affirmed English common law by stating that a husband had the right to chastise his wife.¹¹⁶ The court also stated that in exercising this right, a husband should not be subjected to "vexatious prosecutions" by his wife, and that courts should be hesitant to expose such private conduct to public scrutiny.¹¹⁷

The first American court to recognize the spousal rape exemption was a Massachusetts court in 1857. In *Commonwealth v. Fogerty*,¹¹⁸ the court, relying solely on Hale's unsupported declaration, stated in dictum that marriage to the victim was a defense to rape.¹¹⁹ It is possible, however, that judicial affirmation occurred even earlier.¹²⁰ According to

110. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

111. Ruth Bader Ginsberg, *Women, Men, and the Supreme Court Rulings*, in *WOMEN IN THE COURTS* 22 (Winifred L. Hepperle & Laura Crites eds., 1978) (with regard to women, Thomas Jefferson said: "Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." *Id.* (quoted in MARTIN GRUBERG, *WOMEN IN AMERICAN POLITICS* 4 (1968))).

112. Cf. George Kriegman, *Entitlement Attitudes: Psychological and Therapeutic Implications*, in *ATTITUDES OF ENTITLEMENT* 1 (1988).

113. "To the extent that the Framers' intent can fairly be fathomed, the dominant conceptions denied the humanity and equality of a majority of the American people, including women, the Native American population and people of color." Sylvia L. Law, *Family, Gender & Sexuality*, 26 *JUDGES' J.*, Summer 1987, at 22, 56. Despite this fact, there are many who subscribe to the notion that we should "look to the original intent of the men who drafted and ratified the Constitution to determine its contemporary meaning." *Id.* at 23.

114. Ryder & Kuzmenka, *supra* note 82, at 397.

115. Sewell, *supra* note 41, at 988.

116. *Bradley v. State*, 2 Miss. (1 Walker) 156 (1824).

117. *Id.* at 158.

118. *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489, 491 (1857).

119. Rene I. Augustine, *Marriage: The Safe Haven for Rapists*, 29 *J. FAM. L.* 559, 562 (1990-91).

120. See Ryder & Kuzmenka, *supra* note 82, at 396 n.32 and accompanying text.

most statutes and common law interpretation, an element of rape was that the victim was not the spouse of the rapist.¹²¹ Therefore, few cases have dealt with the issue directly.¹²²

The early decades of the nineteenth century confirm strong judicial approval of men's rights and privileges.¹²³ In 1836, a New Hampshire court held that a wife who failed to submit to the legitimate authority of her husband could not obtain a divorce.¹²⁴ Any woman who provoked her husband's anger or refused to remain silent deserved any abuse inflicted upon her.¹²⁵ Consequently, she had no right to complain.¹²⁶ The husband was regarded as the head of the household.¹²⁷ Since his wife was subordinate to him, he had the right to control her actions.¹²⁸ Although society denounced a husband who beat his wife, a worse offense was the wife's rebellion against the proper exercise of her husband's authority.¹²⁹ Courts stressed the importance of family autonomy and privacy by their reluctance to intrude into the domestic sphere.¹³⁰

The last half of the nineteenth century brought changes to women's legal status when virtually every state passed Married Women's Property Acts.¹³¹ Among other things, the Acts allowed women to enter into contracts, sue or be sued, manage their own property, and work outside the home without requiring their husbands' permission.¹³² Although altering the status of women in the legal and economic spheres, women continued to be under the domination and control of men. In these Acts lay the groundwork for the succeeding theory upon which women were denied equality and autonomy.¹³³

121. *Id.* at 396-97 nn.33-34 and accompanying text.

122. *Id.*

123. *See Sewell, supra* note 41, at 990.

124. *Poor v. Poor*, 8 N.H. 307, 316 (1836). *See Sewell, supra* note 41, at 990.

125. *Poor*, 8 N.H. at 310-16. *See also Sewell, supra* note 41, at 990-91 nn.60-64.

126. *Poor*, 8 N.H. at 310-16.

127. *Id.* at 314-15 (the husband was the head of house, the wife was subordinate to him).

128. *See id.* at 314-15 (the rationale lay in the husband's responsibility for his wife's torts, debts and crimes committed in his presence).

129. *Id.* at 313 (a wife's rebellious conduct was worse than a husband's actions). The court placed the responsibility for preventing further abuse on the wife. *Id.* at 319-20.

130. *See Adams v. Adams*, 100 Mass. 365, 373 (1868) (refusal to issue writ of supplicavit against an abusive husband); *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 454-59 (1868) (court interference was a greater outrage than domestic abuse; state government was subordinate to the family government, which men were charged with ruling).

131. *See* LEO KANOWITZ, *WOMAN AND THE LAW: THE UNFINISHED REVOLUTION* 40-41 (1969).

132. *Id.* *See also To Have & To Hold, supra* note 72, at 1257 n.16.

133. *Id.* at 1257.

The Acts gave full effect to the "separate spheres" ideology. This doctrine gradually superseded the unities theory as the legal justification for the marital rape exemption and non-intervention by the state.¹³⁴ This theory holds that men occupy the public realms of politics and the marketplace while women occupy the private realm of the family.¹³⁵ Women were no longer inferior, they were simply "different."¹³⁶ The separate spheres ideology served as the catalyst for the view, still widely accepted, that "any legal intrusion upon the woman's sphere constituted an illegitimate public invasion of the private sphere."¹³⁷ Thus, the subordination of women was accomplished through the absence of laws restraining male power¹³⁸ and the deliberateness with which a blind eye was turned from the home, whether it be violent or not.¹³⁹

Some states, however, began to reject the notion of a husband's right to chastise his wife through judicial decisions,¹⁴⁰ through the enactment of statutes punishing abusers,¹⁴¹ or by permitting divorce on grounds of cruelty.¹⁴² One court held that although the right of chastisement was "abolished," the state should continue to refrain from interfering.¹⁴³ In reality, however, legal relief was accessible only to those women who could afford the cost of litigation, and then only if they could endure the

134. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 177-78 (1982).

135. As one Supreme Court Justice wrote, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

136. See *To Have & To Hold*, *supra* note 72, at 1257; see also Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 958 (1984) ("Assumptions about biological difference and destiny provided the prime justification for creating a separate, inferior legal status for women." (footnotes omitted)).

137. *To Have and to Hold*, *supra* note 72, at 1258. See Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW* 117, 122 (David Kairys ed., 1982) ("Isolating women in a sphere divorced from the legal order contributes directly to their inferior status by denying them . . . legal relief . . . and by sanctioning conduct of the men who control their lives.").

138. See *To Have and to Hold*, *supra* note 72, at 1258.

139. "The court likened the family to a government within itself, subordinate to state law yet free from interference absent infliction of intolerable abuse or permanent injury." See Sewell, *supra* note 41, at 992 n.71; see also *State v. Rhodes*, 61 N.C. (Phil. Law) 453, 456-57 (1868).

140. Alabama and Massachusetts judicially abrogated a husband's right to physically abuse his wife. See *Fulgham v. State*, 46 Ala. 143 (1871); *Commonwealth v. McAfee*, 108 Mass. 458 (1871).

141. See PLECK, *supra* note 102, at 109 (Maryland, Delaware, and Oregon passed legislation allowing punishment for abusive husbands).

142. See DOBASH & DOBASH, *supra* note 40, at 64.

143. See *Rhodes*, 61 N.C. at 459 (husbands' abuse rights abolished, but reiterated that courts should be disinclined to inquire into domestic affairs).

resulting humiliation and social criticism.¹⁴⁴ In at least one state the husband's right of chastisement was still honored,¹⁴⁵ while in every state it remained legal for a husband to rape his wife.

a) *The Thirteenth Amendment*

The intent of the Thirteenth Amendment¹⁴⁶ was to abolish the system of chattel slavery, whereby white people legally owned African-Americans as their personal property.¹⁴⁷ Some members of Congress recognized the parallels between the master-slave relationship and the husband-wife relationship.¹⁴⁸ Concern was expressed "that the Thirteenth Amendment had the potential to reach into the private sphere of the home and to alter the traditional relationship between husband and wife."¹⁴⁹ During debates on drafts of proposed amendments, one Senator stated that if the Amendment were enacted "a woman would be equal to a man [and a] wife would be equal to her husband as free . . . before the . . . law."¹⁵⁰ "Congress . . . chose to limit the scope of the Amendment, no doubt fearing the slippery slope of a constitutional amendment with the breadth to touch the most sacred of . . . institutions, the relationship between man and woman in marriage."¹⁵¹ In fact, early cases interpreting the Thirteenth Amendment indicate Congress only intended to alter the relationship of master and slave.¹⁵² The limitation placed on the Amendment through the selection of its language and the

144. Finesmith, *supra* note 15, at 80.

145. See *Knight v. Knight*, 31 Iowa 451, 457-58 (1871) (the wife/victim of domestic abuse was denied a divorce because she invited the abuse by her insubordinate behavior).

146. U.S. CONST. amend. XIII, § 1, provides in pertinent part "[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

147. McConnell, *supra* note 42, at 211-12.

148. *Id.* at 207 n.2. "A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. . . . All these rights rest upon the same basis as a man's right of property in the services of slaves." CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. White).

