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Isn't it a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence

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ISN'T IT A CRIME: FEMINIST PERSPECTIVES ON SPOUSAL IMMUNITY AND SPOUSAL VIOLENCE

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His hands, they never hit me sober
His hands, they never marked my face
I would rather be blind
than see him treat me that way
I would rather be deaf than hear that sound
Like a pistol cracking
as the spirit breaks
and love comes tumbling down.
Janis Ian
"His Hands" from "Breaking Silence"

The epidemic of spousal abuse has garnered considerable attention since John Stuart Mill railed against men "little higher than brutes" who were able to obtain a ready victim "through the laws of marriage."[1] Americans today have " 'discovered' family violence in the sense that Columbus 'discovered' America, although the discovery was no news to those who already lived there."[2] Despite this attention, the epidemic grows.

Much has been written about the reluctance of police to arrest in domestic violence cases[3] and the reluctance of the state to prosecute

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1 JOHN S. MILL, THE SUBJECTION OF WOMEN 37-38 (Susan M. Okin ed., 1988) (3d ed. 1870).

2 DONALD G. DUTTON, THE DOMESTIC ASSAULT OF WOMEN: PSYCHOLOGICAL AND CRIMINAL JUSTICE PERSPECTIVES at ix (1995).

3 Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171 (1994); Gary M. Bishop,

such cases.[4] Part of that reluctance may be caused by prevalent societal attitudes that diminish the importance of spousal violence. In a number of jurisdictions, the reluctance to pursue criminal sanctions against married abusers is caused by the difficulty of procuring the battered spouses' testimony.[5] In those jurisdictions, the prosecutor cannot compel a reluctant spouse's testimony because of the spousal privilege not to testify against a defendant spouse. Even in jurisdictions that have some exceptions to the privilege, including spousal violence exceptions, the prosecuting authority may find it legally, as well as practically difficult to procure the spouse's testimony.

Consider the following fact situations, all of which depict typical patterns of wife abuse:[6]

(a) Sue's husband Abner accuses her of infidelity and telephones the man he believes to be her lover, insisting that he come over and discuss the matter. The three sit together in a car, and during the discussion Abner pulls out a revolver and shoots the other man in the temple. He then points the gun at Sue, threatening to kill her if she tries to get away. He drives aimlessly until the car runs out of gas. Abner is charged with murder of the supposed lover and kidnapping of Sue. Sue, the only witness, is reluctant to testify.[7]

(b) After Raymond hits his wife, she obtains a protective order against Raymond, prohibiting him from visiting or approaching her at her resi-

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Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C. L. REV. 1357 (1989); Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667 (1987); Lauren L. McFarlane, Note, *Domestic Violence Victims v. Municipalities: Who Pays When the Police Will Not Respond?*, 41 CASE W. RES. L. REV. 929 (1991); Sue E. Schuerman, Note, *Establishing a Tort Duty for Police Failure to Respond to Domestic Violence*, 34 ARIZ. L. REV. 355 (1992); *Developments in the Law: Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993)[hereinafter *Legal Responses to Domestic Violence*].

[4] Jane W. Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. L. & CRIMINOLOGY 56 (1984); Chief Justice A.M. "Sandy" Keith, *Domestic Violence and the Court System*, 15 HAMLINE L. REV. 105 (1991); Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RTS. L. REP. 39 (1993); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994); Elena Salzman, Note, *The Quincy District Court Domestic Violence Prevention Program: A Model Legal Framework for Domestic Violence Intervention*, 74 B.U. L. REV. 329 (1994); *Legal Responses to Domestic Violence*, *supra* note 3.

[5] I recognize that much battering occurs in intimate relationships not sanctioned by state-recognized marriage. The privilege does not, however, apply to unmarried couples, and a discussion of battering in these relationships is beyond the scope of this Article. For further information, see generally Mac D. Hunter, *Homosexuals as a New Class of Domestic Violence Subjects Under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUISVILLE J. FAM. L. 557 (1992-93); Sandra E. Lundy, *Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts*, 28 NEW ENG. L. REV. 273 (1993).

[6] See *infra* text accompanying notes 28-59 for discussion of patterns of wife abuse.

[7] Michigan v. Love, 391 N.W.2d 738, 739-40 (Mich. 1986). *See infra* notes 165-71 and accompanying text.

dence or her place of employment without permission from the court. Several days after this order is entered, Raymond is arrested outside the marital home. Raymond's wife now wants to drop both the domestic violence charge and the violation of protective order charge, and wishes to invoke her privilege not to testify.[8]

(c) Deneen shows up at the police station with a black eye and red marks on her face and neck. She is wearing only a raincoat over her pajamas. She tells the police that her husband punched her, dragged her by the hair, and choked her. The police go with Deneen to the family home and find her husband sitting on the steps, highly intoxicated, with a forty-four magnum beside him. When Deneen decides not to press domestic violence charges, the charge is reduced to disorderly conduct. Deneen does not want to testify.[9]

(d) A wife calls 911 after her estranged husband breaks through the locked back door of her condominium. He rages through the house, screaming obscenities and threatening violence. He does not, however, hit her. When the police arrive, they charge the husband with vandalism and trespass. The wife wants to drop the charges and does not want to testify.[10]

Whether the husband will be charged, tried, or convicted will depend, in part, on the availability of evidence. Certainly the best evidence, if not the only evidence, will come from the eyewitness spouse. But whether these wives are considered to be witnesses competent to tes-

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8 City of Reynoldsburg v. Eichenberger, No. CA-3492, 1990 WL 55402, at *1 (Ohio Ct. App. Apr. 18, 1990); *see infra* text accompanying notes 207-09.

9 City of Huron v. Bass, No. E-90-29, 1991 WL 137009, at *1 (Ohio Ct. App. July 26, 1991). See *infra* text accompanying notes 159-61 for a discussion of this case.

10 This "hypothetical" is inspired by an incident between O.J. Simpson and Nicole Brown Simpson that came to light after Nicole was murdered and O.J. was charged with the murder of Nicole and her friend, Ronald Goldman. Simpson was acquitted of both charges on October 3, 1995. *See* California v. Orenthal James Simpson, No. BA-097211, Superior Court of Los Angeles County, Dept. No. 103, Judgments of Acquittal (Oct. 3, 1995).

Police rushed to Nicole Simpson's home October 25, 1993 after Simpson came to the house in a rage after discovering a photo of one of her former boyfriends. Because Nicole would not let O.J. in the house, O.J. went to the rear of the house and kicked in the French doors. Police did not charge O.J. with vandalism and trespassing because Nicole did not want to prosecute. A newly released police report notes that the only reason any report was made of the incident is because the police officer insisted on taking one. Police could not refer the incident to prosecutors as a spousal battery claim, said Los Angeles Police Lieutenant John Dunkin, because "you can't charge (spouse abuse) if someone's beating up his ex-wife's car or door." California's law against spousal battery "has to do with traumatic injuries to a person, not a thing," Dunkin said. Sally A. Stewart, *Simpson's Ex-wife Wouldn't Prosecute*, USA TODAY, June 23, 1994, at 3A; *see* Mark Potok, *Grand Jury to Meet Today in Simpson Case*, USA TODAY, June 24, 1994, at 3A. City Attorney James Hahn and Police Chief Willie Williams met June 23, 1994 to launch a study of police procedures on domestic violence calls and to give officers more leeway in deciding to charge someone. "The officers [responding to the 911 call] were going by the book," said Hahn. "But we need to rewrite the book .... Domestic abuse is more than violating a restraining order and punching somebody. It's also harassing over the phone, slashing the tires, beating the door down." Potok, *supra*, at 3A.

tify, and whether the prosecution can compel their testimony, will depend on the jurisdiction's spousal privilege.

This simple evidentiary rule—spousal privilege—illustrates why evidence law matters.[11] Rules of evidence are frequently thought of as simply "neutral" rules of procedure related to courtroom control and trial tactics. Rules of evidence can tell us much more, however, about the legal system's attitude toward women.[12] Because the legal system was created by men, it inevitably ignores the lives of women.[13] Courts and commentators may declare loudly that domestic violence[14] is no longer tolerated in this society, and that married women have the

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[11] The *University of Loyola of Los Angeles Law Review* held a symposium aptly entitled *Does Evidence Law Matter?* Of particular relevance to the analysis contained in this Article is the section entitled *The Connection Between Evidence Rules, Social Values and Political Realities*, 25 LOY. L.A. L. REV. 629 (1992).

