IS DOMESTIC VIOLENCE A CRIME?:
INTIMATE PARTNER RAPE AS ALLEGORY

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INTRODUCTION

By the late 1990s, dramatic changes in official criminal justice policy toward domestic violence were underway in many areas of the country. Police and prosecutors were no longer to treat such violence as a domestic quarrel best settled by family members in private. Instead, in many jurisdictions, legislation and department protocols mandated or promoted arrest and prosecution in domestic violence incidents, and authorized active...
pursuit and criminalization of civil protection order violations.\(^1\) Within a few years after these policies took effect, however, conflict over their benefits emerged and remains a central issue in domestic violence policy today.\(^2\) Many concerns over the policies, particularly the way in which some have been implemented, are highly legitimate and require ongoing attention if we are to implement a domestic violence response that effectively addresses the needs of battered women, while also holding offenders accountable.\(^3\)

However, what continues to be most notable about the changes in criminal domestic violence policy is how incomplete their implementation has been. Despite tremendous efforts in education and training of police, prosecutors and judges, and enormous amounts of federal money expended on practice development and improvement, most of us need only turn to our local paper or courthouse to see examples of widespread failure to implement effective criminal justice policies for domestic violence.\(^4\)


\(^3\) See Sack, supra note 1, passim (examining critiques of the implementation of domestic violence criminal justice policy); see G. Kristian Miccio, If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence, 15 WASH. & LEE J. C.R. & SOC. JUST. 405, 414-15 (2009) (explaining that while advocating for mandatory arrest and a criminal response to domestic violence, feminists nevertheless felt a distrust for law enforcement, and in working with a system that had been a source of the problem). See Sack, supra note 1, at 1740 (noting advocates for a strong criminal justice response would also agree that it is only one of many strategies that are critical to the success of the anti-domestic violence movement); see also Miccio, supra note 3, at 414 (noting mandatory criminal justice response has always been viewed as one component of a multi-dimensional approach).

\(^4\) See, e.g., Veronica Gonzalez, Murder Suspect May Plead In Five Year Old Case, WILMINGTON STAR-NEWS, Feb. 8, 2010, available at http://legal.blogs.starnewsonline.com/10406/murder-suspect-may-plead-in-five-year-old-case/. Gradie Lee Rhodes was charged with the murder of Joyce Hoskins, who had failed in two attempts to get protective orders against him. Hoskins was killed just months after Rhodes was released from prison and was on parole with intense supervision for murdering another ex-girlfriend. Id. See also Bianca Prieto, Orange County couple's whirlwind romance ends in murder-suicide, PALM BEACH POST, Jan. 22, 2010, available at
The *Castle Rock v. Gonzales* case is a tragic example of law enforcement’s failure to enforce the terms of a protection order.\(^5\) When her estranged husband took her three children from the front lawn in violation of a protection order, Jessica Gonzales alerted police, showed them the order, and tried repeatedly to explain the danger he posed.\(^6\) But despite her desperate efforts over several hours to have police enforce the order and arrest her husband, the officers failed to act. Instead, they told her that there was nothing they could do, and took a dinner break.\(^7\) The horrible consequences of this failure became apparent when Gonzales’ husband appeared at the police station and initiated a shoot-out, causing officers to shoot and kill him.\(^8\) The three little girls were found dead in the back of his car.\(^9\)

While the end result of the police inaction in *Gonzales* is thankfully rare, the police conduct itself is all too common.\(^10\) From this perspective, the central issue becomes not whether the changes in domestic violence policies should have been implemented, but why, in many regards, they have *not* been

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\(^6\) *Id.* at 752-754.

\(^7\) *Id.* at 753-754.

\(^8\) *Id.* at 754.

\(^9\) *Id.* Jessica Gonzales filed a claim against the town under 42 U.S.C. § 1983, claiming that her procedural due process rights had been violated when the police failed to enforce the protection order. *Id.* The Court held that Jessica Gonzales failed to state a claim because she did not have a property interest in the enforcement of the order, so that her procedural due process rights had not been violated. *Id.* at 768. The Court found that such a property interest did not exist because, despite language in Colorado’s statute governing arrests for violation of domestic violence orders that police “shall arrest,” the police actually maintained discretion as to whether or not to make an arrest. *Id.* at 760-64.

\(^10\) See [STATE OF NEW YORK, DIVISION OF CRIMINAL JUSTICE SERVICES, OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, THE FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1994: EVALUATION OF THE MANDATORY ARREST PROVISIONS, THIRD INTERIM REPORT TO THE GOVERNOR AND LEGISLATURE 4 (2000)](http://www.palmbeachpost.com/news/crime/orange-county-couple-s-whirlwind-romance-ends-in-190719) (assessing impact of New York’s mandatory arrest law six years after its enactment, report noted the low incidence of arrest in domestic violence incidents where perpetrators were no longer at the scene); *see also* Miccio, *supra* note 3, at 433-34 (noting that though New York’s law was not limited to on-scene arrests, the actual police practice of failing to follow up on offenders who have fled the scene appears to reflect a police attitude of avoidance or abdication of arrest responsibility in domestic violence cases).
implemented in any meaningful way.

The problem does not lie primarily with individual criminal justice practitioners who refuse to cooperate with domestic violence reforms. Most of these practitioners are both sincere and well-meaning. Nor does the problem lie in the novelty of the innovations, since in many instances, the changes in domestic violence policies have been in place for over a generation. I believe that the fundamental explanation for the resistance to full implementation of these changes rests in historical justifications for the toleration of domestic violence which we thought we had jettisoned long ago. Yet the legacy of these justifications continues to shape our beliefs about violence against women. Do we really believe that domestic violence is a crime?

In order to explore this question, this Article focuses on a particular aspect of domestic violence, marital and intimate partner rape. While the legacy of the rationales for condoning violence against women may be hidden from view in contemporary domestic violence policy generally, it is alive and well in the treatment of marital and intimate partner rape. It is in the challenges to criminalization of partner rape that the deepest ambivalence in our views about violence against women is writ large. Changes in the criminal justice policy toward domestic violence have been met with significant controversy and backlash. But unlike a backlash, which assumes that there has been major progress from which to retreat, the criminalization of intimate partner rape is a movement that has stalled before it started. Though the formal barrier to prosecution, the marital rape exemption, began to be dismantled in the mid-1980s, there remain legal obstacles as well as informal barriers to full prosecution of these crimes. Perhaps most significantly, public opinion appears confused and ambivalent about the prosecution of these cases. To many, the term “intimate partner rape” remains an oxymoron.11

11 Martha M. Ertman, Sexuality: Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either, 73 DENV. U. L. REV. 1107, 1113 n.15 (1996) (“Until recently, marital rape was an oxymoron because rape was defined as forcible sex with a person not the defendant’s wife. But it has since progressed from a privilege toward a crime.”) (citations omitted); Martha Albertson Fineman, Progress and Progression in Family Law, 2004 U. CHI. LEGAL F. 1 (2004) (stating “marital rape’ is no longer considered an oxymoron”).
The current treatment of marital and intimate partner rape helps to illuminate how domestic violence in general was addressed in the days before laws and policies concerning domestic violence were changed. The current state of partner rape law gives us a picture of how different life would be for battered women if the criminal justice reforms in domestic violence had never been implemented. Further, an exploration of the treatment of partner rape can inform our understanding about current obstacles to the full development of an effective criminal response to domestic violence. The study of partner rape prosecution helps to uncover some of our deepest beliefs about domestic violence and our resistance to fundamental change in its criminalization.