149. McConnell, *supra* note 42, at 215-16 (citing Amy Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 477 (1988)).

150. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864) (statement of Sen. Howard).

151. McConnell, *supra* note 42, at 217.

152. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (dictum). See McConnell, *supra* note 42, at 216-17 (due to its unique common law status, it is reasonable to conclude that the husband-wife relationship, like the parent-child relationship, was considered protected from Thirteenth Amendment prohibition).

debates surrounding its enactment illustrate a continued commitment to the subservience of women.¹⁵³

C. Twentieth Century America

Notwithstanding the statutory and judicial reforms of the late nineteenth century and the passage of the Nineteenth Amendment,¹⁵⁴ domestic violence was not an important issue.¹⁵⁵ Traditional doctrine concerning the family and proper gender roles was reiterated.¹⁵⁶ Early twentieth century family court systems advocated family preservation¹⁵⁷ and discouraged separation and divorce, often boasting of their record of reconciling couples.¹⁵⁸ Rather than meting out criminal punishment for an abusive husband, the courts might appoint case workers to investigate the home, mediate between the spouses, or perhaps offer the wife advice on how to please her husband so she could avoid physical abuse.¹⁵⁹ Wives would be urged to withdraw complaints, be denied petitions for financial support from their husbands, or courts would assign their cases to social service organizations.¹⁶⁰

The spousal immunity doctrine, which prevented battered wives from bringing tort actions against their abusive husbands, appeared in the early 1900s.¹⁶¹ "Then, as now, the doctrine was justified [as a means] of supporting the marital relationship and domestic harmony."¹⁶² Thus, the reality was that criminal courts, family courts, and civil courts offered virtually no assistance or protection to abused women.

During the first sixty years of the twentieth century, existing domestic violence legislation was largely ignored or circumvented by the courts and law enforcement agencies.¹⁶³ This allowed men, as individuals and

153. McConnell, *supra* note 42, at 215-17. Moreover, because women were denied the right to vote they had no political power. The result for women was inferiority within the private sphere and something less than non-existence within the public sphere.

154. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend XIX.

155. See Sewell, *supra* note 41, at 994; see also SHUPE ET AL., *supra* note 57, at 12.

156. See PLECK, *supra* note 102, at 126.

157. *Id.*

158. *Id.* at 125, 138-39 (preservation of the family was the goal; court procedures were established to discourage separation and divorce).

159. *Id.* at 140-41 (judges referred wives to social service agencies, or would counsel the wife on how to satisfy her husband).

160. *Id.*

161. Eisenberg & Micklow, *supra* note 69, at 146; Finesmith, *supra* note 15, at 80.

162. Finesmith, *supra* note 15, at 80.

163. DOBASH & DOBASH, *supra* note 40, at 64.

as a class, to maintain and strengthen their dominant position over women.

Psychoanalysts of that period had a tremendous impact on the perception of domestic violence.¹⁶⁴ Domestic violence was attributed to the victim's inherent sexual and biological functions.¹⁶⁵ The theory that masochism played a significant role in women's lives emerged.¹⁶⁶ Masochism allegedly caused women to provoke their husbands to batter them and then to remain in the abusive relationship.¹⁶⁷ Both practicing psychiatrists and the general public were persuaded to shift the blame away from the man-abuser and onto the woman-victim.¹⁶⁸

The women's movement of the 1960s is widely credited with the "discovery" of wife abuse.¹⁶⁹ By 1978 there were only nine states that had legislation addressing the issue of domestic violence.¹⁷⁰ Some states had begun to make provisions for battered women's shelters.¹⁷¹ Still, most batterers were not prosecuted, and until the 1970s there was no meaningful attempt to enforce existing criminal laws.¹⁷² Early studies revealed the casual response of the criminal justice system as a whole to the issue of domestic violence and the battered woman.¹⁷³ Some researchers interpreted these findings as evidence that the chattel theory persisted in the minds of judges and attorneys.¹⁷⁴

In the late 1970s the validity of the marital rape exemption was questioned.¹⁷⁵ The anti-rape movement asserted that the myths about the nature of male and female sexuality and beliefs about the "proper" roles of women punished rape victims by defining rapes as "victim-precipitated crimes."¹⁷⁶ The battered women's movement viewed domestic vio-

164. See PLECK, *supra* note 102, at 145-46 (disciples of Freud had influence on the perception of wife abuse).

165. *Id.* at 125. A New York court psychiatrist testified that when the husband got drunk, spent his salary, and then beat his wife, the source of the problem lay in the menopausal wife who was "upset and undemonstrative toward her husband." *Id.*

166. *Id.* at 158-59.

167. *Id.*

168. *Id.* at 160-63.

169. "Like sexual harassment, the 'problem' of battering and the social and legal construct of a 'battered woman' did not exist in this country until the women's movement named it." Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 979-80 (1991).

170. Finesmith, *supra* note 15, at 80.

171. *Id.*

172. *Id.* at 80 (citing DOBASH & DOBASH, *supra* note 40, at 8).

173. Norma J. Wikler, *Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts*, ST. CT. J., Summer 1989, at 13, 14.

174. *Id.*

175. Ryder & Kuzmenka, *supra* note 82, at 398.

176. See Wikler, *supra* note 173, at 6.

lence as a manifestation of the male power and female subordination inherent in gender relations.¹⁷⁷ Although there had been "little change in the culture of female subordination that supported and maintained abuse," women began to take on "new roles."¹⁷⁸ In the late 1960s, pioneer female litigators began to observe for themselves how judges with stereotypical, gender-biased attitudes could undermine legal reform through the exercise of judicial discretion and through their courtroom behavior.¹⁷⁹

Feminists proposed that male-female relationships were formed by the unequal allocation of power based on gender.¹⁸⁰ "As the dominant class, men have differential access to important material and symbolic resources, while women are devalued as secondary and inferior. Violence (such as rape or battering) is the most overt and visible form of control wielded by men as a class over women."¹⁸¹ Thus, domestic violence was characterized as an aspect of gender relations and a reflection of male power and female subordination. Viewed in this light, domestic abuse becomes a kind of gender terrorism.¹⁸²

III. DOMESTIC ABUSE TODAY: RESPONSES AND RATIONALES

The legal and social status of women has changed over the past one hundred years.¹⁸³ The contemporary treatment of marital rape and domestic violence, however, demonstrates an underlying commitment to female subordination and female difference.¹⁸⁴ "Although legislators and judges do not explicitly refer to women as chattel or to women's natural role in the home,¹⁸⁵ the rationales for the marital rape exemption . . . betray deep, perhaps unconscious, discriminatory views."¹⁸⁶ Adher-

177. Schneider, *supra* note 169, at 980.

178. *Id.* at 983.

179. Wikler, *supra* note 173, at 6.

180. Bograd, *supra* note 42, at 558-9.

181. *Id.*

182. Edward W. Gondolf, *Anger and Oppression in Men Who Batter: Empiricist and Feminist Perspectives and their Implications for Research*, 10 VICTIMOLOGY: INT'L J. 311, 313 (1985).

183. *To Have & To Hold*, *supra* note 72, at 1258.

184. *Id.*

185. See also Trammel v. United States, 445 U.S. 40, 52 (1980). "Nowhere . . . is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." *Id.* Unfortunately, merely saying it doesn't make it so.

186. *To Have & To Hold*, *supra* note 72, at 1258.

ence to these concepts necessarily serves to maintain male power in male dominated institutions.¹⁸⁷

A. *The Parties*

1. The Abuser

Before turning to the criminal justice system's response to domestic abuse, it is helpful to explore the justifications men give for assault, battery, and rape. One of the erroneous beliefs about domestic violence is that it is a problem only among the poor and minorities.¹⁸⁸ This misconception can be explained in part by the fact that battered women who are poor lack the resources of their middle- and upper-class counterparts; therefore, they are more likely to come to the attention of governmental officials.¹⁸⁹ The reality is that men who batter, stalk, and rape, as well as their victims, come from all social, economic, and ethnic groups.¹⁹⁰

There is no single profile of the typical batterer.¹⁹¹ However, batterers generally embrace traditional gender roles more strongly.¹⁹² They believe the man is "the master" of the house;¹⁹³ that men have the right to a woman's services, including sex,¹⁹⁴ with the corresponding right to obtain these services through violence.¹⁹⁵ "Sex is frequently the most significant service in the battering relationship; it becomes symbolic of the man's total domination of the woman."¹⁹⁶

187. "Men are able to rape because of their power-privileged position in society." Willis, *supra* note 40, at 2208.

188. Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 276 (1985).

189. *Id.*

190. Guy, *supra* note 7, at 995 n.33 (discussing stalkers and batterers); Waits, *supra* note 188, at 276 (discussing spousal abuse); Augustine, *supra* note 119, at 560 (citing statistic of one study which found that one of seven married women has been raped by her husband).