[12] For example, the federal rules of evidence speak about character of a "victim" in Rule 404, but talk about the "alleged victim" in the rape shield rule. *See* FED. R. EVID. 404, 412. (I am indebted to Dayna Ferebee, one of my Feminist Jurisprudence students, for this observation. I am embarrassed to say that I have been reading these rules for ten years without noticing the difference.) The drafters of the rape shield rule seem to have fallen into the trap of believing rape myths of the lying victim. *See* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1045 (1991); *see also* Ann Althouse, *Beyond King Solomon's Harlots: Women in Evidence*, 65 S. CAL. L. REV. 1265 (1992); Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914 (1994); Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327 (1993).

[13] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 238 (1989); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2, 4 (1988). An interesting example of this tendency to ignore the impact of rules of evidence on the lives of women is raised in an article entitled *A Right to Every Woman's Evidence.* In a lecture considering the spousal privilege, the speaker invites the listener to consider what makes the study of evidence so fascinating:

> Instead of considering what I have said, consider what I have been required to draw on: English legal history of the seventeenth and eighteenth centuries; Bentham and Wigmore, each a leading scholar of his generation; logical analysis as we are taught it in law schools; attorneys' briefs and Supreme Court opinions; the sociology of prosecutorial behavior (fraught, to be sure, with empirical inadequacy); and your responses and mine to questions we cannot escape when values clash.

Richard O. Lempert, *Mason Ladd Lecture: A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725, 738-39 (1981). Noticeably absent from this litany of information relied upon are the voices and experiences of women affected by the law of marital privilege. The sociology of prosecutors is apparently more important than the sociology of affected women. See *infra* text accompanying notes 290-308 to hear battered women speak about the privilege.

[14] I use the phrases "spousal violence" and "domestic violence" interchangeably in this Article. These phrases tend to obscure the reality that wives are victims and husbands are perpetrators in the vast majority of cases. *See* LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 39-40 (1986); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMAN'S MOVEMENT 214-15 (1982). A return to the term "wife-beating" would make apparent the gendered aspects of domestic violence, but would also obscure the reality that abuse does not always take the form of beating. Perhaps the greater problem is with using modifiers with the word "violence." We distinguish this violence from other violence, as if it is a lesser evil when the violence occurs at home and at the hands of intimates. Why not call it what it is—VIOLENCE. Perhaps what is needed is to treat spousal abuse as violence unmodi-

right to feel secure in their homes, but such rights, with little way to prove entitlement to the rights, echo emptily. Those jurisdictions that refuse to give the prosecution the right to compel testimony in domestic violence cases the way they can in every other crime send an obvious message: When a man beats his wife it is not a crime that offends the state—it is simply a private matter between the two of them.[15] Even those jurisdictions with a spousal violence exception leave married women unprotected by the legal system because of very narrow and uninformed views of what constitutes spousal violence.

Part I of this Article discusses profiles of batterers and victims as a predicate for analyzing applications of spousal immunity. Part II explores the common-law spousal privilege and spousal violence exceptions to the privilege. Part III explores modern applications of spousal immunity in cases of domestic violence. Next, Part IV critiques the spousal immunity doctrine from the perspective of feminist legal thought and includes the voices of battered women discussing the spousal privilege.[16] Finally, Part V proposes a solution to the problems caused by spousal immunity in domestic violence cases.

I. THE NATURE OF DOMESTIC VIOLENCE

"Every eighteen seconds, a woman is beaten in the United States and between 2000 and 4000 women die every year because of this abuse."[17] Some authorities estimate that incidents of domestic vio-

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fied, taking inspiration from the title of Catherine A. MacKinnon's book on feminism. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

15 ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 27-28 (1994) (citing Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't*, 95 YALE L.J. 788, 801 (1986)); *see also* ELIZABETH A. STANKO, INTIMATE INTRUSIONS: WOMEN'S EXPERIENCE OF MALE VIOLENCE 103-04 (1986) (noting that police assumptions about the naturalness of violence against women pervade the system's process of sorting out criminal from noncriminal behavior).

16 Marina Mata-de la Garza, Texas Wesleyan University School of Law student, Class of 1995, and my research assistant, conducted interviews at battered women shelters in Dallas and Tarrant Counties, Texas. I am indebted to Marina for her hard work and sensitivity in conducting these interviews. While the interviews are not meant as an accurate empirical survey, the results give voice to women's concerns and attitudes toward the decision whether to testify. I recognize, however, that these women, who have made the decision to leave a battering relationship to go to a shelter, may be atypical. We have respected the women's desire for confidentiality, identifying them only by initials and revealing only the biographical data they were comfortable with sharing. Transcripts of the interviews are on file with the author.

17 Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 241 (1994) (citing Sylvia A. Law, *Every 18 Seconds a Woman is Beaten: What Judges Can Do in the Face of this Carnage*, 30 JUDGES J. 12, 14 (1991)). As to women killed by a partner,

> The popular tendency is to dismiss or even forgive the act as a "crime of passion." But that rush of so-called passion is months, even years, in the making. "There are few cases where murder comes out of the blue," says Sally Goldfarb, senior staff attorney of the NOW Legal Defense and Education Fund. "What we are talking about is domestic violence left unchecked and carried to its ultimate outcome."

Jill Smolowe, *When Violence Hits Home*, TIME, July 4, 1994, at 18, 22.

lence affect four million women each year.[18] The FBI estimates that one out of every two women in this country will be in an abusive relationship at some time in her lifetime.[19] The likelihood of a woman being assaulted by a member of her family is more than two hundred times greater than the risk of being assaulted by someone who is not a family member.[20] Intimate violence is the leading cause of injuries to women ages fifteen through forty-four years, and one of the leading causes of injuries to all women.[21] Battering is a significant cause of homelessness for women and children. In the last decade, almost one-half of all homeless women were refugees from domestic violence.[22] "Women are at more risk of being killed by their current or former male partners than by any other kind of assault."[23]

In addition to the direct harm to women by instances of violence in intimate relationships, researchers have identified a number of secondary harms:

> [F]ederal officials estimate that "domestic violence" costs U.S. firms four billion dollars a year in lower productivity, staff turnover, absenteeism, and excessive use of medical benefits. One New York City study of fifty battered women revealed that half of them missed at least three work days a month because of abuse, while 64 percent were late for work, and more than three-fourths of them used company time and company phones to call friends, counselors, physicians, and lawyers that they didn't dare call from home.[24]

Harm to children in homes where the husband batters the wife is also well documented. One survey discovered that wife beaters abused children in seventy percent of cases.[25] Further, a person who experiences violence as a child is more likely to engage in violence as an

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18 *Women and Violence: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 117 (1990) (testimony of Angela Browne, Ph.D.).

19 *Hearing on Domestic Violence: Hearing on the Need to Concentrate the Fight Against an Escalating Blight of Violence Against Women Before the Senate Comm. on the Judiciary*, 103rd Cong., 1st Sess. 7 (1993) (statement of Sarah M. Buel).

20 Murray A. Straus, *Physical Violence in American Families: Incidence Rates, Causes, and Trends*, *in* ABUSED AND BATTERED: SOCIAL & LEGAL RESPONSES TO FAMILY VIOLENCE 17, 18 (Dean D. Knudsen & JoAnn L. Miller eds., 1991); *see also* MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 49 (1980) (discussing the statistic further); Smolowe, *supra* note 17, at 21.