In Part I of this Article, I describe the criminal justice response to domestic violence as it existed in Queens, NY in the early 1990s, as viewed through the facts of a case in which I was involved. I then explain the role of intimate partner rape in my case, its connection to battering, and the reasons why an examination of intimate partner rape can help us to understand both the need for criminalization of domestic violence, and the reasons why such criminalization has not yet been fully implemented. Part II discusses the historical treatment of marital rape and the rationales that exempted husbands from criminal charges for rape of their wives. This Part also explores the relationship between the historical justifications provided for the toleration of marital rape and of domestic violence by the criminal justice system. In Part III, I examine the current treatment of partner rape in the criminal law, and in Part IV, I consider how the legacy of the justifications for partner rape continue to influence the current laws and policies in both partner rape and domestic violence. I conclude that the historical rationales that have obstructed progress in partner rape reform also continue to impede our ability to fully address domestic violence. To move forward in the fight to achieve justice for battered women, we must look backward, and confront the centuries-old rationales that still inform our policies and practices.

I. THE SOUND OF SILENCE: DOMESTIC VIOLENCE POLICY IN THE
NOT-TOO-DISTANT PAST

A. Queens, New York, 1990s

It is a truism to say that we are all shaped by the experiences we have lived. When speaking to students and younger people about the need for aggressive enforcement of domestic violence criminal justice policy, I fear it can be difficult for them to understand the situation as it existed only twenty years ago, because there has been such progress since that time. We have already seen how the Gonzales case exemplifies the horrific consequences that can come from a continuation of non-intervention policies. Unfortunately, I do not have to go so far afield to feel the pain of those consequences. In the mid-1990s, while practicing as a criminal defense lawyer, I worked on a domestic violence case in Queens, not too far from the campus of St. John's University. I want to share some of the issues that stood out to me in that case, to try to convey what I believe could be the devastating result if we were to back away from policies that require law enforcement, prosecutors, and judges to treat domestic violence seriously.

The client in my case was a housewife and part-time bookkeeper in her mid-thirties, who had been married for several years and had two young sons. She was also a battered woman who had been subjected to severe physical, sexual, and psychological abuse by her husband for most of their marriage, starting when she was pregnant with their first child. The violence escalated over the years, and by the end, her husband carried a gun at all times when he was at home. He threatened her with it and actually shot at her shortly before the incident that led to this case. He was a hunter, who had the dead animals he had killed stuffed and displayed around their home. He would tell her that she would be next.

Her husband forced sex on her multiple times, and at a certain point in their marriage, she never had consensual sex with him again. Though she would resist at times, most of the time she was too fearful. At times her husband had the gun on her during these episodes. He got her pregnant during one of the rapes, but she miscarried after he pushed her down a flight of stairs. Though at times she told him that she wanted to leave and get a
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In divorce, he told her that she would never take his two sons away and live.

She worked with her family day after day, and though they saw bruises and saw her fear of making him angry, they never said anything to her or anyone else. When she miscarried, she told her doctor that she had fallen down the stairs. Later, when we obtained the doctor's notes, we saw that he had written on that day, "Fallen? Pushed?", so the doctor clearly suspected something but did not ask her or tell anyone.

Once during a violent episode, my client called the police, but when they arrived her husband answered the door, and the officers did not attempt to speak with her privately. They did not arrest him, and no-one offered her any services. During another incident, she tried to call 911, but her husband pulled the phone out of the wall. She didn't try to reach the police again. Early one morning, after a long night of abuse, her husband started once again to try to force sex on her. In a moment, she grabbed his gun, which he kept on the bedside table, and shot him once, killing him. She was charged with intentional murder.

The Queens District Attorney's Office at that time had no specialized domestic violence bureau, and the prosecutor assigned to the case had no expertise in this area. From the start, the D.A.'s office painted my client as a villainous and cold-blooded murderer and failed to acknowledge the long history of domestic violence to which she had been subjected. The D.A. would not consider a plea to a lower charge, and we went to trial.

We asserted a defense of self-defense, and sought to introduce testimony from an expert on the dynamics of battering to explain why my client was acting reasonably when she feared she was in imminent danger from her husband that day. Though this was not a psychiatric defense, the judge, also untrained in domestic violence, treated this offer of testimony as a claim of mental illness, and required my client to undergo examination by a prosecution psychiatrist with the prosecutor present. It was unsurprising when the prosecutor's psychiatrist concluded that my client was a sociopath and liar.

The jury convicted my client of murder, and another judge imposed almost the maximum sentence, something virtually

unheard of given her background. The judge announced that she was worse than a mafia killer, because she had killed the father of her children. When he made this statement, the judge knew that her husband had abused her sons, though he had not allowed this evidence to be admitted at the trial. Although these statements were enraging, ultimately they proved to be beneficial when the appellate court took the unusual step of overturning the trial judge’s sentence even though it was within the discretionary range. Instead, the appellate court imposed the minimum sentence allowed, though this was still fifteen years to life. I still can hear her voice when she was in prison telling me that though she hated to be away from her children, jail was a relief after her marriage, “because at least [she] felt safe.”

There is a lot of failure to go around in this case. Her family, the community, and, of course, I failed my client. But our criminal justice system failed her, perhaps, most of all. The police response, the prosecutor, and the court’s treatment of the case, all reveal a system that was not addressing domestic violence adequately or intelligently. This case is not ancient history. The incident occurred in 1993 and her trial and appeal took place over the course of the mid-1990s.

But a lot has changed since then. In 1994, New York passed a mandatory arrest law in domestic violence cases, and police

13 Women who kill their batterers generally receive longer sentences than men who kill intimates. See Developments in the Law—Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1574, 1574 n.3 (1993) (citing estimates that women who kill an intimate partner on average receive sentences of fifteen to twenty years, while men who kill an intimate partner on average receive sentences of two to six years); see also Wendy Keller, Disparate Treatment of Spouse Murder Defendants, 6 S. Cal. Rev. L. & Women’s Stud. 255, 284 n.3 (1996) (citing same statistics); see also Elizabeth Schneider, Battered Women and Feminist Lawmaking 280-81 nn. 114-115 (2000) (citing one survey finding that 83.7% of battered women convicted of homicide received sentences ranging from 25 years to life).

14 Despite her murder conviction, the Family Court awarded her legal custody of her children when her husband’s parents brought a suit for custody.


16 Id.

17 In 1993, the same year that the incident I describe occurred, Manhattan Borough President Ruth Messinger issued a report that criticized the New York City justice system’s response to domestic violence and claimed that it placed battered women in greater danger. See Miccio, supra note 3, at 408 n.5.

have changed their procedures, so that they now separate the parties and interview them privately to try to ascertain what happened.\textsuperscript{19} The police have specialized domestic violence officers in each precinct who follow up with the victims after domestic violence calls.\textsuperscript{20} There now is a Family Justice Center in Queens that offers victims of domestic violence a range of services, including housing assistance, safety planning and counseling.\textsuperscript{21} If these laws, procedures and services had been in place in the 1980s and early 1990s, perhaps the domestic violence suffered by my client could have been addressed, and her story would not have ended in tragedy. The Queens D.A.’s office now has a specialized domestic violence prosecution bureau, with attorneys trained and experienced in these cases, and Queens now has specialized courts with judges trained to preside over domestic violence cases.\textsuperscript{22} Of course, this doesn’t mean that domestic violence has been effectively prevented, or that every victim has

\textsuperscript{19} See New York Police Department, Domestic Violence: What You Need to Know: How the Police Can Help, available at http://www.nyc.gov/html/nypd/html/crime_prevention/domestic_violence.shtml. The police department pamphlet for domestic violence victims explains the protocol when police arrive on scene: “In order to assist you and your family, the police must interview you, your abuser, and others who may have seen or heard the incident. When possible, you will be asked questions apart from the abuser. This is done so that you can speak freely about the incident without intimidation.” Id. The pamphlet also explains that the police will prepare a Domestic Incident Report, and victims will be given a copy. Id.

\textsuperscript{20} See id. The pamphlet for domestic violence victims, which is available in several different languages, describes things police can do to help, including assistance in moving to a shelter, obtaining and serving a protection order, getting medical care and social services, lock change, and speaking to a Domestic Violence Prevention Officer.