191. See DEL MARTIN, BATTERED WIVES 45 (1976).

192. McConnell, *supra* note 42, at 231.

193. Waits, *supra* note 188, at 286. "The individual batterer abuses his wife not so much to release his anger . . . but rather, for the same reason men exploit women in the larger society and have beaten and discriminated against them throughout history-to keep them in their place." Gondolf, *supra* note 182, at 316.

194. See DAVID FINKELHOR & KERSTIN YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6-7, 61-83 (1985) (one out of ten wives had been sexually assaulted by her husband at least once; the husband-rape victims interviewed claimed they had a right to forcible sexual relations); DIANA E. RUSSELL, RAPE IN MARRIAGE 61 (1990) (one out of every three battered women had been raped by her batterer).

195. McConnell, *supra* note 42, at 231.

196. *Id.*

Abusers also believe a man has a right to discipline his wife.¹⁹⁷ Violence is triggered when the batterer believes that the woman has failed to serve him in the way he deserves and desires.¹⁹⁸ Batterers provide elaborate justifications for their abuse:¹⁹⁹ "They use minimization, intentionality, confusion, outright denial, intoxication, loss of control, and projection of blame to deny any responsibility. Similarly, interviews with men who rape show that they use almost identical justifications to excuse their violent acts."²⁰⁰

The abuser needs to dominate and control his wife or girlfriend.²⁰¹ He alone is entitled to possession of her.²⁰² One method of control that batterers use is limiting the woman's access to others by isolating her.²⁰³ To that end, he may prevent her from getting medical treatment or prohibit her from seeing family members.²⁰⁴ Attempts at domination may take the form of controlling access to food or money or threatening their children with abuse.²⁰⁵ Some abusive men torment their victims with the potential loss of their children through custody battles or parental kidnapping.²⁰⁶ The result of these "coercive techniques is to [fortify] the ultimate power of the man over the woman."²⁰⁷

Like batterers, many intimate stalkers regard their victims as their personal possessions.²⁰⁸ If the woman expresses a desire for independence, the abuser views this as a threat to his dominance. Consequently, he applies force or threats of force in order to maintain his and her relative positions within the relationship.²⁰⁹ Termination of the relationship is the ultimate threat to the abuser's dominance and often increases the risk of aggression and stalking:²¹⁰ "When persons perceive that they are being threatened [or] have become powerless . . . they assert themselves

197. LENORE E. WALKER, *THE BATTERED WOMAN* 12 (1979).

198. *Id.*

199. Gondolf, *supra* note 182, at 320.

200. *Id.*

201. Waits, *supra* note 188, at 286-87.

202. *Id.*

203. See, e.g., MARTIN, *supra* note 191, at 84.

204. McConnell, *supra* note 42, at 233.

205. *Id.*

206. *Id.*

207. *Id.*

208. McAnaney, *supra* note 8, at 841.

209. *Id.*

210. *Id.*

through the most expedient means available - violence."²¹¹ Thus, violence supports a perception of power.²¹²

The fact that many battered women cannot escape their abusive situations also promotes the batterer's belief in his right to coerce his victim.²¹³ Many cases of rape and violence occur after the parties no longer live together.²¹⁴ The prevalence of violations of temporary restraining orders is indicative of abusers' belief in their right to dominate and possess their women.²¹⁵

2. The Victim

The traditional psychiatric evaluation of a woman who remains in, or leaves and returns to, an abusive relationship is that she is a masochist, staying in the abusive relationship because she enjoys being beaten.²¹⁶ Society's predisposition is to blame the victim,²¹⁷ believing that but for her action or inaction the assault would not have occurred.²¹⁸ The victim, in fact, often blames herself for the violence.²¹⁹ A battered woman accepts what traditionally have been promoted as proper male and female roles.²²⁰ In her mind her success is predicated on her role as wife and mother.²²¹ The happiness of the family rests with her.²²² Therefore, she believes any family conflict, including violence, is her fault.²²³

211. Gondolf, *supra* note 182, at 320.

212. *Id.*

Violence may be used by individual men to control or punish individual women who challenge, or are seen to be challenging, their authority. Even if men do not express their power in this way, the fact that they can if they so choose inevitably underlies apparently harmonious interactions between those who are not equal. In this way the power of men, as individuals and as a sex class, can be asserted.

Jalna Hanmer, *Policing Men's Violence: An Introduction*, in *WOMEN POLICING AND MALE VIOLENCE: INTERNATIONAL PERSPECTIVES* 4 (Jalna Hanmer et al. eds., 1989).

213. McConnell, *supra* note 42, at 233.

214. *State v. Smith*, 426 A.2d 38 (N.J. 1981); *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984); *Shunn v. State*, 742 P.2d 775 (Wyo. 1987).

215. McConnell, *supra* note 42, at 233.

216. See MARTIN, *supra* note 191, at 67-71 (discussing the myth of battered women as masochists); WALKER, *supra* note 197, at 20.

217. See WALKER, *supra* note 197, at 31 (discussing that the victims believe the myths).

218. See Edwards, *supra* note 39, at 189-90. "Women who are victims of sexual assault, sexual harassment and domestic violence are always in retrospect perceived as having taken some risk, contributed to the assault, or provoked their attacker." *Id.*

219. See Waits, *supra* note 188, at 281 n.66 (victims blame themselves for the violence).

220. See WALKER, *supra* note 197, at 33 (battered women usually come from homes in which traditional sex roles have been emphasized).

221. *Id.* at 23.

222. *Id.* at 34.

223. *Id.* at 33.

"Some wives do not perceive forcible intercourse by their husbands as a criminal act; instead, they simply accept their submissive position in the relationship."²²⁴ The lack of criminalization of spousal rape encourages this view as there is a tendency for people to identify conduct as immoral only if it is defined as criminal.²²⁵

Another factor affecting victims of domestic violence is the lack of social or legal resources.²²⁶ When police refuse to treat domestic violence as a crime, women are likely to see police as supporting their husband or boyfriend, causing them to feel frustrated, defenseless, and alone.²²⁷ The view that domestic abuse is a minor problem that is best dealt with at home is also influential.²²⁸ This attitude is often manifested in the criminal justice system and society at large.²²⁹

Learned helplessness often results from continued violence or threats of violence. Although a victim may take responsibility for her abuser's behavior, she is unable to initiate behavior that might provide relief, such as leaving the relationship.²³⁰ A by-product of the abuse is that she becomes unable to perceive possible solutions to her problem.²³¹ Furthermore, in many abusive situations the woman is financially dependent upon her abuser. Even if she works outside the home, the abuser frequently demands that she give her wages to him.²³² She may feel emo-

224. Ryder & Kuzmenka, *supra* note 82, at 410-11. "The reason why women 'take' such abuse, from ogling on the street to so-called date rapes, has to do with the gender domination that pervades their every moment of existence. The violent episodes are not a sharp break from everyday experience, but one extreme." Dorie Klein, *Violence Against Women: Some Considerations Regarding Its Causes and Its Elimination*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN* 203, 210 (Barbara R. Price & Natalie J. Sokoloff eds., 1982).

225. See Schwartz, *supra* note 31, at 51 (concepts of right and wrong have moral roots, one being criminal law itself).

226. Finesmith, *supra* note 15, at 82. There is also the problem of under-funding of public relief agencies for abused women, such as shelters for women and children, counseling services, and job-training agencies. *Id.* "[W]omen are more likely to suffer abuse when there is 'resource deprivation.' They may attempt to escape from the violence or stop it, but their options are limited or denied. In other words, they are not compliant victims or provocative accomplices, but trapped by society's lack of response." Gondolf, *supra* note 182, at 316.

227. Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 *YALE L.J.* 788, 790-91 (1986).

228. Finesmith, *supra* note 15, at 82.

229. *Id.* "Thus a subtle testimony to the law's success in achieving legitimacy is that women, and other groups who are oppressed and dominated within society, now largely accept the law's categories and its modes of discourse." Diane Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW* 294, 300 (David Kairys ed., 1982).

230. WALKER, *supra* note 197, at 48.

231. *Id.* at 47-48.

232. *Id.* at 33-34.

tionally dependent on him as well.²³³ Often times she may lack other emotional resources, such as friends and family who are willing to support her decision to leave.²³⁴ Finally, she may be all too aware that ending the relationship does not invariably end the violence.

Women who leave an abusive relationship fear retribution by the abuser. There is considerable evidence that the woman leaving the relationship will often precipitate or escalate the violence.²³⁵ "She may have tried to leave, only to have him threaten violence against her or others if she did not return."²³⁶ Many men threaten to pursue "their woman" relentlessly.²³⁷ The victim may believe that it is pointless to attempt escape.²³⁸ She may feel that ultimately the abuser will kill her whether she leaves or stays.²³⁹

3. The Criminal Justice System

Before examining the criminal justice system's response to domestic violence, it is important to note at the outset that the criminal justice system is not gender-neutral.²⁴⁰ Studies have concluded that women are systematically discriminated against in the courts: "[G]ender bias against women litigants, lawyers and court personnel is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment, and equal opportunity."²⁴¹ One committee found that in domestic abuse cases both judges and jurors require more substantiation of physical injuries than in other serious crimes and that the sentences im-

233. *Id.* at 68.