21 Antonio R. Novello et al., *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132, 3132 (1992).

22 Mullins, *supra* note 17 at 244 (citing SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN at xiv (1991)).

23 Smolowe, *supra* note 17, at 21 (quoting psychologist Angela Browne, a pioneering researcher in partner violence).

24 JONES, *supra* note 15, at 12.

25 Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE 162 (Kersti Yllo & Michelle Bograd eds., 1988).

adult—perhaps three times as likely.[26] So pervasive are the consequences flowing from domestic violence that U.S. Health and Human Services Secretary Donna Shalala has said, "Domestic violence is an unacknowledged epidemic in our society."[27]

A. The Cycle of Violence

Psychologist Lenore Walker, in her pathbreaking study of 120 battered women, identified what she terms the cycle of violence. Battering relationships go through a cycle of three stages: tension building, acute battering, and contrition.[28] During the tension building phase, there is "minor" battering; the wife attempts to calm her abuser by becoming "nurturing and compliant, by anticipating his every whim, or by simply staying out of his way."[29] Nonetheless, the abuse escalates, becoming more frequent and more serious. The level of verbal and psychological abuse rises and he becomes more possessive and jealous.[30]

Phase two "is characterized by the uncontrollable discharge of the tensions that have built up during phase one."[31] This phase of severe battering will typically last from two to twenty-four hours.[32] Everything the victim does during this phase enrages the batterer. If she tries to defend herself, he beats her into submission; if she is passive, he beats her harder.[33] The beating stops only if the batterer exhausts himself or she gets away.[34]

The third phase—loving contrition—follows the acute battering. The batterer begs forgiveness and promises to change, to never hit her again.[35] He brings flowers and candy; he is loving and charming.[36] This romantic stage lasts until the entire cycle starts over again.[37] And it will start over: in a battering relationship, the cycle repeats, with the abuse continually escalating.[38]

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26 *See* RICHARD J. GELLES, THE VIOLENT HOME 169-70 (1987); STRAUS, *supra* note 20, at 122.

27 Smolowe, *supra* note 17, at 20.

28 LENORE WALKER, THE BATTERED WOMAN 55 (1979); *see also* DUTTON, *supra* note 2, at 125.

29 WALKER, *supra* note 28, at 56.

30 *Id.* at 57-58; DUTTON, *supra* note 2, at 125.

31 WALKER, *supra* note 28, at 59.

32 *Id.* at 60.

33 *Id.* at 61-62.

34 *Id.* at 61.

35 *Id.* at 65.

36 *Id.* at 65-66.

37 *Id.* at 69.

38 *Id.* at 69 ("Most women report that before they know it, the calm, loving behavior gives way to little battering incidents again. The phase-one tension building recurs, a new cycle of battering behavior begins.")

B. Profile of a Batterer

Because the initial focus of the battered women's movement was the victim, information about batterers is less extensive than that available about the victims of domestic violence. With the growth of treatment programs for batterers, however, researchers and counselors have been able to construct more accurate portraits of batterers.[39] One common variable appearing in literature about batterers is power motivation.[40]

Donald Dutton reported that batterers in treatment groups manifested power issues through frequent mention of "their need to control or dominate the female, their belief that female independence meant loss of male control, and their attempt to persuade or coerce the female into adopting their definition of how the relationship should be structured and how it should function."[41] Controlling behaviors by the batterer include threatening his wife if she talks about leaving, tearing the telephone off the wall to prevent her from calling the police, spying on her house, and lying in wait to assault her new boyfriend.[42]

The typical batterer is a traditionalist, believing in male supremacy, the stereotyped masculine sex role in the family,[43] and his entitlement to use violence to discipline his wife.[44] His assumption that male entitlement has priority over female needs allows him to deny the wrongness of the violence.[45] In working with batterers, James Ptacek detected a pattern of batterer justification for violence because of the wife's failure to fulfill the "obligations of a good wife."[46] Ptacek saw in the batterers' explanations a deeply gendered sense that the privileges of male entitlement had been unjustly denied.[47] One batterer described how his "arguments" with his wife would start:

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39 Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solution*, 60 WASH. L. REV. 267, 286 (1985). Waits notes that early information about batterers came from victims' reports because of the reluctance of the perpetrators to talk about violence and their tendency to deny and minimize their violence. *Id.* at 240 n.95. Waits notes further that the accuracy of the victims' reports have been confirmed by the new information coming to light from the batterers themselves. *Id.*

40 DUTTON, *supra* note 2, at 64.

41 *Id.*

42 James Ptacek, *Why Do Men Batter Their Wives?*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 25, at 151.

43 WALKER, *supra* note 28, at 36.

44 *Id.* at 12; Ptacek, *supra* note 42, at 133.

45 Ptacek, *supra* note 42, at 149.

46 *Id.* at 147.

47 Seventy-eight percent of the batterers Ptacek interviewed gave justifications that fall into this category. *Id.*

> I think a lot of it had to do with my frustration of not being able to handle children.... [My wife] would tell me, you know, "Let me handle this." I said, "*I'm the man of the house.*" Then we'd start arguing. That's basically how they used to happen.[48]

Ptacek noted other gendered excuses from batterers: "I should just smack you for the *lousy wife* you've been"; "I don't know if I demanded respect as a person or a *husband* or anything like that, but ..."; "I'm the *man of the house*"; and "the first time I was *acting like a man* and I got it."[49] The batterer's feelings of entitlement may be a learned response: many batterers saw their fathers beat their mothers or were beaten themselves, or both.[50] Lenore Walker reports that even in batterers' childhood homes where overt violence was absent, a general lack of respect for women and children was evident.[51]

Another staple characteristic of the batterer is possessiveness and jealousy.[52] In order to feel secure he must constantly monitor his wife's every activity, but he remains suspicious of her possible relationships with other men. A frequent subject of his verbal abuse is suspicion that his wife is having an affair or affairs.[53] Consider the following situation:

> Robert was referred to our treatment group while his wife was still hospitalized for injuries sustained from his beating.... The incident that led to his being in the group occurred at his wife's office party. About thirty people were drinking and chatting when, according to Robert, his wife disappeared (*i.e.*, he could not find her in a large, unfamiliar house). After ten to fifteen minutes he saw her and insisted that they leave the party.... During treatment, Robert revealed that he believed his wife was having an affair and that, when she disappeared at the party, she was having sex with a co-worker. (She was talking to two female co-workers on an outside balcony.) Two months into treatment Robert phoned me in a panic and said that he was "about to kill [his] wife." He had returned from an out-of-town business trip to find "a key with a man's name on it." (It was the name of the key manufacturer.) He again assumed his wife was having an affair and became enraged. It took him three days to completely calm down.[54]

The batterer's jealousy also leads him to drive away his wife's relatives and female friends; his pathological jealousy extends to the couple's

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48 *Id.* (emphasis added).

49 *Id.* at 148.

50 WALKER, *supra* note 28, at 38.

51 *Id.*

52 *Id.* at 37.

53 *Id.* at 37-38.

54 DUTTON, *supra* note 2, at 30. This is a case study of a man who underwent treatment in the Assaultive Husbands Program, a court-mandated treatment program in Vancouver, B.C. The author notes that "[n]ames and certain aspects of the men's lives have been changed to protect their identity." *Id.* at 29.

own children as well.[55] It is by isolating his wife from others that he is able most effectively to control her.

Ptacek concludes that the batterer deliberately chooses to use violence to control his wife.[56] However, Ptacek found that the decision to use violence was often obscured by the batterer's excuse that he was out of control. Ptacek discerned that "[w]hile the men claim that their violence is beyond rational control, they simultaneously acknowledge that the violence is deliberate and warranted."[57] Further evidence of the control the batterer has over his use of violence is the fact that he is rarely violent in other relationships,[58] and that he rarely batters his wife when there are witnesses (other than the children).[59]

C. Profile of a Battered Wife

The first question leveled at a battered woman tends to be, "why do you stay?"[60]

> Why would anyone subject herself to repeated, severe beatings? Why would anyone remain in a relationship that carries an ever-present threat of injury and even death? And why, as so often happens, would a battered woman repeatedly leave her husband, only to return again and again to face inevitable beatings?[61]

Kathleen Waits concludes that the explanation lies not in psychopathology, but in a "tragic combination of social and personal forces."[62]

Lenore Walker, who pioneered the study of battered women, identifies a number of characteristics common to battered women.[63] The battered woman is a traditionalist, viewing her husband as the head of the family and believing, even if she works outside the home, that "a woman's proper place is in the home."[64] She feels responsible for maintaining the peace at home, and thus accepts the blame for her husband's violence.[65] For example:

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55 WALKER, *supra* note 28, at 37-38. The well-documented fact that battering frequently occurs during pregnancy, RICHARD J. GELLES, *Violence and Pregnancy: A Note on the Extent of the Problem and Needed Services*, *in* GELLES, FAMILY VIOLENCE 126-27 (1987), may be explained by the jealousy Walker noted.