\textsuperscript{21} Press Release, City of New York, Office of the Mayor, Mayor Bloomberg, Queens District Attorney Brown and Domestic Violence Commissioner Jimenez Celebrate the Opening of New York City’s Second Family Justice Center (July 15, 2008), available at http://www.nyc.gov/test/ocdv/downloads/pdf/QFJC_Opening_PR.pdf (announcing the opening of a Family Justice Center in Queens, which will bring together dedicated domestic violence prosecutors, civil attorneys and social services providers under one roof to assist domestic violence victims and their children).

been treated sensitively, or that all domestic violence homicides have been stopped.\textsuperscript{23} The current state of affairs is far from ideal, but it is well ahead of where we were less than twenty years ago.

Do we want to return to the bad, but not so old days, of my client’s case? For me, this exemplifies why we must work to ensure that these laws and policies are enforced more effectively, while also learning from our mistakes and addressing all of the needs of battered women. As the following sections in this Article explain, I focus on one particular component of my client’s case to argue for increased enforcement of domestic violence reforms—intimate partner rape.

\section*{B. The Connection Between Battering and Intimate Partner Rape}

\subsection*{a. Intimate Partner Rape in the Queens Case}

The role of marital rape in my client’s case demonstrates in several ways its function in a battering relationship, and the part it has played in the law’s treatment of domestic violence. It was central to the abuse that my client’s husband inflicted on her. It was a method of choice for him because as he told her, the physical bruises he caused through forced sex were on parts of her body that the public did not see, and so others would be less likely to be aware of his violence. The sex was also something he felt she owed to him as his wife, a belief with deep roots in our legal history.\textsuperscript{24}

\textsuperscript{23} However, intimate partner homicides in New York City increased 9.5\% from 2007 to 2008, and increased 24.7\% in New York State as a whole. \textsc{Matthew Fetzer \& Adriana Fernandez-Lanier, \textit{Domestic Homicide in New York State}, 2008, 93 (2009).} Forty-six of the 523 homicides that took place in New York City in 2008, or 8.8\%, were intimate partner homicides. \textit{Id.} at Table 2, at 3. Thirty of those intimate partner homicide victims were women, while sixteen were male. \textit{Id.} at 3. There were only sixty-five female victims of all homicides in New York City in 2008, so that almost half (46.2\%) of all female homicide victims were victims of intimate partner homicide. In contrast, only 16 out of 429, or 3.7\% of all male homicide victims were victims of intimate partner homicide. \textit{Id.} However, in New York City, the number female victims in intimate partner homicides decreased by four (from thirty-four to thirty) and the number of male victims doubled (from eight to sixteen) from 2007 to 2008. \textit{Id.} at 11.

\textsuperscript{24} In one study of battered women who had been sexually assaulted by their partners, over 85\% of the women reported that their husbands held traditional beliefs about a husband’s ongoing right to have sex with his wife at any time. \textsc{Jacquelyn C. Campbell \& Peggy Alford, \textit{The Dark Consequences of Marital Rape}, 89 AM. J. NURSING 946, 947 (1989)} (stating 87.4\% of respondents reported that their husbands believed in husband’s right to have sex with wife whenever he wants it).
The actual episodes of rape were very violent, which contrary to popular belief, is frequent in intimate partner rape. And the humiliation and betrayal that she felt was a very typical reaction by women to rape by someone they know. Despite commonly held views, the psychological reactions of victims of intimate partner rape can be far more severe than the response of those who have suffered from rape by a stranger, because in addition to all the other horrors, there is the sense of betrayal and destruction of any trust that once existed.

Further, I am convinced that the fact that much of the abuse in my client's case was sexual was an important factor in her conviction. Despite the frequency with which marital rape occurs, it remains difficult to persuade juries that marital rape is "real rape," that it was an act of violence, or that the victim is telling the truth. This is true in prosecutions of marital rape, and I believe it was true when such acts were part of the background that contributed to my client's defense of self-defense. The cause of this complex of misperceptions can be traced to the way that marital rape has been treated in the Anglo-American legal system.

Though we do not always think of sexual assault as a part of a battering relationship, as my client's case typifies, it can be a significant component of domestic violence. Understanding the dynamics, the consequences and the legal history of intimate partner rape can be critical to comprehending the treatment of domestic violence in our law and practice.

b. The Overlap of Battering and Rape

Rape and domestic violence traditionally have been conceptualized as separate forms of violence against women. While rape involves sexual violence, research and policy on domestic abuse has focused on non-sexual physical aggression, such as assaults or threats of violence. Though criticism of the

25 See Jacquelyn C. Campbell & Karen L. Soeken, Forced Sex and Intimate Partner Violence: Effects on Women's Risk and Women's Health, 5 VIOLENCE AGAINST WOMEN 1017, 1018 (1999) (noting historically sexual assault was seldom considered as separate phenomenon of battering, and that forced relationship sex was a separate and important type of violence against women); see Raquel Kennedy Bergen, Marital Rape: New Research and Directions, National Online Resource Center on Violence Against Women (2006), http://new.vawnet.org/category/Main_Doc.php?docid=248 (explaining historically many battered women's shelters and rape crisis centers failed to address the problem of
contemporary legal treatment of both rape and domestic violence began to flourish in the 1970s, there was little discussion in either field of intimate partner rape.26

In reality, however, the two forms of violence are intertwined. First, a significant percentage of rapes are perpetrated by an intimate partner of the victim. Though we tend to picture a rapist as a stranger on a dark street, data show that a majority of sexual assault victims know their assailants.27 Further, many of these non-stranger rapes are perpetrated by current or former intimate partners.28 One of the most recent comprehensive surveys of violence against women concluded that 7.7% of all women will be raped by their current or former partners at some time during their lifetimes.29 This study concluded that marital rape).


27 According to data from the National Crime Victimization Survey, 54% of all rapes in 2006 were committed by someone well known to or a casual acquaintance of the victim, as compared to 34% committed by strangers. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES, NATIONAL CRIME VICTIMIZATION SURVEY, TABLE 34, (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus06.pdf [hereinafter Table 34]. A 1992 study found that only 22% of forcible rapes and sexual assaults were committed by strangers. NATIONAL VICTIM CENTER & CRIME VICTIMS RESEARCH AND TRAINING CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992) [hereinafter RAPE IN AMERICA]. Local rape crisis centers report even higher proportions of non-stranger rapes. Massachusetts and Minnesota rape crisis center data from the mid-1980s report that over 80% of all rapes reported are perpetrated by non-strangers See Lynn Hecht Schafran, Writing and Reading About Rape: A Primer, 66 ST. JOHN'S L. REV. 979, 985, 986 n.12 (1993). The stereotype that rape involves a stranger perpetrator, use of a weapon and/or physical violence, and results in signs of physical injury is false. In reality, in most sexual assaults the perpetrator is known to the victim, weapons or physical violence are not used and there is no sign of physical injury. See Kimberly A. Lonsway, Joanne Archambault & David Lisak, False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-stranger Sexual Assault, THE VOICE, Vol. 3, No. 1, 2009 at 1, 3-4.