234. Finesmith, *supra* note 15, at 82.

235. See Schafran, *supra* note 2, at 51 (often the woman faces real danger if she tries to leave).

236. Waits, *supra* note 188, at 283.

237. Finesmith, *supra* note 15, at 82.

238. WALKER, *supra* note 197, at 75.

239. *Id.* (discussing women's fears that abusers are capable of killing them).

240. Pamela Jenkins & Barbara Davidson, *Battered Women in the Criminal Justice System: An Analysis of Gender Stereotypes*, 8 BEHAV. SCI. & L. 161, 162 (1990). Cf. Thomas & Beasley, *supra* note 3, at 39.

Although international law is gender neutral in theory, in practice it interacts with gender-based domestic laws and social structures that relegate women and men to separate spheres of existence: private and public. Men exist as public, legal entities in all countries, and baring an overt abuse by the state, participate in public life and enjoy the full extent of whatever civil and political rights exist. Women, however, are in every country socially and economically disadvantaged in practice and in fact in many places by law. Therefore, their capacity to participate in public life is routinely circumscribed.

Id.

241. Schafran, *supra* note 2, at 49 (quoting *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 15 (1986-87)).

posed in these cases are generally lower. The committee also found that courts are hesitant to impose sanctions on men who violate protective orders.²⁴²

Gender bias in the courts places women at a distinct disadvantage. Coupled with a society and legal system that treats the family as an inviolate institution, relief for victims of domestic violence becomes virtually impossible.²⁴³ Because most members of the legal profession are men, they control how women are treated by the legal system:

Thus, even if the laws were not sexist, the fact that those who make the laws (federal and state legislators, government administrators and judges) and those who enforce the laws (police and courts) are overwhelmingly male, affects in major ways how women are thought of and treated by the legal system. Even when the criminal law does not formally discriminate against women, in practice—as the law operates in the processing of women from police to courts to jails—the law very often does discriminate.²⁴⁴

a) *The Response of the Legislature*

It has been said, "Women, racial/ethnic minorities, the poor, and working class people rarely benefit from the law . . . [R]ich white men are most influential in creating laws . . . Much of criminal law is written by state legislatures and the United States Congress, whose members are overwhelmingly male."²⁴⁵ With respect to domestic violence, history confirms the veracity of this charge. Traditionally the law has not provided protection for victims of domestic abuse. Attempts to pass federal legislation have faced much opposition.²⁴⁶ Objections to the various bills were made on the grounds that such legislation was an "unacceptable . . . intrusion into the domestic realm, an attack on the American family, and a means of funding feminist causes."²⁴⁷

242. *Id.*

243. *See* Finesmith, *supra* note 15, at 82.

244. Sokoloff & Price, *supra* note 36, at 24.

245. *Id.* at 12. The disproportionately large number of male representatives in state legislatures has been cited as a factor contributing to the continued existence of the marital rape exemption. Augustine, *supra* note 119, at 584. Iowa State Senator Joseph Coleman stated that prosecuting a husband for raping his wife "is against natural law." *Id.* at 589 (citing *Lawmaker: Spousal Rape Violates Natural Order*, UPI, Mar. 23, 1989, available in LEXIS, Nexis Library, UPI file.). A California State Legislator is reported to have said, "If you can't rape your wife, who can you rape?" ESTRICH, *supra* note 29, at 74.

246. *See* Sewell, *supra* note 41, at 998-1000 (discussing the attempts to pass federal legislation in the 1970's and 1980's).

247. *Id.* at 999.

There were other leaders and organizations, however, that provided support.²⁴⁸ In 1978 and 1982, Congress and the United States Civil Rights Commission completed studies and produced reports on domestic violence.²⁴⁹ The 1982 report recognized the problems in many of the federal programs.²⁵⁰ These problems included a political and social bias on the part of those implementing the services, as well as a lack of sympathy and understanding from those who were in a position to help the victims.²⁵¹

In an effort to correct these problems, the Violence Against Women Act was presented to Congress.²⁵² The Act, among other things, creates federal penalties for the abuser who enters another state to continue abusing his victim, requires orders of protection to be given "full faith and credit" by other states, and allows for the expenditure of funds for shelters and training programs.²⁵³ Although it was first introduced in 1990, the Act was not passed until September 13, 1994.²⁵⁴

There is also state legislation addressing domestic abuse.²⁵⁵ These laws allow victims to obtain orders of protection if there is evidence of sexual abuse or actual or threatened physical abuse.²⁵⁶ Some states, however, mandate that the abuser and victim be related,²⁵⁷ whereas others require that the victim and abuser be members of the same household.²⁵⁸ In some states separate criminal domestic abuse statutes have been enacted, which impose a range of penalties from fines to jail time.²⁵⁹ Other states have enacted statutes requiring mandatory arrest of the abuser if the police have probable cause to believe domestic abuse has occurred.²⁶⁰

248. *See id.* at 1000-02 (discussing the support from President Jimmy Carter and the Law Enforcement Assistance Administration).

249. *Id.* at 1002 n.133 and accompanying text.

250. *Id.* at 1002 n.134 and accompanying text.

251. *See id.* at 1002.

252. S.11, 103d Cong., 1st Sess. (1993).

253. *See* Biden, *supra* note 12, at 59 (discussing the goals and provisions of the Violence Against Women Act).

254. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

255. *See generally* Sewell, *supra* note 41, at 1002-05 (statutes include civil remedies, criminal remedies, and/or provide public funds for shelters).

256. *See id.* (discussing the statutes that allow the issuance of restraining orders).

257. *Id.* at 1003.

258. *Id.*

259. *See id.* at 1002-03 (citing CAL. PENAL CODE § 273.5 (West 1988 & Supp. 1994) (maximum sentence of four years and maximum fine of \$6,000)).

260. *E.g.*, CONN. GEN. STAT. ANN. § 46b-38b(a) (West Supp. 1994); ME. REV. STAT. ANN. tit. 19, § 770(5) (West Supp. 1993); *see also* Sarah M. Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 214-15 (1988).

Some state statutes provide another remedy - allowing the court to order the abuser into a diversion program.²⁶¹ This program can act as a substitute for criminal prosecution or be imposed during the penalty phase.²⁶² Many battered women's advocates oppose these programs.²⁶³ They believe diversion programs are a milder form of punishment and the resulting lack of a criminal conviction minimizes the severity of the violent act.²⁶⁴ Furthermore, the use of diversion programs based on the existence of a relationship between the victim and abuser diminishes the violent act of the abuser and imputes blame onto the victim.²⁶⁵ It is also another example of disparate treatment of violence between strangers and violence between intimates.

Often a woman leaving an abusive relationship triggers harassment and violence. This has resulted in the recent legal development of the crime of stalking. In 1990, California was the first state to enact an anti-stalking law.²⁶⁶ Since then, the majority of states have followed suit.²⁶⁷ There has been much controversy surrounding the stalking laws.²⁶⁸ Some criticism is based on constitutional grounds,²⁶⁹ while others charge

261. See generally Sewell, *supra* note 41, at 1003. See, e.g., CAL. PENAL CODE § 1000.6(a)(1)-(3) (West 1985 & Supp. 1994) (outlining eligibility and extent of diversion program); MICH. COMP. LAWS ANN. § 769.4a(2) (West 1982 & Supp. 1993).

262. Sewell, *supra* note 41, at 1003 n.148.

263. RULE OF THUMB, *supra* note 16, at 63.

264. *Id.* at 62.

265. *Id.*; see also Sewell, *supra* note 41, at 1003 n.148.

Family counseling is particularly suspect because it tends to displace the responsibility for the violence and does not address the underlying power differential. . . . The men may learn to control their violence, but they may in the process intensify their control over women in other ways, like withholding finances, manipulating the women verbally, or diminishing their role in decision-making.

Gondolf, *supra* note 182, at 317.

266. CAL. PENAL CODE § 646.9 (West Supp. 1994). The enactment was triggered in part by the killing of actress Rebecca Schaeffer by an obsessed fan who had stalked her and the murder of five women who had been stalked and then killed by former boyfriends or husbands. Each of these five women had obtained a restraining order. Guy, *supra* note 7, at 991-92.

267. See, e.g., CAL. PENAL CODE § 646.9 (West Supp. 1994); FLA. STAT. ANN. § 784.048 (West Supp. 1994); MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1994); MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993); NEB. REV. STAT. § 28-311.02 (1993); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1993); W. VA. CODE § 61-2-9a (1994); WIS. STAT. ANN. § 940.32 (West Supp. 1994). See also Guy, *supra* note 7, at 992 n.7 (partial listing of the states that have enacted anti-stalking laws).

268. See Guy, *supra* note 7, at 993.

269. See *id.* at 993 n.16 and accompanying text (citing Gere-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 35, 36 (stating that stalking laws are void for vagueness)).

that the statutes are a politically safe short-cut.²⁷⁰ Seeing the need for such legislation, however, Congress enacted a federal law directing the National Institute of Justice to draft a model stalking law that would not violate the Constitution.²⁷¹ While not a panacea, the enactment of these statutes is at least a recognition that simply leaving an abuser does not end the violence. Harassment and stalking do exist; such behavior should be criminalized and those laws should be fully enforced.