56 Ptacek, *supra* note 42, at 147-49.

57 *Id.* at 153.

58 Lenore Walker found that no more than 20% of batterers are violent toward others. WALKER, *supra* note 28, at 24; *see also* Ptacek, *supra* note 42, at 143 (noting that his study of batterers found that only 28% were violent both within and outside of the family.).

59 WALKER, *supra* note 28, at 61. Walker opines, "It seems reasonable to conclude that the men know their behavior is inappropriate, because they keep battering such a private affair." *Id.*

60 Waits, *supra* note 39, at 279.

61 *Id.* at 279-80.

62 *Id.* at 280.

63 WALKER, *supra* note 28, at 31.

64 *Id.* at 33-34. According to Walker, battered women who work outside the home often feel guilty about their work.

65 *Id.* at 34.

> Q: How did you react the first time you were hit?
> A: I blamed myself and said if I would have shut up or if I would have not done this, or if I had done this, this would not have happened. In any instance, I always felt responsible for the situation, and that I should do something to fix it. I always had to be the one to "make up" following being hit, like it was my fault and I should apologize.[66]

Battered women stay, they say, because they love their husbands. One woman who had left her husband to go to a shelter said:

> [A]fter all I have been through in the relationship I am currently in, I still want to be in it. I don't want to lose that person, even though I know in my head I deserve better. You can always know in my (sic) head, but it's making your heart follow through that's hard.[67]

For battered women, the beatings engender "learned helplessness,"[68] serious impairment of problem-solving abilities,[69] and clinical depression that makes it difficult to deal with even simple, everyday matters.[70] Low self-esteem is also common among battered women.[71] The battered woman believes her husband when he tells her that he beat her because she is stupid and ugly.[72] She minimizes the seriousness of the battering because her identity becomes submerged in his:

> It is very easy, when you care about someone, more than you care about yourself, to not want to punish them. . . . You want to be with that person so much that you become willing to accept any type of behavior, or lifestyle, just so that you are with them, especially if your self-esteem revolves around being with that person.[73]

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66 Interview with D.W., *supra* note 16 (Feb. 21, 1995).

67 *Id.* D.W. explained that her husband would kick, slap, and shove her. She had to go to the hospital to get stitches over one eye after one incident, and for treatment of a hairline fracture in her arm after another.

68 The theory of learned helplessness was developed first in experiments on animals. When subjected to electric shocks at random, animals, realizing that they could not control the punishment, become passive and compliant. WALKER, *supra* note 28, at 45-48.

69 *Id.* at 48; Jacquelyn C. Campbell, *Public-Health Conceptions of Family Abuse, in* ABUSED AND BATTERED, *supra* note 20, at 43.

70 WALKER, *supra* note 28, at 50; *see* CHARLES EWING, BATTERED WOMEN WHO KILL 21 (1987).

71 WALKER, *supra* note 28, at 32. Walker notes that often low self-esteem exists prior to the marriage and the beatings:

> Women are systematically taught that their personal worth, survival, and autonomy do not depend on effective and creative responses to life situations, but rather on their physical beauty and appeal to men. They learn that they have no direct control over the circumstances of their lives. Early in their lives, little girls learn from their parents and society that they are to be more passive than boys. Having systematically trained to be second best, women begin marriage with a psychological disadvantage.

Id. at 51.

72 ELAINE BASHAM ET AL., FAMILY VIOLENCE: THE BATTERED WOMAN 11 (1984).

73 Interview with D.W., *supra* note 16 (Feb. 21, 1995).

She comes to hate herself for being unable to leave: "Thus, a destructive psychological spiral is established: . . . her inability to escape makes her feel even more inadequate and helpless."[74]

The situation is exacerbated when the battered wife is financially dependent on the batterer.[75] The presence of children may also hamper her ability to leave. Many battered women express the belief that children need their fathers or say that they are staying in the relationship because of the children.[76]

> Getting hit will go away, it'll stop for a while. But packing up the children? Where do you go? A shelter? But what happens after you stay a while at the shelter? You can't stay there forever. Will it be worse because you left in the first place? You feel responsible and ask "What if I hadn't opened my mouth?" You know, you have no car and no job, what do you do?[77]

Other women find the strength to leave because of the children: "I was scared of him. I wanted to leave for the children. I sometimes had to throw them out the window so that he would not come after them."[78]

In trying to understand why women stay in battering relationships, some have drawn analogies between battered women and hostages:

> An American male hostage in the 1985 TWA skyjacking was overheard saying at the end of the crisis, "I will be coming back to Lebanon. Hamiye [one of the jailers] is like a brother to me." Why did Birgitta Lundblad, the Swedish bank teller, who had been held hostage for six days, visit one of her captors while he was in jail following the bank holdup? Why do many battered women "love" the men who batter them, finding it difficult to leave them?[79]

Donald Dutton has developed a theory of "traumatic bonding" to explain the beaten wife's reluctance to leave. Traumatic bonding refers to the strong emotional ties that develop in a relationship characterized by a power imbalance and intermittent abuse.[80] Further, the re-

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74 Waits, *supra* note 39, at 283.

75 *See* WALKER, *supra* note 28, at 33-34. Walker found that even women who work outside the home and thus have an income typically turn their money over to their husbands. They may also be forced to quit work to keep their batterers happy. In explaining why it took so long to leave the batterer, many women explain that he controlled the finances. *See, e.g.*, Interview with M.D., *supra* note 16 (Apr. 1, 1995) ("I was insecure of not making it financially."); Interview with R.E.H., *supra* note 16 (Mar. 28, 1995) ("I didn't have a family to turn to. I had no money.").

76 WALKER, *supra* note 28, at 30; *see also* Interview with A.A., *supra* note 16 (Apr. 1, 1995) ("I would stay for the children, but they would tell me to leave him."). A.A. has four children ranging in age from twelve to two.

77 Interview with D.W., *supra* note 16 (Feb. 21, 1995).

78 Interview with J.S., *supra* note 16 (Mar. 28, 1995). J.S. has five children.

79 Dee L.R. Graham et al., *Survivors of Terror: Battered Women, Hostages, and the Stockholm Syndrome, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 25, at 217.

80 DUTTON, *supra* note 2, at 191-92; *see also* Graham et al., *supra* note 79, at 217-21.

inforcement from the contrition phase[81]—love, attention, romance—makes it difficult to leave.[82]

II. Spousal Immunity

A. The Right to Compel Testimony Generally

"The power of government to compel persons to testify . . . is firmly established in Anglo-American jurisprudence."[83] English law provided that courts had the power as early as 1562.[84] By 1742 it was considered an "indubitable certainty" that "the public has a right to every man's evidence."[85] The Sixth Amendment to the U.S. Constitution refers to the right to compulsory process,[86] and the Judiciary Act of 1789 provided for compulsory process for witnesses in federal court.[87] Every state in the Union makes provision for compulsory process, recognizing the power of the state government to compel the testimony of witnesses.[88]

The duty to testify arises from the need of the judicial system to have access to all relevant evidence to aid in ascertaining the truth.[89] The need for the testimony allows the government to compel testimony even when the duty to testify requires sacrifices from a citizen.[90] As Wigmore aptly noted, "[f]rom the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution and from law and order as indispensable elements of civilized life."[91] There are, however, exceptions to the power to compel testimony. The Fifth Amendment privilege

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81 *See supra* text accompanying notes 35-38.

82 Walker, *supra* note 28, at 66-69.

83 Kastigar v. United States, 406 U.S. 441, 443 (1972) (citing 8 J. Wigmore, Evidence § 2190 (McNaughton rev. 1961)).

84 Statute of Elizabeth, 5 Eliz. 1, cl. 9, § 12 (1562).

85 *Kastigar*, 406 U.S. at 443 n.5 (quoting the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. Hansard, Parliamentary History of England 675, 693 (1812), and referring to the parliamentary debate on the Bill to Indemnify Evidence).

86 The Court in *Kastigar* noted that the duty to testify was recognized in the Sixth Amendment's requirement that an accused be confronted with the witnesses against him as well as the requirement that an accused have compulsory process for obtaining witnesses in his favor. 406 U.S. at 443-44.