28 Of the 54% of rapes committed by non-strangers, more than half were perpetrated by someone well known to the victim. TABLE 34, supra note 27. The category "well-known" does not break down the data into different types of close relationships. Id. The 1992 study found that 9% of all rapes were committed by husbands and ex-husbands, 10% by boyfriends or ex-boyfriends, 11% by fathers or step-fathers, 16% by other relatives, 29% by non-relatives such as friends or neighbors. RAPE IN AMERICA, supra note 27, at 4. In the remaining 3% of rapes reported, the respondents were either unsure or refused to answer. Id.

approximately half of all victims of intimate partner rape were raped multiple times by the same partner; of those women victimized more than once by the same partner, the average was 4.5 rapes.\textsuperscript{30} 62.6% of those women victimized more than once said that the victimization lasted one year or more.\textsuperscript{31}

In addition, a substantial percentage of perpetrators who physically batter their intimate partners also sexually assault them. While not all intimate partner rape is accompanied by other types of violence, it is clear that there is significant overlap between sexual assault and additional forms of domestic violence.\textsuperscript{32} Several studies indicate that in approximately 40 to 45% of battering relationships, the perpetrator sexually assaults or forces sex upon his partner.\textsuperscript{33} In one study involving battered women who were sexually assaulted by their partners, the women reported a variety of types of forced sex, including vaginal intercourse (82.7%), anal intercourse (52.8%), being hit, kicked, or burned during sex (44.1%), and having objects inserted in the vagina and anus (28.6%).\textsuperscript{34} Some of the women reported being forced into acts of extreme degradation, including sex with animals, and involvement of their children in various sexual acts.\textsuperscript{35} Almost half of the women (49.6%) had been threatened with physical violence for refusing sex, more than one third (36.7%) had been beaten for refusing sex, and 50.9% had been forced to have sex immediately after having been beaten.\textsuperscript{36}

\textsuperscript{30} Tjaden & Thoennes, supra note 29, at 39.
\textsuperscript{31} Id.
\textsuperscript{32} See Bergen, supra note 25, at 1 (stating women in physically abusive relationships may be especially vulnerable to rape by their partners); Sarah M. Harless, Note, From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims, 35 Rutgers L. J. 305, 308 (2003).
\textsuperscript{33} JACQUELYN C. CAMPBELL & DAVID BOYD, VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR HEALTH CARE PROFESSIONALS 5 (2000) (citing studies). See Bergen supra note 25 (noting studies have found that there are some women who are raped by their husbands, but not otherwise battered).
\textsuperscript{34} Campbell & Alford, supra note 24, at 947. The research sample came from 115 questionnaires completed by women who were incoming residents of domestic violence shelters throughout the state of Michigan, and who reported that they had been sexually abused. Id. at 946-947.
\textsuperscript{35} Id. at 947.
\textsuperscript{36} Id. at 947–48.
There is also evidence that batterers who rape their partners may be among the most dangerous perpetrators of domestic violence. Battered women who are also sexually assaulted by their partners have physical health effects beyond those caused by physical and emotional abuse.\textsuperscript{37} And victims of domestic violence who are also the victims of intimate partner rape are subject to more serious physical abuse and at greater risk of homicide.\textsuperscript{38}

Clearly then, intimate partner rape is a form of domestic violence that deserves serious attention. Its significant coexistence with other forms of intimate partner violence also makes it an important topic for understanding and addressing domestic violence generally.

\textbf{C. Intimate Partner Rape As Allegory}

There are many aspects of my client's case on which I could draw to argue that the recent reforms in law and policy have been critical to our progress in achieving an effective domestic violence response. I am choosing to focus on intimate partner rape, however, because changes in this area have lagged far behind those in domestic violence generally. Where intimate partner rape is concerned, the bad old days are surely still with us. Therefore, for those who have not experienced the traditional handling of domestic violence by the criminal justice system, intimate partner rape provides a current and stark example of ineffective, uneducated and unjust treatment of violence against women in our laws and policies. In this way, it can help to demonstrate why we cannot return to a domestic violence policy that fails to require serious treatment by the criminal justice system.

But the story of intimate partner rape serves as more than just a warning about the failures of past treatment of domestic violence. It also may help us to understand some of the ongoing

\textsuperscript{37} Campbell & Soeken, \textit{supra} note 25, at 1030-31, 1032.

\textsuperscript{38} \textit{CAMPBELL & BOYD, supra} note 33, at 2; Campbell & Soeken, \textit{supra} note 25, at 1028 (describing researching findings that battered women who were also sexually assaulted by their batterers were at significantly higher risk for homicide than battered women not sexually assaulted). See Schwartz, \textit{supra} note 26, at 45 (noting that rape crisis center staff "often argue that marital rapes are characterized by some of the most serious physical abuse").
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barriers to achieving greater progress in the current treatment of domestic violence. As explained in the following section, though intimate partner rape has some separate historical justifications and distinct harms, it is a form of domestic violence and shares many of the traditional rationales for domestic violence generally. Perhaps then the laws and practices of intimate partner rape can help to reveal the causes of resistance to full implementation of domestic violence policy that will mark justice for battered women.

II. THE LEGAL HISTORY OF MARITAL RAPE

For most of our history, the law did not consider rape by a husband of his wife a crime.\textsuperscript{39} In fact, the phrasing of this statement does not accurately characterize the historical view of marital sexual relations, since at that time, one could not conceive of any sexual act by a husband with his wife as a “rape.” Though we commonly refer to the “marital exemption” to rape, historically the law would not consider a husband “exempt” from prosecution; his behavior simply was not recognized by the law as potentially criminal. It is only in the modern era that the law began to contemplate that such acts by a husband could be recognized within the criminal law, and to consider his removal from that law an exception. What we now term the “marital exemption” to rape shares some historical roots with our law’s traditional recognition of the right of a husband to use physical violence against his wife, though it also was supported by some additional justifications particular to rape.

A. Coverture and Property Rights

Both the marital exemption to rape and the historical right of a husband to “chastise” his wife\textsuperscript{40} were justified by the law of coverture, adopted in this country from English law. At marriage, a woman’s legal identity was merged into that of her husband. As William Blackstone stated, “By marriage, the

\textsuperscript{39} Melissa Murray, Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life, 94 IOWA L. REV. 1253, 1261 & 1262 n. 29 (2009) (citing 19th century legal treatises stating that a husband could not be convicted of raping his wife).
\textsuperscript{40} Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2122-23 (1996).
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 that of the husband.\textsuperscript{41} A married woman could not own or transfer property, sue or be sued, or enter into contracts.\textsuperscript{42}

Further, a husband was responsible for any legal obligations undertaken by his wife. This responsibility provided the basis for legal recognition of domestic violence. Because the husband carried the burden of his wife's conduct and any misconduct, the law held that he had the right to "correct" her behavior, including physical discipline if necessary.\textsuperscript{43} The husband thus had the right to use physical violence against his wife, as a master did against a servant or a father against a child.\textsuperscript{44}

In addition to the justification for domestic violence, coverture created a specific rationale for the marital rape exemption, because if a husband and wife were one legal entity, a man could not be charged with raping himself.\textsuperscript{45} Further, because a married woman had no autonomous legal existence, she was considered the property of her husband.\textsuperscript{46} Rape was conceptualized not as a crime of violence, but as a property crime. Committed against a single woman, it violated the property interest of the woman's father, and the rape of a married woman was a violation of the property rights of her husband.\textsuperscript{47} A husband could not legally rape his wife, because he could not be convicted of "stealing" or causing harm to his own property.\textsuperscript{48}

\textsuperscript{41} WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765).
\textsuperscript{43} BLACKSTONE, supra note 41, at 432 ("The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children.").
\textsuperscript{44} Id.
\textsuperscript{45} Sandra L. Ryder & Sheryl A. Kuzmenka, Legal Rape: The Marital Rape Exemption, 24 J. MARSHALL L. REV. 393, 400 (1991) (discussing how rape laws originated from the premise that male property rights were being violated).
\textsuperscript{47} See People v. Liberta, 474 N.E. 2d 567, 576 (N.Y. 1984) (noting historically rape laws were designed to "protect the chastity of women and thus their property value to their fathers or husbands").
\textsuperscript{48} See Woolley, supra note 26, at 275-76 (discussing how wives were considered chattel of their husbands); see also Katherine M. Schelong, Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking, 78
B. Protecting Marital Privacy and Harmony

The law of coverture continued to provide justification both for domestic violence and the marital rape exemption until well into the 19th century. However, the system of coverture began to be dismantled with the passage of the Married Women’s Property Acts, which gave married women the right to own property and incur personal legal obligations. 49 The first Married Women’s Property Act was enacted in Mississippi in 1839 and, within fifty years, every state had adopted some form of such an act.50

Though coverture could no longer provide legal justification for domestic violence, a new rationale for such violence emerged. The preservation of marital privacy and domestic harmony required that the law remain uninvolved in the relationship between husband and wife.51 Though domestic violence may not be officially approved, it would be tolerated by the legal system, so as not to invade the privacy of the family. Further, by staying out of private marital relations, the law would promote reconciliation and restoration of harmony. As one court put it: “If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.”52

The rationale of preserving marital privacy and harmony to condone physical violence also was used to maintain the marital exemption for rape.53 If the general relationship between

49 See Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 HARV. L. REV. 1255, 1257 n.16 (1986)(these Acts began to alter the traditional status of married women by granting them such rights as the right to contract, to sue and be sued, and to retain their own earnings).