Under common-law definitions of rape, non-consensual sexual intercourse between husband and wife was excluded.²⁷² The marital rape exemption protects a man who has forcible sexual intercourse with his wife.²⁷³ As previously discussed, the historical justifications for sanctioning marital rape were the chattel theory, the unities theory, and the contract theory of implied consent. Courts have since declared that women are no longer considered the property of men, that women do not surrender their identity upon marriage,²⁷⁴ and that the theory of implied consent is no longer valid.²⁷⁵ Nevertheless, many states continue to recognize some form of the marital rape exemption,²⁷⁶ while still others have expanded the exemption to include men who are not married to their victims.²⁷⁷ "The continued vitality of the exemption demonstrates

270. See *id.* at 993 (some critics argue the problem is too widespread and complex for one law to handle; they claim legislators are using these laws as a politically safe shortcut).

271. *Id.*

272. Ryder & Kuzmenka, *supra* note 82, at 393.

273. *Id.* at 393-94.

274. Trammel v. United States, 455 U.S. 40 (1980). "Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." *Id.* at 52.

275. State v. Smith, 426 A.2d 38 (N.J. 1981).

[T]his implied consent rationale, besides being offensive to our valued ideals of personal liberty, is not sound where the marriage itself is not irrevocable. If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage "contract," may she not also revoke a "term" of that contract, namely, consent to intercourse? Just as a husband has no right to imprison his wife because of her marriage vow to him . . . he has no right to force sexual relations upon her against her will.

Id. at 44. Others have asserted that in marrying, a woman does not agree to a life of sexual slavery in which she unconditionally surrenders her body to her husband. See Ryder & Kuzmenka, *supra* note 82, at 402.

276. See generally Augustine, *supra* note 119, at 578-584 (discussing the status of the exemption under state law). Some jurisdictions have rejected the marital rape exemption, for example: Alabama (Merton v. State, 500 So. 2d 1301 (Ala. Ct. App. 1986) (abolishing exemption by judicial action); Florida (FLA. STAT. ANN. § 794.011 (West 1992 & Supp. 1993) (prosecutes marital rapists)); Wis. STAT. ANN. § 940.225(6) (West Supp. 1993).

277. See *infra* p. 111.

that legislators view a modicum of family violence as the norm; some violence by men ought to be expected."²⁷⁸

Most state statutes no longer explicitly define rape as intercourse with a female not the spouse of the actor.²⁷⁹ Although today it is less overt, in many states the marital rape exemption remains firmly intact. Some states maintain the exemption generally, but deny it upon meeting certain statutory criteria.²⁸⁰ For example, some states recognize the exemption unless the parties are separated under a court order or unless they are living separately or one spouse has filed for divorce, annulment, separation, or separate maintenance.²⁸¹ Still other states allow prosecution if the spouses were not living together at the time of the rape.²⁸² These statutes require an evaluation of the state of a relationship or the existence of a piece of paper to determine whether violent, forced, non-consensual sex is a crime.

Some states allow prosecution of spouses for rape or other sexual offenses provided the victims meet stringent reporting requirements.²⁸³ For example, Virginia only allows prosecution for marital rape if the victim reports the assault within ten days.²⁸⁴ Some states consider marital

278. Schwartz, *supra* note 31, at 57.

279. See, e.g., LA. REV. STAT. ANN. § 14:41 (West 1986 & Supp. 1994) (language exempting spouses repealed). *But see* 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994) ("A person commits a felony of first degree when he engages in sexual intercourse with another not his spouse.").

280. Augustine, *supra* note 119, at 579.

281. See, e.g. KAN. STAT. ANN. § 21-3501(3) (Supp. 1993) (exemption is recognized unless the couple is living apart, either spouse filed for an annulment, divorce or separate maintenance, or if one spouse has filed for relief under the abuse act); MD. ANN. CODE art. 27, § 464D (1994) (Maryland denies the exemption when the spouses are not living together under a written separation agreement, or if the spouses have been living apart for more than three months before the rape); N.M. STAT. ANN. § 30-9-10H (Michie Supp. 1994) (spouse is defined as "a legal husband or wife unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce"); see also Augustine, *supra* note 119, at 579.

282. See, e.g., OHIO REV. CODE ANN. § 2907.02(A)(1) (Anderson Supp. 1993) (exemption applies unless the spouses are living apart); TEX. PENAL CODE ANN. § 22.011(c)(2) (West 1994) (marital rape is not a crime unless the spouses are not living together or have filed for dissolution of the marriage or for separate maintenance).

283. E.g., CAL. PENAL CODE § 261 (West Supp. 1994) (the victim must meet reporting requirements to qualify for protection under the spousal rape statute); 18 PA. CONS. STAT. ANN. § 3128 (Supp. 1994) (to overcome the exemption the victim must file a complaint within 90 days of the assault).

284. VA. CODE ANN. § 18.2-67.2:1 (Michie 1988). See, e.g., CAL. PENAL CODE §§ 262, 264, 799-801 (West 1988 & Supp. 1994) (marital rape must be reported within 1 year of the attack).

rape as a separate, lesser crime than traditional rape.²⁸⁵ In Pennsylvania, even if the spousal sexual assault provision is fully enforced, the maximum penalty a spouse-rapist would receive is approximately half that of a stranger-rapist.²⁸⁶ Clearly this dichotomy sends the message that rape in marriage is "less bad," and that these women are "second class victims not worthy of equal protection."²⁸⁷

The marital rape exemption has been successfully challenged on equal protection grounds. The New York Court of Appeals held that the exemption violates the Fourteenth Amendment since there is no rational basis for distinguishing between marital rape and non-marital rape.²⁸⁸ However, the response of several state legislatures has been to eliminate the constitutional violation by expanding the exemption to include unmarried persons.²⁸⁹ Some states have expanded the exemption to shield from prosecution men who qualify as social companions,²⁹⁰ such as dates, or to men who have had sexual relations with their victims within the previous year.²⁹¹ "These laws expand the scope of the archaic exemption beyond even that envisioned by Lord Hale in the seventeenth century This is indeed a frightening reality for those who value bodily integrity and personal liberty."²⁹²

285. See, e.g., 18 PA. CONS. STAT. ANN. §§ 3101, 3128 (Supp. 1993) (separate crime of spousal assault); TENN. CODE ANN. §§ 39-13-503, -507 (1991) (spousal rape is a class C felony while rape is a class B felony).

286. 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1993) (rape is a first degree felony), 18 PA. CONS. STAT. ANN. § 3128 (Supp. 1993) (spousal sexual assault is a second degree felony), 18 PA. CONS. STAT. ANN. § 1103 (Supp. 1993) (first degree felonies receive a maximum of 20 years while second degree offenses are punishable by a maximum of 10 years). See also VA. CODE ANN. §§ 18.2-61, 18.2-67.2:1 (Michie 1993) (the punishment for rape is five years to life, the punishment for marital sexual assault is one year to 20 years).

287. Judith A. Lincoln, Note, *Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape*, 35 WAYNE L. REV. 1219, 1235 (1989) (quoting Comment, *Spousal Sexual Assault: Pennsylvania's Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777, 796 (1986)).

288. *People v. Liberta*, 474 N.E.2d 567, 569 (N.Y. 1984).

289. See, e.g., MINN. STAT. ANN. § 609.349 (West 1987). Therefore, "[i]t is an affirmative defense to a charge of first degree sexual assault that the [rapist] and victim were married or [living together] at the time of the [sexual assault]." See Ryder & Kuzmenka, *supra* note 82, at 415 n.176 and accompanying text.

290. See, e.g., DEL. CODE ANN. tit. 11, §§ 761, 774, 775 (1987 & Supp. 1992); MONT. CODE ANN. § 45-5-511(2) (1993).

291. See generally Schwartz, *supra* note 31, at 41-42. The effect of this is that consent to intercourse even once means that the woman becomes sexually bound to that man; lost is her right not to consent to sexual relations and to have her wishes respected. *To Have & To Hold*, *supra* note 72, at 1260.

292. Augustine, *supra* note 119, at 581.

b) *The Response of Law Enforcement Agencies*

Historically, police department policies and procedures have minimized the criminality of domestic violence and discouraged arrest.²⁹³ An arrest, if made at all, was conditioned upon evidence of severe and visible injury. There have also been cases in which police organizations never responded to domestic abuse calls they received.²⁹⁴ It is important to recognize that police officers are "vulnerable to the same faulty perceptions and biases about [domestic abuse and marital] rape as is society at large."²⁹⁵ The root of the problem goes much deeper, however, for even when they are educated to the realities of domestic violence, many police officers still refuse to believe that domestic violence is truly a criminal act necessitating and deserving of legal intervention.²⁹⁶ Despite the existence of abuse, some officers may think that preservation of the family is the law's primary objective.²⁹⁷ Other officers "believe that a man has a right to use force to 'show his wife who's boss.'"²⁹⁸ Male police officers may even identify with the batterer.²⁹⁹ "The batterer's psychology is more familiar to them than the victim's. Some consciously or subconsciously perceive parallels in their own lives that lead them to forgive the husband, as they themselves would wish to be forgiven."³⁰⁰

Although some states and individual police departments have mandatory arrest policies,³⁰¹ police response, even today, is often insufficient and ineffective.³⁰² Some police departments do not view harassment and stalking seriously, which can result in inadequate enforcement of existing laws.³⁰³ Response time to domestic abuse calls is often greater than that of other cases, due in part to the custom of some of-

293. Waits, *supra* note 188, at 311.

294. *Id.* Hartzler v. City of San Jose, 120 Cal. Rptr. 5 (1975) (the victim called police because her husband said he was coming over to kill her; the police told her to call them back once the husband had arrived; the police arrived on the scene only after the next call, which was made by a neighbor informing the police that the victim had in fact been killed by her husband).