87 Judiciary Act of 1789, 1 Stat. 73, 88-89.

88 *See, e.g., Ex parte* Weeks, 456 So. 2d 404, 407-08 (Ala. 1984); People v. Schweitzer, 187 Cal. Rptr. 696, 698 (Cal. Ct. App. 1982); Ambles v. State, 383 S.E.2d 555, 556-57 (Ga. 1989); Mason v. Robinson, 340 N.W.2d 236, 247 (Iowa 1983); State v. Gilbert, 326 N.W.2d 744, 746 (Wis. 1982).

89 *Mason*, 340 N.W.2d at 242.

90 *Id.*

91 8 John H. Wigmore, Evidence § 2192, at 72-73 (McNaughton rev. 1961).

against compulsory self-incrimination is perhaps the most familiar.[92] Other privileges, including the spousal privilege, are exceptions as well.

B. Separating the Two Marital Privileges

Two marital privileges exist,[93] and some confusion ensues because the term "marital privilege" is sometimes used to refer to both. One privilege prevents the testimony of one spouse against the other (spousal immunity),[94] while the other prevents testimony only about confidential communications made during marriage (marital communications privilege).[95]

Spousal immunity, in most jurisdictions, applies only in criminal cases.[96] The privilege arises upon the marriage of the witness spouse and the defendant spouse and terminates upon their divorce.[97] Spousal immunity works as a complete bar to testimony, regardless of the subject matter of the testimony. In some jurisdictions, spousal immunity is read broadly enough to lead to exclusion of otherwise ad-

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92 The Court in *Kastigar* calls it the most important. Kastigar v. United States, 406 U.S. 441, 444 (1972).

93 Others have subdivided the same protections into three or four different privileges. *See* WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5572 (1989) (three marital privileges); Rejected Fed. R. Evid. 504 advisory commitee's note (four different marital privileges); Comment, *Evidentiary Privileges and Incompetencies of Husband and Wife*, 4 ARK. L. REV. 426 (1950) (four marital privileges); Note, *Adverse Spousal Testimony in Federal Courts*, 33 TUL. L. REV. 884 (1959) (three spousal privileges).

94 A number of other terms are frequently used to refer to this privilege. Wigmore dubbed it "the privilege for anti-marital facts." 8 WIGMORE, *supra* note 91, ch. 79, at 210. Some commentators refer to it as the adverse testimony privilege as distinguished from the communications privilege. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1563 (1985) [hereinafter *Privileged Communications*]. I use the term "spousal immunity," as does Richard Lempert, *A Right to Every Woman's Evidence*, *supra* note 13, at 726, in recognition of the origin of the privilege as a rule of incompetency preventing a spouse from testifying.

95 Discussion of the communications privilege is beyond the scope of this Article. Communications privileges tend to provide less difficulty in spousal abuse cases than does the spousal immunity privilege because courts tend to hold that threats and violence are not communicative, or are not induced by the confidence incident to marriage, and thus do not come within the privilege. *See, e.g.*, Morgan v. United States, 363 A.2d 999, 1004 (D.C. 1976); Harris v. State, 376 A.2d 1144, 1146 (Md. Ct. Spec. App. 1977); People v. Thompson, 314 N.W.2d 606, 610 (Mich. Ct. App. 1981); State v. Johnson, 586 S.W.2d 437, 441 & n.3 (Mo. Ct. App. 1979); State v. Americk, 256 P.2d 278, 279 (Wash. 1953). Some jurisdictions have a spousal violence exception to their confidential communications privilege as well as to their spousal immunity privilege, thus allowing the wife's testimony about the abuse. *See, e.g.*, 725 ILL. COMP. STAT. ANN. § 125/6 (Smith-Hurd 1993); LA. CODE EVID. ANN. art. 504 (West 1995).

96 *See* David Medine, *The Adverse Testimonial Privilege: Time to Dispose of a 'Sentimental Relic'*, 67 OR. L. REV. 519, 520 & n.8 (1988).

97 C. MCCORMICK, MCCORMICK ON EVIDENCE § 66, at 162 (3d ed. 1984); WRIGHT & GRAHAM, *supra* note 93, § 5572.

missible out-of-court statements made by a spouse who declines to testify.[98]

The marital communications privilege protects against disclosure of confidential communications made during marriage. The marital status of the spouses at the time of the trial is immaterial; so long as the communication was made during marriage, the privilege applies.[99]

When a spouse, currently married to the defendant spouse, is called to testify about confidential communications made between the spouses during marriage, both privileges would apply and either could be invoked to prevent the testimony.[100] In a number of situations, however, there is no overlap of the two privileges. For example, if a divorced spouse is called to testify, spousal immunity would not apply, but the testifying spouse could not testify about confidential communications made during marriage.[101] If a communication between the spouses occurred in the presence of a third person, thus destroying confidentiality and rendering the communications privilege inapplicable,[102] a spouse called to testify could still refuse to testify by invoking spousal immunity. If the testifying spouse chooses, as the holder of the privilege,[103] to waive the immunity privilege, but the defendant spouse, as the holder of the communications privilege[104] refuses to waive it, the testifying spouse may testify but may not reveal any confidential communications made during marriage.

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98 Peek v. United States, 321 F.2d 934, 943-44 (9th Cir.), *cert. denied*, 376 U.S. 954 (1963); Estes v. Kentucky, 744 S.W.2d 421, 423-25 (Ky. 1988); Dawson v. Kentucky, 867 S.W.2d 493, 495 (Ky. Ct. App. 1993) (extrajudicial statement admissible because spousal violence exception to privilege applied); Bayse v. Mississippi, 420 So. 2d 1050, 1053-54 (Miss. 1982) (wife's out-of-court statements to police inadmissible on both spousal privilege and hearsay grounds). *But see* State v. Burden, 841 P.2d 758, 759-61 (Wash. 1992) (en banc) (spousal immunity excludes only in-court testimony of spouse). Wigmore stated that it could be argued that the privilege extends to "testimonial utterance[s] in any form" and therefore hearsay statements "are equally privileged with testimony on the stand." 8 WIGMORE, *supra* note 91, § 2232, at 225-26. An early draft of the Proposed Federal Rules provided that the privilege applied to hearsay as well as live testimony. *See* WRIGHT & GRAHAM, *supra* note 93, § 5571, at n.7. This provision was later changed and was not transmitted to Congress with this hearsay limitation. *Id.* at n.18.

99 CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE § 5.33, at 473 (1995); *Id.* § 5.34, at 478.

100 "The testimonial privilege [spousal immunity] is the broader of the two in that it precludes all adverse testimony by the spouse, not merely disclosure of confidential communications." *Id.* § 5.33, at 473.

101 *See, e.g.*, Pereira v. United States, 347 U.S. 1, 6 (1954); United States v. Fisher, 518 F.2d 836, 840 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975); *see also* MUELLER & KIRKPATRICK, *supra* note 99, § 5.33, at 473.

102 *See, e.g.*, Wolfle v. United States, 291 U.S. 7, 14, 16 (1934); United States v. Crouthers, 669 F.2d 635, 642 (10th Cir. 1982).

103 *See infra* text accompanying notes 126-33.

104 The holder of the communications privilege is generally the communicant spouse—the spouse who made the statement. WRIGHT & GRAHAM, *supra* note 93, §§ 5586-5587.

C. Overview of the Origin and History of Spousal Immunity

1. The Privilege Itself.—Two commentators have noted that the overwhelming majority of articles written on the marital privilege, unlike those written on other evidentiary principles, have some account of history in them.[105] While it is tempting to buck that trend, the same commentators correctly state that history plays an important part in understanding the marital privilege.[106] Only in investigating the origins and history of the marital privilege is it possible to understand why and how the rules work to disadvantage married women.