50 Id.

51 See Siegel, supra note 40, at 2168-69 (noting public inquiries into marriages were thought to be too disruptive to the private life of the couple).

52 State v. Oliver, 70 N.C. 60, 61-62 (1874). See State v. Rhodes, 61 N.C. 453, 457 (1868) (“However great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.”).

53 See Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. 1373, 1486-87 (2000) (positing modern defense of the marital rape exemption focuses on the need to protect the privacy of the spousal relationship from judicial intervention and to promote reconciliation) [hereinafter Hasday, Contest and Consent]; Note, To Have and To Hold, supra note 49, at 1257-58, 1268-69 (describing development
husband and wife was private, then their sexual relations were certainly even more intimate, and should remain protected from legal intervention. Further, the law’s involvement would prevent the spouses from reconciling and restoring marital harmony.\(^5\)

The justification of protecting marital privacy shaped and perpetuated criminal laws and policies of non-intervention in both domestic violence and marital rape through the late 20th century. Through the 1970s, police officers were instructed to treat incidents of domestic violence as non-criminal matters, rather than arrest perpetrators.\(^5\) Most frequently, police would separate the parties and tell the husband to cool off and take a walk around the block.\(^5\)

The argument that marital rape should not be criminalized because it would prevent reconciliation of the spouses also continued through the modern era, despite its obvious weaknesses.\(^5\) For example, in a 1981 case, the Supreme Court of Colorado upheld the constitutionality of a marital rape exception, finding that it “may remove a substantial obstacle to the resumption of normal marital relations,” and “encourag[e] the preservation of family relationships.”\(^5\) The Court further stated that the marital exception avoids prying into private marital relations: “[o]therwise juries would be expected to fathom the intimate sexual feelings, frustrations, habits and understandings of modern privacy rationales for marital exemption, which included fostering marital harmony and encouraging spousal reconciliation). See Schwartz, supra note 26, at 34-35 (noting the “Hydra-like existence” of the marital exemption, “as each argument is refuted by scholars, another one, equally spurious, rises to take its place.”).\(^5\)

\(^5\) Hasday, Contest and Consent, supra note, at 1487 (noting that the marital privacy argument assumes that the rape exemption protects the interests of both husband and wife, and that marriage is “a necessarily harmonious relation, and legal intervention [is] the first, unwelcome introduction of antagonism and injury”); see also Protecting Them From Themselves, supra note 42, at 1472-74 (citing arguments by defenders of the marital rape exemption that its abandonment would violate the privacy of both husbands and wives by government invasion of the marital bedroom). \(^5\) Joan Zorza, The Criminal Law of Misdemeanor Domestic Violence, 1970-1990, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) (explaining police policy regarded domestic violence as a private matter).\(^5\)

\(^5\) Id. at 47-48 .

\(^5\) See Schwartz, supra note 26, at 46-47 (noting that this argument presumes that sexual violence by husbands is a trivial marital issue to be “ironed out” and that such violence does not merit attention by the criminal law); see also Liberta, 474 N.E.2d at 574 (“The marital rape exemption simply does not further marital privacy because this right of privacy protects consensual acts, not violent assaults.”); Weishaupt v. Commonwealth, 315 S.E.2d 847 (Va. 1984) (noting that if marriage has already deteriorated to the point of rape, “we doubt that there is anything left to reconcile.”).

unique to particular marital relationships." For far longer than it affirmatively condoned domestic violence, the law continued to justify non-intervention in marital rape cases in order to protect marital privacy and harmony. The first case holding the marital exemption unconstitutional was not decided until 1984, and it was not until 1993 that every state had eliminated the full marital exemption. Further, as discussed below, while domestic violence now is clearly against the law in every state, marital rape continues to be partially exempted from prosecution and treated differently in the law of many states.

The preservation of privacy and promotion of reconciliation remained a justification for the marital rape exemption. However, defenders of the exemption also relied on an additional justification not overtly utilized to condone domestic violence — the consent of the victim.

C. Consent to Rape

Unlike domestic violence, or other crimes of violence, rape traditionally requires proof that the victim did not consent to the act. Therefore, a justification for the marital rape exemption was that the victim had in fact consented to have sexual relations. The wife's consent, however, did not have to be proven in each act of sex. Rather, this consent to sexual relations with her husband was ongoing and implied by her marital vows.

This argument is thought to have originated in a treatise by Lord Matthew Hale, a Chief Justice of England in the 17th century: "The husband cannot be guilty of a rape committed by himself upon 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." According to this

59 Id.
62 See infra text accompanying notes 67-75.
theory, through marriage, a wife has agreed to sexual intercourse with her husband at any time and under all circumstances. As many modern commentators and courts have noted, Judge Hale provided no precedent for his “ongoing consent” theory. However, it was readily accepted into the common law, and has had remarkable staying power.

While the formal law of coverture was abandoned, and the status of married women in other areas changed dramatically, courts in the modern era continued to rely on this conception of the “wifely duty,” together with the marital privacy argument to uphold the marital rape exemption. To the extent that they offered any justification at all, courts typically cited to Hale or simply stated that the exemption was settled law.

III. THE CURRENT LEGAL TREATMENT OF MARITAL RAPE

The elimination of the full marital rape exemption by court decision and legislation began in the 1980s, and by the early 1990s, the full exemption did not exist in any state. However, almost half of all states continue to differentiate between marital and stranger rape in a variety of ways, such as imposing heightened procedural requirements for marital rape, requiring additional elements of proof, continuing a marital exemption for certain forms of rape, and authorizing lower sentences for marital rape convictions.

...
A. Current Statutes

Without attempting to be comprehensive, the following examples provide a flavor of the different treatment that marital rape currently receives under the law. Until very recently, several states narrowed the time that a victim had to report a marital rape in order for it to be prosecutable.\textsuperscript{68} South Carolina still maintains distinct reporting requirements for spousal rape, mandating that it be reported within thirty days.\textsuperscript{69} Some state laws prevent prosecution of a spouse for certain forms of rape. For example, in Maryland, a spouse cannot be charged with first or second degree rape—the two most serious charges of sexual assault—unless the parties are separated or other requirements are satisfied.\textsuperscript{70} In Ohio, Kentucky, and New Hampshire, while generally perpetrators may be prosecuted for rape where the victim is not mentally competent or able to consent, a spouse is exempt from prosecution in such situations.\textsuperscript{71} Rhode Island also exempts spouses from first degree sexual assault charges when they know or have reason to know that the victim is “mentally


\textsuperscript{69} See S.C. CODE ANN. § 16-3-615 (2008).

\textsuperscript{70} See MD. CODE ANN., CRIM. LAW § 3-318 (West 2009). Maryland law exempts spouses from first and second degree rape, as well as sexual offense in the third and fourth degrees, unless the parties have a written separation agreement or have been separated for at least three months immediately prior to the incident, or have a decree of limited divorce, or the perpetrator uses force or threat or force and the act is without the consent of the spouse.

