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

by

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

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

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

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

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

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

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A NOTE ABOUT LEGAL TERMS

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

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INTRODUCTION
"LEGITIMIZING" MARITAL RAPE: CHANGING SOCIAL AND LEGAL ATTITUDES ABOUT SEXUAL ASSAULT IN MARRIAGE

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

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

[1] Melissa Anne Bazhaw, "For Better or for Worse? Media Coverage of Marital Rape in the 1978 Rideout Trial," Master's thesis, Georgia State University (2008), 2-3.
[2] Irene Hanson Frieze, "Investigating the Causes and Consequences of Marital Rape," *Signs* 8, no. 3 (1983), 532.

man in America," discussed the trial on *The CBS Evening* News. National newspaper coverage included the *New York Times*, the *Chicago Tribune*, the *Washington Post*, and the *Los Angeles Times*.[3]

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

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

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[3] Bazhaw, "For Better or for Worse," 3, 50.
[4] Lisa M. Cuklanz, *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change* (Philadelphia, PA: University of Pennsylvania Press, 1996), 53, 56.
[5] Robert Vernon "Vern" Cook served in the Oregon House of Representatives from 1956 until 1960 when voters elected him to the Oregon Senate. He remained in the Senate until he was defeated in the 1980 election.
[6] Cuklanz, *Rape on Trial*, 56.

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

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

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[7] *Ibid.*, 53.
[8] Susan Barry, "Spousal Rape: The Uncommon Law," *American Bar Association Journal* 66, no. 9 (1980), 1091.
[9] Franklin E. Zimring, "Legal Perspectives on Family Violence," *California Law Review* 75, no. 1 (1987), 537.
[10] Bazhaw, "For Better or for Worse," 63-64; G. F. Will, "When Custom Doesn't Work Anymore," *Washington Post* (December 28, 1978).

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

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

[11] The jury was not in a position to consider a sentence less than twenty years. All that they knew was that the "judge called for an acquittal or a minimum conviction of first-degree rape, with a 20-year sentence, without instructing the jury how much of the sentence the defendant would actually serve." Barry, "Spousal Rape: The Uncommon Law," 1091.
[12] Bazhaw, "For Better or for Worse," 64; Judy Mann, "Jury in Oregon Ducked Constitutional Questions," *Washington Post* (December 29, 1978).
[13] Lisa Kivett, "Sexual Assault: The Case for Removing the Spousal Exemption from Texas Law," *Baylor Law Review* 38 (1986), 1047.

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

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

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

[14] Cuklanz, *Rape on Trial*, 63. See, Diana Russell, *The Politics of Rape: The Victim's Perspective* (New York: Stein and Day, 1975); Del Martin, *Battered Wives* (San Francisco: Glide Publications, 1976).
[15] Barry, "Spousal Rape: The Uncommon Law," 1091.

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

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

[16] Bazhaw, "For Better or for Worse," 52.
[17] *Ibid.*, 52-53.
[18] Barry, "Spousal Rape: The Uncommon Law," 1090.
[19] *Ibid.*

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

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

[20] Bazhaw, "For Better or for Worse," 39.
[21] Bazhaw, "For Better or for Worse," 38.

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

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

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

[22] The early study ranking the severity of crimes occurred in 1974, prior to the criminalization of marital rape. Therefore, participants ranked rape by a former rather than a current spouse. Jennifer A. Bennice and Patricia A. Resick, "Marital Rape: History, Research, and Practice," *Trauma, Violence, & Abuse* 4, no. 3 (2003), 323.
[23] Cuklanz, *Rape on Trial*, 55.

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

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

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[24] Lori Moore, "The Statement and the Reaction," *New York Times*, August 21, 2012; Charlotte Alter, "Todd Akin Still Doesn't Get What's Wrong With Saying 'Legitimate Rape,'" *Time*, July 17, 2014.
[25] Molly Redden, "This GOP Lawmaker Wants a Woman to Get Permission From the Father Before Having an Abortion Unless it was 'Legitimate Rape,'" *Mother Jones*, December 17, 2014, accessed June 21, 2015, http://www.motherjones.com/politics/2014/12/republican-wants-women-get-permission-father-having-abortion.

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

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

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

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

[26] Danielle L. McGuire, *At the Dark End of the Street: Black Women, Rape, and Resistance – a New History of the Civil Rights Movement from Rosa Parks to the Rise of Black Power* (New York: Alfred A. Knopf, 2010).
[27] Estelle B. Freedman, *Redefining Rape: Sexual Violence in The Era of Suffrage and Segregation* (Cambridge, MA: Harvard University Press, 2013).

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

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

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

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

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[28] Sara Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (Minneapolis, MN: University of Minnesota Press, 2015).
[29] Rose Weitz, "A History of Women's Bodies," in Rose Weitz, ed. *The Politics of Women's Bodies: Sexuality, Appearance, and Behavior*, Third Edition (Oxford University Press, 2010), 4.

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

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

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

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

> "abduction." In all of these tort actions the person entitled to seek redress was the owner of the woman, whose virtue or chastity was fundamental.[31]

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

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

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

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

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

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

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

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

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

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

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