295. Augustine, *supra* note 119, at 585-86.

296. See Waits, *supra* note 188, at 313.

297. *Id.* at 314.

298. *Id.* at 314.

299. *Id.*

300. *Id.*

301. See Buel, *supra* note 260, at 214-15 (discussing mandatory arrest, included is a partial list of states or police departments that have instituted such procedures).

302. See Waits, *supra* note 188, at 311-16 (addressing police response to domestic disturbance calls).

303. See Guy, *supra* note 7, at 999 n.77 and accompanying text.

ficers to assign abuse calls a low priority.³⁰⁴ Most marital rape complaints and domestic abuse calls do not go beyond the investigative phase.³⁰⁵ Investigating police generally convey to the marital rape victim, explicitly or implicitly, that an arrest will not result if it is based solely on her report.³⁰⁶

Rather than arresting the abuser, police frequently assume the role of mediator³⁰⁷ in an attempt to calm the parties.³⁰⁸ Some officers use a victim's agitation as evidence that she is not trustworthy; they then disregard her attempts to tell her story or are skeptical of her version of the facts.³⁰⁹ Many times officers focus on the victim's behavior rather than the abuser's, to "try to determine how she might have 'provoked' her husband or how she can control him in the future."³¹⁰ Police may minimize the severity of the attack, downplay the abuser's intent to hurt the victim, or diminish the batterer's responsibility by accepting his excuses for the violence.³¹¹ Often police reports are not filed unless an arrest is made, thereby leaving no record for future reference.³¹² If a victim asks the police to arrest her abuser, officers may pressure her to withdraw the request or may refuse to honor it, believing that domestic violence victims never proceed with criminal action; therefore, arrest is pointless.³¹³ Police officers may believe family violence is a private matter into which

304. See RULE OF THUMB, *supra* note 16, at 14 (addressing police response to calls from victims of domestic abuse); DOBASH & DOBASH, *supra* note 40, at 211-12 (domestic disturbances given low priority by Detroit police); Waits, *supra* note 188, at 311 n.250 (survey revealed that Kentucky police did not respond to 17% of all calls for help made by battered women).

305. Augustine, *supra* note 119, at 585.

306. Lincoln, *supra* note 287, at 1223-24.

307. Mediation is an inappropriate response because it fails to hold the abuser accountable for his criminal actions and also gives him no incentive to change his behavior; as a result, mediation may contribute to the escalation of violence. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 23 (1984) [hereinafter TASK FORCE ON FAMILY VIOLENCE].

308. See Eisenberg & Micklow, *supra* note 69, at 156 (an officer's primary goal is to preserve the peace, arrest is used as a last resort); DOBASH & DOBASH, *supra* note 40, at 207-08 (police unlikely to arrest abuser).

309. Waits, *supra* note 188, at 311-12.

310. *Id.* at 312.

311. See *id.* (for example, an abuser's claim that he was drunk). *But see* ME. REV. STAT. ANN. tit. 19, § 768.4 (West 1964) (voluntary intoxication is not a valid defense under the Protection From Abuse Act).

312. Sewell, *supra* note 41, at 1008.

313. Waits, *supra* note 188, at 313.

the law should not intrude.³¹⁴ Some officers regard time spent at domestic disturbance calls as time away from preventing "real" crimes.³¹⁵

This disparate treatment between domestic violence complaints and non-domestic violence complaints has devastating consequences. The United States Attorney General's Task Force on Family Violence noted that "under-enforcement of the law tells victims and assailants alike that family violence is not really a serious crime, if a crime at all."³¹⁶ In deciding how to respond to domestic violence calls, the police, and later the courts, are designating which attacks are to be sanctioned and which are to be criminalized.³¹⁷ Thus, police protection is not absolute, rather it is "conditional upon women meeting police notions of 'deservedness' and the circumstances of the attack meeting their definition of 'crime.'"³¹⁸

In reality, arrest has been shown to be an effective response to domestic violence. Arrest has had a deterrent effect on abusers.³¹⁹ Arrest removes the abuser from the scene, thus ending at least that episode of violence. Without an arrest, violence may escalate because abusers are often angered by police intrusion into their private lives.³²⁰ Finally, an arrest also symbolizes societal condemnation of an abuser's behavior.³²¹

c) *The Prosecutorial Response*

The marital rape exemption will never be truly abrogated and domestic abuse uniformly punished until prosecutors pursue criminal charges.³²² "[T]he very notion of prosecutorial discretion recognizes the opportunity for a prosecutor's personal biases about spousal rape to affect his or her decision of whether to prosecute."³²³

314. *Id.*

315. *Id.*; see also TASK FORCE ON FAMILY VIOLENCE, *supra* note 307, at 11 (the crime of assault is violence between strangers, whereas violence committed against a family member is a family squabble).

316. TASK FORCE ON FAMILY VIOLENCE, *supra* note 307, at 12. "It is this widespread perception that has contributed to the perpetuation of violence within the family." *Id.*

317. Hanmer, *supra* note 212, at 6.

318. *Id.*

319. See Waits, *supra* note 188, at 302-04.

320. SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 25 (1982).

321. Waits, *supra* note 188, at 309.

322. Augustine, *supra* note 119, at 586.

323. *Id.* Yet, one of a prosecutor's duties is to recognize community values in deciding which cases to prosecute. Therefore, which bias influences these decisions, the prosecutor's, society's, or both?

Some prosecutors claim domestic abuse calls are unduly burdensome to the judiciary.³²⁴ Like the police, prosecutors may assign domestic abuse cases low priority.³²⁵ When the parties are related to or have been involved with each other the rate of criminal prosecution decreases.³²⁶ Prosecutors often pursue lesser crimes than those supported by the victims' injuries.³²⁷ Prosecutors may "refuse to file based on a general assumption that abused women will not be willing to testify against their husbands,"³²⁸ or that their statements are suspect due to enmity they feel toward their abusers.³²⁹ Greater levels of proof are often required to support charges of domestic abuse rather than those required in cases of violence between strangers.³³⁰ Prosecutors may not pursue marital rape cases because of the difficulties in getting convictions.³³¹ In fact, some prosecutors have treated victims of domestic abuse as if they were criminals.³³²

Although a majority of states have enacted stalking laws, some prosecutors have questioned their value. For example, one prosecutor has said that "the law is often an inadequate defense against former lovers and husbands with a propensity for violence."³³³ In some states, first offenses can only be charged as misdemeanors and conviction is difficult.³³⁴ Because they believe the punishment is too light to have value as a deterrent, some prosecutors are hesitant to pursue harassment charges.³³⁵

324. See *RULE OF THUMB*, *supra* note 16, at 24 (abuse cases are "extralegal" and put a strain on the criminal justice system).

325. See *id.* at 93 (spousal abuse complaints are assigned low rank by prosecutors).

326. See Finesmith, *supra* note 15, at 107 n.192. (citing Barbara Basler, 'Prior' Relations Cited as a Factor in a Felony Case, *N.Y. TIMES*, Feb. 24, 1982, at B1 (discussing a case in which a pregnant woman was beaten and then burned with a hot iron by her former boyfriend; he was arrested on a charge of felony assault, but the Manhattan District Attorney's Office reduced the charge to a misdemeanor)). Prosecutors view the case as "tainted" when the victim and defendant have had a prior relationship. *Id.*

327. See *RULE OF THUMB*, *supra* note 16, at 31 (the abuser was charged with a misdemeanor after repeatedly battering his victim with a stick).

328. See Waits, *supra* note 188, at 322. See, e.g., *RULE OF THUMB*, *supra* note 16, at 33.

329. Woods, *supra* note 19, at 10; Finesmith, *supra* note 15, at 107.

330. Woods, *supra* note 19, at 10 (corroborative evidence required is greater in domestic abuse cases than it is in crimes between strangers).

331. Augustine, *supra* note 119, at 586.

332. See *RULE OF THUMB*, *supra* note 16, at 93 (by their disbelief, accusations and demeanor, prosecutors' treatment of abuse victims is similar to the treatment of criminal defendants).

333. Schuyler, *supra* note 6, at 19 (paraphrasing Deputy District Attorney Rhonda Sanders in California).

334. *Id.* at 18.