Writing in 1628, Lord Coke observed that "it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband."[107] As the United States Supreme Court has noted:

> This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; [and] second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.[108]

Thus, the spousal immunity privilege arose from the rule rendering interested witnesses incompetent.[109] Although statutes in the United States and England eventually made interested parties competent to testify, "the rule of spousal disqualification remained intact in most common-law jurisdictions well into the 19th century."[110] When the U.S. Supreme Court applied the privilege in 1920, it was deemed so well established a proposition as to "hardly requir[e] mention."[111]

Holding true to its origin as a witness incompetency rule, the spousal disqualification extended to all testimony, whether for or against the criminal defendant. In 1933, the Supreme Court partially abolished the spousal disqualification in the federal courts, so as to permit the spouse of a defendant to testify for the defendant.[112] The Court noted that the practice of disqualifying witnesses with a per-

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105 *Id.* § 5572, at n.20.

106 *Id.*

107 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628). *See generally* 8 WIGMORE, *supra* note 91, § 2227 (discussing Coke's role in the creation or promulgation of the privilege).

108 Trammel v. United States, 445 U.S. 40, 44 (1980).

109 Wigmore suggests a slightly different history of the privilege. He believed that the spousal privilege arose before the spousal incompetency rule, but was "quickly submerged beneath a rule of spousal incompetence that was originated or popularized by Lord Coke." WRIGHT & GRAHAM, *supra* note 93, § 5572 (citing 8 WIGMORE, *supra* note 91, § 2227).

110 *Trammell*, 445 U.S. at 44; *see also* 8 WIGMORE, *supra* note 91, § 2333; Note, *The Husband-Wife Testimonial Privilege in Federal Courts*, 59 B.U. L. REV. 894, 895 (1979).

111 Jin Fuey Moy v. United States, 254 U.S. 189, 195 (1920); *see also* Graves v. United States, 150 U.S. 118, 120-21 (1893); Stein v. Bowman, 38 U.S. (13 Pet.) 209, 220-23 (1839).

112 Funk v. United States, 290 U.S. 371, 380-81 (1933).

sonal interest in the outcome of the case had long since been abolished in this country in accordance with a modern trend that permitted interested witnesses to testify and left it for the jury to assess their credibility.[113] Since defendants were uniformly allowed to testify in their own behalf, no reason remained to prevent them from using their spouses as witnesses. The Court, however, left undisturbed the rule that the defendant spouse could prevent the other from giving adverse testimony.[114]

The American Law Institute, in its 1942 Model Code of Evidence, rejected a rule allowing the criminal defendant to exclude all adverse spousal testimony.[115] The Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws in 1953, also rejected the rule, "still existing in some states, and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action."[116] Several state legislatures enacted similar provisions.[117]

The Supreme Court considered the continued vitality of the privilege against adverse spousal testimony in the federal courts in 1958 in *Hawkins v. United States*.[118] The Government did not seek abolition of the rule so that reluctant spouses could be compelled to testify, but rather sought a modification of the rule so as to allow a spouse to testify voluntarily against the defendant spouse.[119] Asserting that the purpose of the rule was to preserve marital harmony, and that much bitterness would be engendered by voluntary testimony against the defendant spouse, the Court chose not to abandon its rule against adverse spousal testimony.[120]

In 1973, the Supreme Court transmitted to Congress proposed Federal Rules of Evidence. Although Congress ultimately rejected all of the proposed rules concerning privileges, Proposed Federal Rule 505 provides an interesting snapshot of the prevailing sentiment on the Court with regard to spousal immunity. The proposed rule provided in part as follows:

> (a) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

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113 *Id.* at 377-78.

114 *Id.* at 373.

115 *See* MODEL CODE OF EVIDENCE Rule 215 (1942).

116 *See* UNIF. R. EVID. 23(2) commentary (1953).

117 *See* Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359, 362-66 (1952). See *infra* notes 153-55 and accompanying text for a discussion of states that currently have no spousal immunity privilege.

118 358 U.S. 74 (1958).

119 *Id.* at 77.

120 *Id.*

(b) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on his behalf.[121]

The Advisory Committee noted that this rule, making the defendant spouse the holder of the privilege, was consistent with the law in at least thirty jurisdictions and with the Supreme Court's most recent pronouncement on the issue, *Hawkins v. United States*.[122] As previously noted, Congress rejected the proposed rule and adopted instead a single rule stating that the privilege of a witness "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[123] Thus, in federal court, the existence and scope of the spousal immunity privilege was once again left to the courts.

Seven years later, in 1980, the Supreme Court in *Trammel v. United States*[124] held that "reason and experience" no longer justified the *Hawkins* rule. Although spousal immunity was left intact so that a reluctant spouse could resist prosecution attempts to compel testimony, the Court held that a witness-spouse, as the holder of the privilege, could choose to waive the privilege and voluntarily testify against the defendant spouse.[125]

A number of jurisdictions have rules like *Trammel*, in which the witness-spouse is the holder of the privilege and thus can resist state compulsion, but can testify voluntarily for the state.[126] Other jurisdictions make the defendant-spouse the holder of the privilege,[127] while still others require the consent of both spouses before one can testify.[128] In most American jurisdictions the spousal immunity doctrine

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121 FED. R. EVID. 505 (Proposed Official Draft 1972).

122 *Id.* at advisory committee's notes.

123 FED. R. EVID. 501.

124 445 U.S. 40, 53 (1980).

125 *Id.*

126 ALA. CODE § 12-21-227 (1995); ALASKA R. EVID. 505; CAL. EVID. CODE § 970 (West 1995); CONN. GEN. STAT. ANN. § 54-84a (West 1994); D.C. CODE ANN. § 14-306 (1995); GA. CODE ANN. § 24-9-23 (Supp. 1994); HAW. R. EVID. 505; LA. R. EVID. 505; MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1995); MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1995); MO. ANN. STAT. § 546.260 (Vernon Supp. 1996); N.J. STAT. ANN. § 2A:84A-17 (West 1994); OR. REV. STAT. § 40.255 (1995); R.I. GEN. LAWS § 12-17-10 (1994); UTAH CODE ANN. § 77-1-6 (1995); *see, e.g.*, Ziglar v. Alabama, 629 So. 2d 43, 46 (Ala. Crim. App. 1993) (witness-wife was holder of privilege and court erred in compelling her testimony after she invoked the privilege).

127 ARIZ. REV. STAT. ANN. § 13-4062 (Supp. 1995); COLO. REV. STAT. ANN. § 13-90-107 (West Supp. 1994); IDAHO CODE § 9-203 (1990); MICH. COMP. LAWS ANN. § 600.2162 (West Supp. 1995); MINN. STAT. ANN. § 595-02 (West 1988); MISS. CODE ANN. § 13-1-5 (1995); MONT. CODE ANN. § 46-16-212 (1993); VA. CODE ANN. § 19.2-271.2 (Michie 1995); WASH. REV. CODE ANN. § 5.60.060 (West 1995); W. VA. CODE § 57-3-3 (Supp. 1995); *see, e.g.*, Arizona v. Cohen, 844 P.2d 1147, 1152 (Ariz. 1992) (defendant-husband, as holder of the privilege, could prevent his wife's testimony).

128 *See, e.g.*, NEB. REV. STAT. § 27-505 (1989) ("During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.").

has shed its roots as a rule of incompetency and is considered a true privilege, waivable by the holder.[129] Some jurisdictions still maintain that spousal immunity is a rule of incompetency which can be raised by either party or *sua sponte* by the court.[130] Thus, in *Ohio v. Savage*,[131] the court held that, as a rule of incompetency, spousal immunity could not be waived by the husband's failure to object to his wife's testimony at a preliminary hearing.[132] Further, the wife's testimony at that hearing was not admissible under the hearsay exception for prior testimony of unavailable witnesses. The court noted that, while unavailability under the hearsay rule meant a person "exempted . . . on the ground of privilege," the wife was not unavailable, but was instead incompetent.[133]

2. The Privilege in Cases of Spousal Violence.—The common-law spousal immunity privilege developed a number of exceptions over its long history. "[T]he oldest and the most frequently litigated exception"[134] is applicable in cases when one spouse has committed a crime of violence against the other spouse. In such a case, the privilege does not apply. The exception was recognized at least as early as the 1631 prosecution of the notorious Lord Audley who willingly subjected his wife to gang rape by his friends.[135] The Supreme Court noted in 1839 that spousal immunity does not apply "where the husband commits an offence against the person of his wife."[136] Often rationalized as a "necessity" exception, it was developed in response to the difficulty of prosecuting a spouse who committed a crime of violence against the other spouse, when there were usually no other witnesses to the crime.[137] Other courts and commentators rationalized the exception by referencing one stated purpose of the privilege: to preserve marital harmony. Thus, Wigmore argued, there would be

129 *Cf.* Young v. Superior Court, 12 Cal. Rptr. 331, 333 (Ct. App. 1961) (holding that, because the term "competency" in the statute means "privilege," husband shot by wife comes within the exception, and the privilege does not exist).