\textsuperscript{71} OHIO REV. CODE ANN. § 2907.02(A)(1) (LexisNexis 2009) (“No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when . . . [for the purpose of preventing resistance, the offender substantially impair the other person’s judgment or control by administering any drug . . . surreptitiously or by force . . .” or the other person is less than thirteen, or whose ability to resist or consent is substantially impaired because of a mental or physical condition.). See KY. REV. STAT. ANN. § 510.035 (West 2009) (“A person who engages in sexual intercourse or deviate sexual intercourse with another person to whom the person is married, or subjects another person to whom the person is married to sexual contact, does not commit an offense under this chapter regardless of the person’s age solely because the other person is less than sixteen (16) years old or mentally retarded.”); N.H. REV. STAT. ANN. § 632-A:2 (excepting legally marital spouses when victim is “mentally defective and the actor knows or has reason to know that the victim is mentally defective” or when victim is a minor over the age of 13). See also OKLA. STAT. tit. 21, § 1111 (2009) (stating in Oklahoma, spouse is exempt where victim “is incapable through mental illness or any other unsoundness of mind . . . of giving legal consent” unless force or violence is used or threatened.)
incapacitated, mentally disabled, or physically helpless."\(^\text{72}\)

Some states require proof of additional elements in marital rape prosecutions. For example, while many states have modified or eliminated certain legal requirements for rape in the past 30 years, such as proof of force or resistance, some jurisdictions have kept these elements intact for marital rape. In Oklahoma, for example, spousal rape requires use or threat of force or violence.\(^\text{73}\) Similarly, in Idaho, a spouse can be convicted of rape only if the victim resists and her resistance is overcome by force, or she is prevented from resisting due to threat of bodily harm or because of a narcotic or anesthetic.\(^\text{74}\)

Some jurisdictions provide for lower sentences in marital rape cases. In Virginia, both non-marital and marital rape is subject to a sentence ranging from five years to life imprisonment. However, where the offender is the spouse of the victim, the judge may suspend a guilty judgment and dismiss the charges if the defendant successfully completes counseling while on probation.\(^\text{75}\)

The continued disparity in the treatment of marital rape has important symbolic value, for it indicates that the law continues to view rape by an intimate partner as less serious and less of a crime than stranger rape. Just as criminalizing conduct sends a message to both would-be perpetrators and the community at large that certain behavior is unacceptable, failure to criminalize certain conduct makes clear that it is tolerated.\(^\text{76}\) Under our


\(^{73}\) See OKLA. STAT. tit. 21 § 1111 (2009) ("Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person."); see also NEV. REV. STAT. ANN. § 200.373 (LexisNexis 2009) ("It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force.").

\(^{74}\) IDAHO CODE ANN. §§ 18-6107; 18-6101 (2009).

\(^{75}\) VA. CODE ANN. § 18.2-61 (2009). The statute states that the judge can do this only where an offender has not previously had a case dismissed under this procedure, and where the victim and the prosecutor consent. The charges may be dismissed "if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness." Id. § 18.2-61(C) (2009) (emphasis added). In South Carolina, an offender can be sentenced for up to thirty years for non-marital rape, but only for up to ten years for marital rape. See S.C. CODE ANN. § 16-3-652 (2008); Id. § 16-3-615 (2008).

\(^{76}\) See Schwartz, supra note 26, at 50-51. The public is more likely to view conduct as immoral if it is criminal. Id. Elimination of the marital rape exemption also makes a
current laws, the message is that rape by an intimate continues to be acceptable, at least under certain circumstances. And even more fundamentally, the differential treatment of marital rape demonstrates ongoing toleration for the view that married women are not entitled to legal autonomy.77

Of course, the changes in marital rape laws that have occurred to eliminate the full exemption provide some symbolic benefit. However, even this benefit diminishes if the public perceives that such laws are not enforced. Moreover, the harms caused by such violence are not addressed if marital rape is not prosecuted. The following section discusses how the ambivalence that has led to only partial legal reform in this area, has also hindered effective prosecution of marital and intimate partner rape cases.

B. Prosecution of Intimate Partner Rape

The National Violence Against Women Survey found that less than one-fifth (17.2%) of those women raped by an intimate partner said that they reported the most recent rape to police.78 Rape victims generally have been reluctant to report the crime to police due to the criminal justice system’s historically insensitive treatment of these cases. This reluctance to report can only be greater in the context of intimate partner rape, which continues to be minimized by our system. As described above, in many jurisdictions, the rape may not even be considered a crime at all, which gives little incentive for the victim to report it.

But even when these rapes are criminalized in the formal law, prosecution remains infrequent and conviction rates are low. Ultimately, only about 7.5% of all intimate partner rapes are prosecuted and, of those, 58.1% do not result in a conviction.79 Prosecution of intimate partner rape has been only marginally more effective since recent reforms in rape law were implemented. One study which reviewed national data from the 1970s to 1990 found that though there was a slightly greater

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77 Bergen, supra note 25 (noting marital rape exceptions make it appear that marriage creates an entitlement to sexual intercourse); Schelong, supra note 48, at 117 (arguing the continuation of this exemption perpetuates the idea that women are chattel of men).

78 Tjaden & Thoennes, supra note 29, at 49.

79 Id. at 51-52.
likelihood that offenders of non-stranger and stranger rapes would be sanctioned similarly, there remained a large "acquaintance discount" in the treatment of rape.80 Another study analyzed data on acquaintance rape prosecutions in Detroit before and after general reforms in rape law.81 The study's hypothesis was that the general reforms in rape law might increase acquaintance rape prosecutions more than prosecutions of stranger rape. However, though post-reform a greater proportion of the acquaintance rape cases were bound over for trial, there was "no support for [the] hypothesis that simple rapes bound over for trial would be taken more seriously in the post-reform period;" these cases were just as likely to be dismissed, and they were no more likely to result in a conviction or incarceration.82

It is likely that many prosecutors do not proceed in marital rape cases, not because they do not take them seriously, but because they believe that these cases will not result in convictions.83 Some may argue that prosecutors nevertheless should continue to try these cases. However, the belief that juries are unlikely to convict may be largely accurate. Like the unequal treatment of partner rape in legal statutes, the low prosecution and conviction rates in these cases reflect a belief system that is rooted in outmoded historical doctrines.

80 Ronet Bachman & Raymond Paternoster, A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?, 84 J. CRIM. L. & CRIMINOLOGY 554, 568-74 (1993). See Schafran, supra note 27, at 1029-30 (citing reports from task forces on gender bias in the courts which note that nonstranger rape may be "minimized and trivialized" by actors in the court system, who may be more likely to doubt the judgment and credibility of victims in these cases).

81 Cassia C. Spohn & Julia Horney, The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases, 86 J. CRIM. L. & CRIMINOLOGY 861, 863-84 (1996) [hereinafter Simple and Aggravated Rape]. The authors had previously studied reforms in rape prosecution generally, and found that in five of six large jurisdictions, these reforms had not resulted in a greater proportion of convictions. See Cassia Spohn & Julia Horney, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 77-105 (1992). Detroit was the one jurisdiction in which rape reform had had some impact, and so they focused their analysis of the impact of reform on stranger vs. acquaintance rapes there. Spohn & Horney, Simple and Aggravated Rape, supra, at 865.

82 Spohn & Horney, Simple and Aggravated Rape, supra note 81, at 883.

83 See Lonsway, Archambault & Lisak, supra note 27, at 4. The authors argue that prosecutors may subscribe to stereotypes about victims of sexual assaults, but even if they do not believe them themselves, they know that the stereotypes "will be prominent in the minds of judges and jurors as they make decisions regarding a sexual assault case." Id. As the authors note, "Prosecutors may therefore believe that they cannot ethically charge a defendant in cases that depart too much from the stereotype of 'real rape,' because a jury would not be likely to convict." Id.
IV. THE LEGACY OF HISTORICAL JUSTIFICATIONS FOR MARITAL RAPE

The different legal treatment, and the difficulties of prosecuting marital rape reflect the continuing power of the historical justifications provided for the marital exemption.

A. The Presumption of Consent

The heightened force or resistance requirements for marital rape in some state laws reveal the presumption of consent by a wife to all sex within marriage. This presumption can be removed only by proving a level of force or resistance that generally is no longer a required element in stranger rape law. The maintenance of the spousal exemption in cases where a victim is legally incapable of giving consent due to age or mental incapacity also reflects the presumption of consent in marital rape.