335. Guy, *supra* note 7, at 999 n.22.

Despite these obstacles, prosecution is a necessary response to force husbands and boyfriends to recognize that stalking, marital or acquaintance rape, and battering are criminal acts, and offenders will be held accountable. Further, through prosecutions, the societal attitudes that impair the ability to secure convictions for domestic abuse cases will change.³³⁶

d) *The Response of the Judiciary*

While changing perceptions of prosecutors will help to stop abuse, other arms of the legal system will also have to take steps to recognize the social problems behind abuse: "Regardless of the scope and depth of social movements . . . social change will not endure unless these movements bring about lasting reforms in our core institutions. This is especially true of legal institutions, such as the courts, whose decisions affect so profoundly the operation of the whole of society."³³⁷ In addressing domestic violence, therefore, the role of the judiciary is crucial.

However, some judges and jurors subscribe to the myths and misconceptions about gender roles and domestic abuse. Judges may inquire into victim provocation and an abuser's excuses that do not constitute a legal defense, and may consider them as mitigating factors.³³⁸ Following a conviction, a judge may impose no more than a stern lecture, making the abuser promise that he will not hurt his wife again.³³⁹ On grounds of preserving family unity, judges have been reluctant to incarcerate abusers.³⁴⁰ Some judges feel the state should not intervene into the home or believe that domestic violence is an aberration.³⁴¹ In addition, believing that harassment is no more than a minor inconvenience for the victim, judges may allot little time on their dockets to handle restraining orders.³⁴² Moreover, many judges do not treat spousal rapes with the same severity as stranger rapes.³⁴³ All of these conceptions hinder progress toward eliminating abuse.

336. Augustine, *supra* note 119, at 586-87.

337. Wilker, *supra* note 173, at 5. "Many judges . . . act in ways to discourage arrest [of persons who commit family violence] by setting low bail or releasing the assailant on his own recognizance, or upon conviction, failing to impose a meaningful sanction." TASK FORCE ON FAMILY VIOLENCE, *supra* note 307, at 23.

338. Waits, *supra* note 188, at 327.

339. *Id.* at 327-28.

340. RULE OF THUMB, *supra* note 16, at 56-59; see also Waits, *supra* note 188, at 328.

341. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11.

342. Guy, *supra* note 7, at 999.

343. Augustine, *supra* note 119, at 588.

IV. CONTEMPORARY JUSTIFICATIONS FOR LEGAL NON-INTERVENTION

Modern day justifications for non-intervention in domestic abuse and marital rape abound. They include the separate spheres theory, the preservation of marital harmony, and encouragement of marital harmony. Arguments in favor of the marital rape exemption persist even today.

A. *Justifications For Non-Intervention In Marital Rape, Assault And Battery*

1. Separate Spheres Ideology & the Right to Privacy

The legal system has created a distinction³⁴⁴ between a public realm of life, which properly is subject to legal or social regulation, and another, fundamentally different, personal sphere, which by its nature is outside the law or society's authority to regulate.³⁴⁵ This distinction has been used to justify dissimilar treatment of similar conduct.³⁴⁶ Domestic issues such as marital rape and battering have been deemed to be in the private sphere, shielded by the right of privacy.³⁴⁷ Hence, the law is "unable" to offer any protection. A refusal to intervene in marital relationships that involve assault, battery and/or rape preserves the relationship of domination and subordination.³⁴⁸

In applying the right of privacy to cases involving marital rape and domestic violence,³⁴⁹ "the right to privacy is claimed by one spouse over the objection of the other."³⁵⁰ In other words, the abuser's right to privacy is more highly valued than the victim's right to protection, auton-

344. Polan, *supra* note 229, at 298. There are those who believe that this distinction has been legitimated through the assertion that it is a "natural," rather than socially imposed ground for differential treatment. *Id.*

345. *Id.*

346. McConnell, *supra* note 42, at 210 n.14. "When similar conduct is treated differently by the law based on whether it occurs in the public or in the private sphere, the legitimacy of the distinction is immediately suspect." *Id.*

347. Schneider, *supra* note 169, at 985.

348. McConnell, *supra* note 42, at 210 n.14 and accompanying text.

349. "The courts, too, have rejected the argument that the marital rape exemption is supported by the right of marital privacy, citing other intrusions the state makes into domestic situations." Ryder & Kuzmenka, *supra* note 82, at 408.

350. Ryder & Kuzmenka, *supra* note 82, at 406. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (the Court recognized the individual's right of privacy as superseding the marital right of privacy).

omy, and bodily integrity.³⁵¹ This lack of intervention into domestic violence cases on the basis of privacy should not be viewed as separate and distinct from the violence, but rather non-intervention becomes a part of the violence itself.³⁵² "Thus the liberal promise of freedom gained through the private family realm applies only to men, not women."³⁵³

Protection of privacy that results in the failure to punish a man who rapes, assaults, or beats his wife, girlfriend, date, or social companion sends a portentous ideological message to society.³⁵⁴ It devalues women³⁵⁵ and protects male domination. It implies she is his property, and he as master is free to control her in whatever way he sees fit.³⁵⁶

That the court will not enter into the marital abode to set rules is more than a respect for the privacy of the citizens. It is also a tacit acknowledgement among male judges, male legislators, and male attorneys (most of whom are husbands) that a husband should not be told how to treat his wife.³⁵⁷

Reliance on the doctrine of family privacy in the face of domestic abuse can only be rationalized as an intent to perpetuate male rule.³⁵⁸ In the end, it is an effective mechanism by which institutional and individual male power and privilege are maintained and fortified.

2. Preserving Marital Harmony

One of the most often cited justifications for the marital rape exemption and for non-intervention in cases of domestic abuse is that the state is fostering marital harmony and intimacy by protecting the privacy of the marital relationship.³⁵⁹ However, there is no harmonious relationship when the woman is being beaten and raped by her husband. Certainly extending the exemption to include social companions cannot be construed as protecting a marital relationship.

351. See Schneider, *supra* note 169, at 974-75; see also Ryder & Kuzmenka, *supra* note 82, at 406.

352. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671-72 (1990). "Society is organized to permit violence in the home; it is organized through images in mass media and through broadly based social attitudes that condone violence. . . . Society permits such violence to go unchallenged through the isolation of families and the failure of police to respond." *Id.* at 1671.

353. Eppler, *supra* note 227, at 801.

354. Taub & Schneider, *supra* note 137, at 122-23.

355. *Id.*; Schneider, *supra* note 169, at 977.

356. Taub & Schneider, *supra* note 137, at 122-23.

357. KAREN DECROW, *SEXIST JUSTICE* 166 (1974).

358. Eppler, *supra* note 227, at 802.

359. *To Have & To Hold*, *supra* note 72, at 1268.

3. Encouraging Reconciliation of Spouses

Even more incredulous is the justification that non-intervention encourages the couple to reconcile. This theory posits that even in the face of rape³⁶⁰ and assault and battery, state intervention into the marital relationship is inappropriate because it will impede a couple's reconciliation.³⁶¹ This necessarily leads to the conclusion that the family should be kept intact at all costs.

B. Arguments Made In Defense Of The Marital Rape Exemption

Coupled with the rationales discussed above, additional grounds are cited to justify the marital rape exemption.

1. Marital Rape is Not a Serious Problem or is Less Serious Than Other Rapes

Overall, modern psychologists agree that victims of marital rape suffer long-term harmful effects due to the physical violence, loss of control, humiliation, and betrayal of trust.³⁶² Marital rape is frequently quite violent and generally has more severe, traumatic effects on the victim than other forms of rape.³⁶³ Women held hostage to abusive marriages are often raped on multiple occasions,³⁶⁴ and frequently these wives are also battered.³⁶⁵ Allowing a woman who has been raped by her husband to pursue charges of assault is wholly inadequate.³⁶⁶ As some courts have understood: "Short of homicide [rape] is the 'ultimate violation of self.'" ³⁶⁷ The attitude that marital or date rape is a victimless crime, or a lesser crime, is to deny the woman who has been raped bodily integrity, autonomy, and equal protection before the law.

360. "By adhering to the notion that prior consent nullifies the brutality of rape, this view distorts the reality of such experience for its victims." *Id.* at 1269.

361. Ryder & Kuzmenka, *supra* note 82, at 405; *see also* Warren v. State, 336 S.E.2d 221, 223 (Ga. 1985)(discussing historical justifications).

362. Ryder & Kuzmenka, *supra* note 82, at 411.

363. *People v. Liberta*, 474 N.E.2d 567, 575 (N.Y. 1984); *see also* RUSSELL, *supra* note 194, at 190-205.

364. *See* RUSSELL, *supra* note 194, at 111 (in a study of marital rape victims 31% had been raped once by their husbands; 37% had been raped between 2-20 times; 31% had been raped more than 20 times).

365. *Id.* at 90.

366. *Liberta*, 464 N.E.2d at 574 (the severity of the harm caused by marital rape differentiates it from the crime of assault); *see also* Ryder & Kuzmenka, *supra* note 82, at 412 (a husband being charged with assault is not an adequate remedy).

367. *Liberta*, 474 N.E.2d at 574-75 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1976)(citations omitted)).