130 *See, e.g.*, OHIO REV. CODE ANN. § 2945.42 (Baldwin 1994); WYO. STAT. § 1-12-104 (1988); *see also Privileged Communications*, *supra* note 94, at 1567; Deborah A. Ausburn, Note, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173, 181 n.26 (1985).

131 506 N.E.2d 196, 198 (Ohio 1987).

132 *Id.*

133 *Id.* at 198-99.

134 WRIGHT & GRAHAM, *supra* note 93, § 5592.

135 Lord Audley's Case, 123 Eng. Rep. 1140, 1141 (1631); *see* 8 WIGMORE, *supra* note 91, § 2239.

136 Stein v. Bowman, 38 U.S. (13 Pet.) 209, 220 (1839). Although *Stein v. Bowman* was a civil action involving testimony of a wife about conversations she had with her husband, the Court in *Hawkins* noted that the *Stein* Court was clearly concerned with the broader question involved in *Hawkins*—whether the wife could testify against the husband in a criminal case "merely because [she] so desired." Hawkins v. United States, 358 U.S. 74, 75 & n.3 (1958).

137 WRIGHT & GRAHAM, *supra* note 93, § 5592.

little marital harmony to be preserved after one spouse had battered the other.[138]

The early common-law interpretations of the spousal violence exception by state courts tended to be extremely narrow. While assaults and attempted murders were invariably considered within the exception,[139] what constituted assaultive behavior could be considered very strictly. In *Grier v. Georgia*,[140] the criminal defendant shot at his wife while she was holding her infant child. He missed his wife, but twice struck the baby, killing her. The court held that there was no available exception to the spousal privilege because no offense was committed upon the person of the wife. Thus, the wife remained an incompetent witness.[141] In a case in which the husband cursed his wife, verbally abused her, and jerked her up and down, injuring her arm in the process, the court held that the spousal violence exception was unavailable because the husband was not charged with assault but with disturbing the peace.[142]

Rape of the wife[143] was usually considered within the common-law spousal violence exception allowing her testimony.[144] However, a hypertechnical reading of the exception allowed one court to hold that the wife was not competent, for the charged rape occurred before the defendant and the victim married.[145] The exception for injury to a spouse did not apply since she was not a spouse when the injury occurred. But because the witness was married to the defendant at the time of trial, she was incompetent to testify in the criminal trial against him.

A number of American states adopted the "spousal violence" exception to the privilege through adoption of English common law. Others adopted it by statute. In a small number of jurisdictions, the

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138 8 WIGMORE, *supra* note 91, § 2239.

139 Kentucky v. Sapp, 14 S.W. 834 (Ky. 1890) (noting that in an attempted poisoning case, wife could testify that she saw her husband sprinkle a substance—later identified as arsenic—on her food); Louisiana v. Parker, 8 So. 473, 474 (La. 1890) (shooting with intent to murder); Michigan v. Sebring, 33 N.W. 808 (Mich. 1887) (assault and battery).

140 123 S.E. 210 (Ga. 1924).

141 The court stated, "It must be remembered that the wife is not permitted to testify at all except as a matter of exception to the general rule; and the provision for her testifying, being an exception, cannot be liberally extended, and must be strictly construed." *Id.* at 214. As of 1987, Georgia provides an exception when either spouse is charged with a crime against the person of a minor child. GA. CODE ANN. § 24-9-23 (Supp. 1994). Today, Mrs. Grier would not only have been competent, but compellable to testify against her husband.

142 Missouri v. Vaughan, 118 S.W. 1186 (Mo. Ct. App. 1909).

143 This occurs usually through an accomplice liability theory, since a husband could not be charged with rape of his own wife in most jurisdictions. *See* Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990).

144 North Carolina v. Martin, 194 S.E.2d 60, 61-62 (N.C. Ct. App. 1973); Kitchen v. Texas, 276 S.W. 252 (Tex. Crim. App. 1925).

145 Missouri v. Evans, 39 S.W. 462 (Mo. Ct. App. 1897).

original common-law exception applied until statutory enactment eliminated the exception. In Alabama, for example, the supreme court adopted the common-law rule in 1892;[146] however, in 1915, the Alabama legislature enacted a statute reversing the common-law rule.[147] The new statute created an election for the witness spouse. Thus, an abused wife could choose to testify voluntarily against her husband (even over his objection), but she could not be compelled to testify.[148] The apparent rationale for doing away with the common-law rule was that it was no longer needed once the wife had the right to testify voluntarily. Surely a battered spouse would want to testify! And if she did not, then one must assume that marital harmony existed and should be preserved.[149]

These views of the privilege exhibit an almost deliberate ignorance of the nature and consequences of domestic violence. The courts that narrowly interpret the "crime against the person of the spouse" exception fail to recognize the significance of conduct true to common patterns of battering relationships. The courts that are satisfied with leaving the decision in the hands of the victim are oblivious to the well-documented behavior of victims of spousal violence. While these courts may be forgiven—in 1890 or 1930—for applying the common-law doctrine in a manner consistent with the mores of their times, modern courts are still applying these archaic notions about spousal violence despite the availability of information leading to contrary views.

III. Modern Applications of the Spousal Immunity Doctrine in Domestic Violence Cases

Wright and Graham have culled more than fifteen exceptions to the spousal immunity privilege, including the exception for crimes against a spouse.[150] They suggest that the spousal crime exception has been interpreted broadly, and usually without regard to the underlying rationales for the exception: "As sometimes happens with exceptions, over the next several centuries this one was expanded by legislative and judicial action far beyond the bounds of physical vio-

146 Johnson v. Alabama, 10 So. 427 (Ala. 1892). The court followed the rule laid down in the *American & English Encyclopedia of Law*: "in any criminal proceeding against the husband or wife, for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify." 7 Am. & Eng. Encyclopedia L. 102 (1889).

147 1915 Ala. Acts 942, § 1.

148 DeBardeleben v. Alabama, 77 So. 979 (Ala. 1918). Georgia followed a similar pattern. *See* Georgia v. Peters, 444 S.E.2d 609, 611-12 (Ga. Ct. App. 1994) (discussing the history of spousal immunity in Georgia).

149 See *supra* text accompanying notes 60-82 for a discussion on why battered wives are reluctant to testify.

150 Wright & Graham, *supra* note 93, § 5591.

lence."[151] They note, however, that the expansion has been inconsistent, leading one jurisdiction to apply the exception when the husband abandoned his wife, but not when he came home drunk and disturbed the peace.[152] Expansion of the exception has generally not resulted from a recognition of the patterns of spousal abuse nor from an understanding of battered women.

A. States with No Spousal Immunity

A number of states have no spousal immunity statute.[153] In most of these states the common-law doctrine of incompetency of spouses to be witnesses was in force until adoption of a confidential communications privilege. After the communications privilege was in place, the prevailing notion became that protecting confidentiality of communications was sufficient, and the common-law doctrine was abrogated.

In a state with no doctrine of spousal immunity, a spouse is a competent and compellable witness in all criminal proceedings. The only remaining question becomes to what extent the spouse can reveal confidential communications on the witness stand. A number of states have included a statutory spousal violence exception to the confidential communications privilege,[154] or created one by judicial action.[155]

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151 *Id.* § 5592, at 738-39.

152 *Id.* § 5592, at 738 (citing Charles B. Erickson, Comment, *Testimony by Husband and Wife in Missouri*, 24 MO. L. REV. 546, 549 (1959)).