The power of the “consent” theory in partner rape is also apparent in an interesting development in rape law in the modern era. When courts began to strike down marital exemptions on equal protection grounds, some state legislatures responded, not by eliminating the marital exemption in their statutes, but instead by expanding the exemption to include unmarried couples who were living together or otherwise sexually involved.84 This expansion of the exemption also reflected modern social mores that recognized the likelihood of sex before marriage. The expansion manifests an outsized

84 See Note, To Have and To Hold, supra note 49, at 1260 & nn. 37-38. This 1985 article cites several states which had recently expanded the exemption to cover unmarried cohabitants and “voluntary social companions.” Id. See also Schel long, supra note 48, at 107. See also MODEL PENAL CODE § 213.1 (1) (1962). The Code bars a conviction for first degree rape if the victim was the perpetrator’s “voluntary social companion . . . upon the occasion of the crime” and had “previously permitted him sexual liberties.” Id. The Model Penal Code’s rape statute exempts a husband from prosecution for all forms of rape of his wife, and is also gender-specific: “A male who has sexual intercourse with a female not his wife is guilty of rape if . . . ” MODEL PENAL CODE § 213.1 (1962). Writing in 1982, Martin Schwartz argued that “gains which have been made by reducing the marital rape exemption have been counteracted by a move in some states to expand the marital rape exemption to unmarried persons who had never before been considered exempt by law.” Schwartz, supra note 26, at 41. Schwartz also notes this expansion exists in the laws of thirteen states. Id.
version of the "ongoing consent" theory. Now, a woman's "ongoing consent" to sex was not limited to her husband. Whenever she had consensual sex, she was providing permanent consent to sex with that partner at any time. 85

Conversely, the influence of the "consent" theory is also clear in statutes which differentiate married partners that are still living together, from those that are separated. Several states define "spouse" for purposes of the marital exemption as one who is living together with his partner. In these statutes, once the parties are formally separated or even just living apart, the husband loses his "marital" status, even though formally he remains married to his victim. 86 This distinction may indicate that a husband living apart or separated from his spouse is not entitled to the presumption of ongoing consent usually enjoyed in marriage. 87

The presumption of consent is also clear from the belief common among the public, including jurors, that the injury of

85 See Note, To Have and To Hold, supra note 49, at 1260. As Schwartz points out, the expansion of the exemption to include non-marital partners cannot be justified by the historical conception of marriage as subject to different treatment under the law. Rather, by expanding the exemption to include non-marital intimate partners, legislators demonstrated toleration of intimate partner violence; "[o]nly a legislative view that accepts at least some domestic violence as proper and normal could lead to the current move to decriminalization." Schwartz, supra note 26, at 57.

86 See, e.g., ALASKA STAT. § 11.41.432 (2009) (providing marital exemption for certain forms of sexual assault if the perpetrator is "married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage"); OHIO REV. CODE ANN. §§ 2907.01 -- 2907.03 (LexisNexis 2009). (providing a marital exemption for certain types of sexual assault, such as sexual battery, but a person married to the offender at the time of the alleged offense is not defined as a "spouse" if the parties have entered into a written separation agreement, there is a pending annulment, divorce or legal separation proceeding, or the incident occurred after the effective date of the judgment for a legal separation). See OHIO REV. CODE ANN. § 2907.01(L); § 2907.03 (LexisNexis 2009) (exempting spouse from sexual battery charge). See also OHIO REV. CODE ANN. § 2907.02 (A)(1) (2010) (noting offender is not exempted under the rape statute if the alleged victim was the legal spouse, but was "living separate and apart from the offender" when "[f]or the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug . . . surreptitiously or by force . . . or the other person is less than thirteen, or whose ability to resist or consent is substantially impaired because of a mental or physical condition). See also MD. CODE ANN., CRIM. LAW § 3-318 (West 2009).

87 See State v. Smith, 426 A.2d 38, 42, 43 (1981). The Court noted that Lord Hale's consent theory was developed in a period when marriages were "effectively permanent, ending only by death or an act of Parliament," but that the rule need not apply when marriage is not irrevocable and divorce is far easier to access. Id. "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?" Id. at 205, 426 A.2d at 44. Therefore, the consent theory did not apply when the spouses, though still legally married, were living separately. Id. at 205-07, 426 A.2d at 44-45.
intimate partner rape must be less severe because the woman previously has had consensual sex with the perpetrator. However, substantial research demonstrates that this is a misperception. In fact, the psychological injury from partner rape can be far greater because the woman feels betrayed by this act of violence from someone with whom she previously has been intimate. Moreover, the physical injuries resulting from intimate partner rape can be severe. Contrary to common perception, intimate partner rapes are not trivial bedroom miscommunications, but acts of psychic and physical violence. The damage and fear is further compounded by the victim's continued contact with her attacker. Moreover, victims of intimate partner rape are themselves affected by the myths surrounding non-stranger rape. They may experience greater trauma because they may be more likely to feel guilt and shame, to hide the rape, to blame themselves and be blamed by others, and to believe themselves less deserving of help.

B. Preserving Marriage

The historical justification of protecting marital privacy and promoting reconciliation continues to have power in modern day rape prosecutions. As one prosecutor of spousal rape cases noted,

88 See Lisa R. Eskow, Note, The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution, 48 STAN. L. REV. 677, 701 (1996) (citing California prosecutor who believes that jurors typically view spousal rape as inherently less severe because "the relationship acts as mitigation"); Bergen, supra note 25 (citing 1996 study of attitudes among college students which found that marital rape was perceived as less serious than stranger rape and that only 50% of male students thought it was possible for a husband to rape his wife). See MODEL PENAL CODE § 213.1 cmt. 8(c). ("Where the attacker stands in an ongoing relation of sexual intimacy, that evil, as distinct from the force used to compel submission, may well be thought qualitatively different"). See also Michelle Anderson, Marital Immunity, Intimate Relationships, and Improper References: A New Law on Sexual Offenses by Intimates, 54 HASTINGS L. J. 1465, 1512 (2003) (noting victims of marital rape often receive little support from family and friends).

89 Actual surveys of victims of marital rape reveal that in fact the injury and trauma can be more severe than in stranger rape. See RUSSELL, supra note 29, at 192 (noting that 52% of women raped by a husband or other relative report long-term trauma, as compared to 39% of women raped by strangers); see also DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 135-37 (1985) (explaining that much of the public does not consider marital rape as serious as stranger rape because of the relationship between the parties).

90 Schafran, supra note 27, at 1021 ("The fear of repeated attacks is especially severe because, unless the wife immediately leaves or is able to force the man to leave, she must live with not only the rape, but also the rapist.").

91 Schafran, supra note 27, at 1019.
jurors are reluctant to convict because of their belief in the tenets of marriage and "[their] desire to promote that institution."92 This goal is reflected in various state rape statutes. It is clearly at work in the Virginia statute which permits dismissal of a marital rape case upon the defendant's successful completion of counseling "if the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness."93

The distinctions made in some jurisdictions between married partners who are living together, and those who are legally separated, or living apart though still married also makes clear the law’s goal of promoting and preserving intact marriage. Once the parties are separated, there is less interest in protecting their privacy or most important, in promoting reconciliation. Further, the goal of marital reconciliation is evident in statutes which permit the exemption for forms of rape that do not require proof of force, but permit prosecution of spouses when force is an element. This distinction suggests that marital reconciliation is still thought to be desirable if the sexual relations, though nonconsensual, were not completed through force.

C. The Lying Woman

Current law also reflects a presumption that wives are likely to lie about rape perpetrated by their husbands. This presumption is most apparent in those statutes with heightened procedural requirements for marital rape cases, such as shortened reporting periods, but it is also present in all statutes which treat marital rape less seriously than stranger rape. Of course, suspicion of married women’s rape accusations is an intensified version of the

92 See Eskow, supra note 88, at 701. As the American Prosecutors Research Institute, the research, development and technical assistance arm of the National District Attorneys Association, states in a guide for prosecutors conducting voir dire in marital and date rape cases: "This is a difficult and tricky area for prosecutors. Unfortunately, many jurors have difficulty with marital rape... too many of them do not see it as a crime. The best approach for this is to use hypothetical questions/scenarios, relating rape to other crimes so that the stigmas & myths are debunked." American Prosecutors Research Institute, Violence Against Women Program - Legal Issues/Resources: Voir Dire Questions, available at http://www.ndaa.org/apri/programs/vawa/voir_dire_questions.html. See also Harless, Note, supra note 32, at 320. Harless cites a marital rape case involving severe violence which resulted in a jury acquittal.