2. Women are Vindictive & Will Fabricate Charges

Although the threat of fabricated claims exists for every crime, "[t]here is no other crime [except marital rape] . . . in which all of the victims are denied protection simply because someone might fabricate a charge."³⁶⁸ Differential treatment for women who have been raped by one other than a stranger reveals a sexist, baseless skepticism of the credibility of these women, and the presumption that they are somehow more invidious than other people.³⁶⁹ This rationale illustrates that a significant element in laws (and attitudes) condoning marital rape is the "stereotype of women as liars, schemers, troublemakers, and homebreakers who want to ruin innocent men to suit their own vindictive or irrational ends."³⁷⁰

3. Floodgates Argument

Proponents of the exemption argue that if marital rape is criminalized, the floodgates will open and women will be rushing to charge their husbands and boyfriends with rape. "This argument that women should continue to be raped and their husbands should continue to enjoy immunity from prosecution simply because the system is ill-equipped to deal with the number of prosecutions, reveals the ironic 'solutions' offered to problems in a patriarchal society."³⁷¹

4. Husband's Right to Sexual Relations Without Fear of Prosecution

Another argument for the exemption is that a husband should be able to have sexual relations with his wife without fear of prosecution.³⁷² "This idea simply confuses marital sex with marital rape."³⁷³ Rape is an act of violence; an expression of power; a realization of male privilege.³⁷⁴

5. Alternative Remedies are Available

Supporters of the exemption also argue that a criminal courtroom is not the appropriate forum in which to address the issue of marital rape. Wives can seek relief in divorce court, thereby obviating the need to

368. Ryder & Kuzemenka, *supra* note 82, at 405 (quoting *Warren v. State*, 336 S.E.2d 221, 225 (Ga. 1985)).

369. Augustine, *supra* note 119, at 576.

370. Schwartz, *supra* note 31, at 56.

371. Augustine, *supra* note 119, at 586 n.102.

372. *Id.* at 577.

373. *Id.*

374. *Id.* at 577-78 (citing Carole J. Sheffield, *Sexual Terrorism, in WOMEN: A FEMINIST PERSPECTIVE* 16 (Jo Freeman ed., 1984)).

repeal the exemption.³⁷⁵ This argument ignores the fact that rape, whether committed inside or outside of marriage, is a brutal, violent act, worthy of criminal punishment and societal condemnation.³⁷⁶

6. Problems of Proof

Another rationale holds that there are evidentiary difficulties in proving lack of consent in prosecutions of marital rape. This is not a valid reason to maintain the exemption. Although some might like to see it happen, it has never been suggested that stranger rape be decriminalized "due to the difficulties of proof posed by a consent standard."³⁷⁷ Perhaps a more enlightened approach would be "[r]ather than decriminalize the behavior, states should inquire into the continuing viability of the consent standard."³⁷⁸ As one scholar argued, "the purpose behind the consent rule is not to protect female autonomy and freedom of choice, but rather to assure men the broadest sexual access to women."³⁷⁹

To define rape as excluding marital rape reinforces the doctrine that holds women are chattel of their husbands or boyfriends.³⁸⁰ If the continuation of the marital rape exemption protects male property interests, abrogation of the exemption proclaims and respects women's right to physical integrity, autonomy, and equality.³⁸¹

V. CONCLUSION

Most, if not all, would agree with the tenet that no one should be assaulted, beaten, or raped. Yet, when behavior such as this is taken into the home, somehow this principle gets lost or, at the very least, tainted. To understand how and why we move from this universal principle to a rule of law or social practice that legalizes or condones acts contrary to this ideal, it must be recognized that violence against women is a multifaceted issue, implicating a wide range of concepts, some of which include gender relations, the meaning of equality, and the right to privacy. America and its institutions were born and nurtured from the vision of

375. Ryder & Kuzmenka, *supra* note 82, at 413. Some have suggested, and rightly so, that if a husband cannot get his wife's consent he is the one who should seek his remedy through the courts and not by rape. *Id.*; see also Schwartz, *supra* note 31, at 54.

376. Ryder & Kuzmenka, *supra* note 82, at 413.

377. *To Have & To Hold*, *supra* note 72, at 1269.

378. *Id.* at 1269 n.91.

379. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1122 (1986).

380. Schwartz, *supra* note 31, at 51.

381. *Id.*

men. They are based upon the language men used, with the meaning men attached to the words and concepts in order to achieve the ends that were important to men, both as individuals and as members of the class of men: "This gender bias, if unchallenged, becomes so embedded in the social structure that it often assumes the form of a social or cultural norm seemingly beyond the purview of the state's responsibility, rather than a violation of women's human rights for which the state is accountable."³⁸² Therefore, a comprehensive analysis of domestic violence must acknowledge and assimilate all the factors involved.

Domestic abuse has always existed. Historically abuse and rape were endorsed by religion, the legal system, and the controlling members of society.³⁸³ The early rationales employed by the state have been rejected. However, new justifications have been formulated. Yet when each of these rationales is examined, it is apparent that none offers a cogent basis upon which a state should abdicate its responsibility to protect its citizens. Either rape, assault, and battery are crimes or they are not crimes. These brutal acts ought not to be conditioned upon one's status or non-status as wife, date, or girlfriend. Specifically, it should not be necessary to evaluate the state of a relationship or the existence of a piece of paper to determine whether violent, forced, non-consensual sex is a crime. It is not appropriate for the state to pursue a policy wherein the family is kept together in the face of violence. Such a policy does not preserve the sanctity of marriage. Rather it perverts the marriage at issue and the institution of marriage as a whole. Likewise, when the right to privacy is invoked by the state as a means of allowing men to continue abusing women, it becomes merely another weapon with which to beat the woman. Thus, the vision and value of the right to personal privacy becomes corrupted.

But our legal system has yet to fully recognize women's rights: "Over the past century, the legal system has rejected some of its most blatant sexist notions and expressions without ceasing to reinforce male power and female subordination."³⁸⁴ For example, while it is true that most legal definitions of rape no longer specifically exclude the husband who rapes his wife, the exemption lives on, and has in some states been expanded. Because the responses to and rationales for domestic violence are couched in different terms, updated by modern rhetoric or sim-

382. Thomas & Beasley, *supra* note 3, at 39.

383. "Throughout history, ideas about women, the family, and the relationship between women and the outside world have been effectively used to rationalize inequality and the inferior status of women." Polan, *supra* note 229, at 297.

384. See Polan, *supra* note 229, at 297.

ply better disguised, there is the perception that there is a commitment to equality and the rights to bodily integrity and autonomy, which the criminal justice system and society uphold. What has happened, however, is that there has been a shift from an overt view of gender relations and women's separate roles to a more subtle view of limited differences.³⁸⁵ This maintains man's superiority and woman's inferiority both inside and outside the home. The law perpetuates inequality by subscribing to an ideology that "camouflages the fundamental injustice of existing sexual relations."³⁸⁶ For the legislature, police enforcement agencies, and judiciary to discriminate against women and among women is to sanction inequality by legitimizing differential treatment.³⁸⁷ Nevertheless, addressing:

domestic violence as merely an issue of equal protection, and by inference therefore, setting up the treatment of men as the standard by which we ought to measure the treatment of women in our societies, may in fact disserve women and mask the ways in which domestic violence is not just another common crime.³⁸⁸

The continued vitality of domestic violence and the emergence of new justifications indicate that there is something more at issue beyond the violent act. The impact of domestic violence is not limited to one home or relationship.³⁸⁹ Each abusive act and the reaction of the criminal justice system have ramifications not only for the abuser and the abused, but also for the members of the affected classes of men and women. Therefore, domestic abuse not only serves the needs of individual abusers, it also provides a unique service to men as a class.

Domestic violence (or sexual harassment or gender harassment) and its justifications survive in order to attain the more expansive result of male power and privilege with corresponding female powerlessness and subservience. The responses to domestic abuse, marital rape, and stalking are evidence of and a mechanism for the continued subordination of women in our society.³⁹⁰ It is a "violent manifestation of the patriarchal beliefs that men have the right to dominate [and] control . . . women,

385. Taub & Schneider, *supra* note 137, at 135.

386. *Id.* at 124. "Because the law purports to be the embodiment of justice, morality, and fairness, it is particularly effective in performing this ideological function." *Id.*

387. *Cf. id.* at 135.

388. Thomas & Beasley, *supra* note 3, at 60.

389. "The violence encountered by people within their families has roots and consequences not confined to those families. When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of that violence." Minow, *supra* note 352, at 1671.

390. *To Have & To Hold*, *supra* note 72, at 1255.

particularly when those women are, as wives or girlfriends, the 'property' or 'possession' of men."³⁹¹ By permitting men to abuse their wives or girlfriends with impunity, the state condones such behavior, and therefore is an accomplice to one of the most fundamental and outrageous acts of male domination over women in contemporary society.³⁹²

In the end, while we can all agree in the abstract with the universal principle with which this conclusion began, that is that no one should be assaulted, beaten, or raped, in reality, violence against women, and in particular domestic violence, is simply too valuable a tool to relinquish.

391. Eppler, *supra* note 227, at 791 n.14; *see generally* DOBASH & DOBASH, *supra* note 40; *see also* MARTIN, *supra* note 191.

392. Eppler, *supra* note 227, at 790.