93 VA. CODE ANN. § 18.2-61 (2009).
suspicion traditionally accorded complainants in all rape cases.\textsuperscript{94} However, though it has become unacceptable to incorporate this suspicion into rape statutes generally, the perception of women as lying accusers remains codified in statutes covering marital rape. Moreover, as defenders of the exemption have argued, women pursuing marital rape charges are thought to have a particular motive to lie: to obtain leverage in a divorce or custody action.\textsuperscript{95} This image of the untrustworthy woman also pervades public attitudes.\textsuperscript{96} Jurors routinely doubt women who allege marital rape, because they do not behave like "real" victims or could not truly have lacked consent.

\textsuperscript{94} See Schwartz, supra note 26, at 52 (traditional elements of rape prosecutions, including corroboration requirements, proof of resistance and lack of consent, as well as testimony on sexual history of victim, derived from belief that women are "spiteful shrews who often falsely accuse innocent men of sexual attacks"); SUSAN ESTRICH, REAL RAPE 54 (1987) (heightened requirements in rape cases are the "institutionalization of the law's distrust of women victims through rules of evidence and procedure"). See also 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (Philadelphia, Robert H. Small 1st Am. Ed. 1847) ("[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.").

\textsuperscript{95} See Protecting Them From Themselves, supra note 42, at 1475 & n.37. See also Lonsway, Archambault & Lisak, supra note 27, at 2-3 (noting how perception of the number of false reports in sexual assault cases is greatly exaggerated, while estimates of the percentage of false reports actually are 2 to 8%). See Lonsway, Archambault & Lisak, supra note 27, at 4-5 (discussing the importance of noting that a rape charge that is not pursued by police or prosecutors is not equivalent to one that is "false."); Schafran, supra note 27, at 1010. See also Lonsway, Archambault & Lisak, supra note 27, at 4, 5 (explaining police or prosecutors may not proceed if they determine a case to be inconclusive or unsubstantiated, which itself can be affected by law enforcement misconception and biases). See also Schafran, supra note 27, at 1011 & n.123(citing Rene Augustine, Marriage: The Safe Haven for Rapists, 29 J. FAM. L. 559, 564 (1990-91)) (most marital rape charges did not survive investigation by police). See RAPE IN AMERICA, supra note 27, at 6 (noting problem is actually the lack of reporting of incidents, and finding that 84% of all rape victims did not report the rape to police.); Schafran, supra note 27, at 1014 (citing Senate Judiciary Committee report which found that only 1% of all rapes were reported, as compared to 53% of all robberies).

\textsuperscript{96} While not spousal rape cases, the publicity surrounding the acquaintance rape charges in the Kobe Bryant and Duke lacrosse players cases makes clear the suspicions cast upon complainants in non-stranger rape cases generally. See, e.g., Mary Jo Melone, Bryant Case May Inflict Lasting Harm on Women, ST. PETERSBURG TIMES, Aug. 25, 2004, http://tampabay.com (Enter "Bryant Case May Inflict Lasting Harm on Women" into archives); Anita L. Allen, Blaming the Victim, THE STAR-LEDGER, May 14, 2006 at 5. See also Lonsway, Archambault & Lisak, supra note 27, at 3: "We have all seen how victims are portrayed in the media accounts of rape accusations made against popular sports and cultural figures. These media accounts show us just how easy it is for us as a society to believe the suspect's statements (a respectable cultural icon) and both discount the victim's statements and disparage her character." Id.
D. The Lessons for Domestic Violence

It is easy to see in the current treatment of marital and intimate partner rape the ongoing power of the historical rationales for exempting such rapes from prosecution. Such rationales underlie the distinctions made in the formal law, explain the low prosecution and conviction rates in these cases, and are sometimes expressed directly by jurors and representatives of our criminal justice system. Continuing unequal treatment of marital rape is directly traceable to the historically unequal treatment of women, and married women in particular.

The connection between this historical inequality and our current treatment of domestic violence may be less apparent to some. It may seem that the domestic violence reforms of the late 20th century have rid our laws and policies of the remnants of historical rationales for violence against women and treatment of married women as the dependents of their husbands. We may wish to distance domestic violence law from the current backward status of marital rape.

But the histories of marital rape and domestic violence law are closely bound. They share the historical justifications of coverture and marital privacy, and even the justifications that seem to pertain more specifically to marital rape – the ongoing consent theory and the image of the lying woman – have resonance in the legal treatment of domestic violence. The presumption of ongoing consent, first developed by Lord Hale, is closely related to the conception of marriage that was reflected in the law of coverture. While the presumption of consent is not an overt element in the law of domestic violence, the narrowly defined gender roles in marriage of which this presumption is a part, also encompass the wifely responsibility to obey her husband. Through marriage, the wife has consented to obey and accept her husband’s treatment. To make an accusation of domestic violence is to step out of that agreed-upon role, and to violate that consent. In this sense, the toleration of domestic violence also carries with it the historical presumption of consent.

The figure of the lying woman, while perhaps more prevalent in rape law and intimate partner rapes in particular, also is a
common trope of domestic violence law. The belief that women make false accusations of abuse to win custody or divorce lawsuits, or simply as an act of vindictiveness, is commonplace in the justice system's treatment of domestic violence.\textsuperscript{97}

The historical legacy of unequal treatment of women remains present in the unfinished business of domestic violence law and policy. Just as martial rape is not truly considered "real" rape, perhaps we do not think that domestic violence deserves to be considered a "real" crime. This may help to explain our reluctance to fully implement domestic violence arrest and prosecution policies and to enforce protection orders. If domestic violence is ever to be fully addressed, we need to examine the unstated assumptions about women that we like to think we have long abandoned. We need to go back to thinking about women's equality.

\textbf{CONCLUSION}

When we look closely at the differential treatment of marital rape and the justifications that underlie those differences, the failure of our justice system to treat all violence against women seriously comes into full relief. What would our world be like if we actually considered marital rape a crime equal in seriousness to stranger rape, or to aggravated assault, or to any other violent felony? And if we aren't willing to consider marital rape a real crime, then how can we consider domestic violence generally to be one? Criminalization of domestic violence represents a step

\textsuperscript{97} See, e.g., Deborah M. Goelman, \textit{Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000}, 13 COLUM. J. GENDER & L. 101, 167 (2004) (noting underlying belief in legal profession that women lie about domestic violence, arguing that "this attitude often is reflected by judges reluctant to grant protection orders when a divorce is pending, believing that women misuse the protection order system to gain an advantage in custody litigation"); Leigh Goodmark, \textit{Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform}, 37 ARIZ. ST. L.J. 709, 741-42 (2005) ("[b]attered mothers confront the same skepticism about their credibility as other women, but their testimony is further shadowed by myths and stereotypes about victims of domestic violence"); Deborah M. Weissman, \textit{Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"} 42 B.C. L. REV. 1081, 1122 (2001) (citing bias by judges who often believe in the "fallacy" of domestic violence claims and the lack of trustworthiness of women who file them"); see id. at 1122 n.223 (despite these beliefs, there appear to be no empirical studies to support the charge that women routinely fabricate abuse allegations, while there are studies demonstrating that "documented instances of women abusing the protective order process are rare and in any event, no greater than any other crimes).
forward in the fight to end violence against women. But it remains plagued by a false hope – that the heritage of coverture, of condoning marital violence in the name of privacy, and of presuming that women in marriage do not have autonomy—has been discarded. Continued progress in the domestic violence movement requires that we dive back into this history and challenge its ongoing hold on the full achievement of equal rights for women. Otherwise the “bad, not so old days” of my client’s case will never fully disappear.