153 Arkansas, Delaware, Florida, Indiana, Kansas, Maine, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin do not have a spousal immunity privilege. They do, however, preserve the spousal communications privilege. *See* ARK. R. EVID. 501, 504; DEL. R. EVID. 504; FLA. STAT. ANN. § 90.504 (West 1994); *id.* § 914.07 (West 1994); IND. CODE ANN. § 34-1-14-5 (West 1994); KAN. STAT. ANN. §§ 60-407, 60-423 (1994); ME. REV. STAT. ANN. tit. 15, § 1315 (West 1980), ME. R. EVID. 504; N.H. R. EVID. 504; N.M. R. EVID. 11-501, 11-505; N.Y. CIV. PRAC. L. & R. 4502, 4512 (McKinney 1992); N.Y. CRIM. PROC. LAW § 60.10 (McKinney 1992); N.D. R. EVID. 501, 504; OKLA. STAT. tit. 12, §§ 2501, 2504 (1990); S.C. CODE ANN. § 19-11-30 (Law. Co-op. Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 19-13-12 to -15 (1987); TENN. CODE ANN. § 40-17-104 (1990); VT. STAT. ANN. tit. 12, § 1605 (1973); VT. R. EVID. 504; WIS. STAT. ANN. § 905.05 (West 1993).

154 *See supra* note 95 and accompanying text.

155 *See, e.g.*, Iowa v. Klindt, 389 N.W.2d 670, 676 (Iowa 1986). Iowa had a spousal immunity statute that had a spousal violence exception. IOWA CODE § 622.7 (1983) (repealed by 1983 Iowa Acts ch. 37, § 7). The confidential communications statute contained no spousal violence exception. IOWA CODE § 622.9 (1983). Noting that a literal interpretation of the communications privilege would in many cases forbid an inquiry into the personal wrongs committed by one spouse against the other, the court created a spousal violence exception. *Klindt*, 389 N.W.2d at 676; *see also* People v. McCormack, 104 N.Y.S.2d 139, 145 (App. Div. 1951); Washington v. Moxley, 491 P.2d 1326, 1329 (Wash. Ct. App. 1971).

B. States with Spousal Violence Exceptions

A majority of states recognize an exception to spousal immunity when one spouse perpetrates violence upon the other.[156] Thus, in Maryland, there is an exception when one spouse commits "assault and battery" against the other,[157] and in Connecticut, the exception applies when a spouse "received personal violence from the other."[158] In other jurisdictions, the language is a bit more ambiguous. For example, Ohio's spousal immunity statute reads as follows:

> Every person is competent to be a witness except:
> (A) . . . .
> (B) A spouse testifying against the other spouse charged with crimes *except crimes against the testifying spouse* or the children of either.[159]

Such a statute appears broad enough to deal with any number of crimes in which the spouse is victimized. Consider, however, *City of Huron v. Bass*.[160] Deneen Bass went to the Huron Police Department to file a domestic violence report against her husband. She had a black eye and her face and neck were covered with red areas. Deneen was crying when she appeared at the station, wearing her coat over her pajamas. She told a police officer that her husband had been drinking all day and that when he returned home he accused her of having extra-marital affairs. He then punched her in the eye, dragged

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156 *See* ALASKA R. EVID. 505(a)(2)(D)(i); ARIZ. REV. STAT. ANN. § 13-4062 (Supp. 1995); CAL. EVID. CODE §§ 972, 985 (West 1995); COLO. REV. STAT. ANN. § 13-90-107 (West Supp. 1994); CONN. GEN. STAT. ANN. § 54-84a (West 1994); HAW. R. EVID. 505; IDAHO CODE § 9-203 (1990); IDAHO R. EVID. 504; 725 ILL. COMP. STAT. ANN. § 125/6 (Smith-Hurd 1993); IOWA CODE ANN. §§ 622.8, 622.9 (West 1995); MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1995); MICH. COMP. LAWS ANN. § 600.2162 (West Supp. 1995); MINN. STAT. ANN. § 595.02 (West 1988); MISS. CODE ANN. §§ 13-1-5, 93-21-19 (1995); MONT. CODE ANN. § 46-16-212 (1993); NEB. REV. STAT. § 27-505 (1989); N.J. STAT. ANN. § 2A:84A-17 (West 1994); N.C. GEN. STAT. § 8-57 (1994); OHIO REV. CODE ANN. § 2945.42 (Baldwin 1994); OHIO R. EVID. 601; OR. REV. STAT. § 40.255 (1988); 42 PA. CONS. STAT. ANN. §§ 5913, 5914 (1995); R.I. GEN. LAWS § 12-17-10.1 (1994); TEX. CODE CRIM. PROC. ANN. art 38.10 (West Supp. 1996); UTAH CONST. art. I, § 12 (1971); UTAH CODE ANN. § 78-24-8 (1992); VA. CODE ANN. § 19.2-271.2 (Michie 1995); WASH. REV. CODE ANN. § 5.60.060 (West 1995); W. VA. CODE § 57-3-3 (Supp. 1995); WYO. STAT. § 1-12-104 (1988). At least one jurisdiction has read the violence exception to require intentional harm to the spouse. In Pennsylvania v. Dungan, 539 A.2d 817 (Pa. Super. Ct. 1988), the husband was driving while intoxicated and caused an accident in which five people were killed. His wife, a passenger in his vehicle, was seriously injured. The court held that the wife was not a competent witness: "We believe the statute was not enacted to apply to the facts of this case . . . but instead are persuaded the exception . . . was designed to protect those Spouses victimized by an act of intentional violence committed upon them by an accused spouse." *Id.* at 824.

157 MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1995).

158 CONN. GEN. STAT. ANN. § 54-84a (West 1994); *see also* IDAHO CODE § 9-203 (1990) ("a crime committed by violence by one against the person of the other"); N.C. GEN. STAT. § 8-57 (1994) ("assaulting or communicating a threat to the other spouse"); 42 PA. CONS. STAT. ANN. § 5913 (1995) ("criminal proceeding against either for bodily injury or violence attempted, done or threatened upon the other").

159 OHIO R. EVID. 601 (emphasis added).

160 No. E-90-29, 1991 WL 137009 (Ohio Ct. App. July 26, 1991) (unpublished opinion).

her by the hair, and tried to choke her. He also threatened to kill her. Deneen ultimately decided not to press domestic violence charges against her husband, and he was charged with disorderly conduct instead.[161] The court held the following: "Appellant was charged with the crime of disorderly conduct, a crime against appellant's entire community. Appellant was not charged with a crime particularly against Deneen Bass, such as domestic violence. Therefore, Deneen Bass was not competent to testify against her husband."[162]

This case illustrates the problem with structuring spousal violence exceptions in terms of crimes *against* a spouse. The rhetoric implies that spousal violence is a private matter between the spouses, unlike other crimes that are against the entire community. This minimizes the importance of spousal violence, denying the community harm. The reasoning likens wife beating to tort rather than crime, leaving it in the hands of the plaintiff victim to bring the charges, produce the evidence, and ultimately prosecute the case. When she refuses to do so, we as a society can shrug and say, "Well, I guess it wasn't very important or she would have done something about it." Thus, we deny the personal harm to the victim as well as the harm to society as a whole.

As another example, consider Michigan's spousal immunity statute, which provides a spousal violence exception with the following language: "A husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent, except . . . where the cause of action grows out of a personal wrong or injury done by one to the other."[163] The Michigan courts have interpreted the "personal wrong or injury" language very narrowly. In *Michigan v. Quanstrom*,[164] the supreme court held that bigamy was not included within the statutory language of "personal injury":

> The language of the rule at common law was as broad as the language "personal injury" in our statute, and that language meant, and was held

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161 The disorderly conduct charge was not, according to the court's opinion, related to Neal Bass's beating of Deneen. Rather, it related to the fact that when the police went to arrest him at the home, they found him sitting on the stairs, highly intoxicated, with a forty-four magnum pistol laying on the floor nearby. At that time, Neal Bass was alone in the house with the couple's 15-month-old baby. The ordinance defined disorderly conduct to involve a voluntarily intoxicated person engaging in conduct or creating a condition that presents a risk of physical harm to himself or another, or to the property of another. The court held that when the police found Bass on the stairs, "clearly, he presented a risk of physical harm to himself, to his baby, his wife and even his neighbors." *Bass*, 1991 WL 137009, at *3.

162 *Id.* This comment suggests that the court does not view domestic violence as a crime against the entire community, but rather, as a purely private matter between the husband and wife.

163 MICH. COMP. LAWS ANN. § 600.2162 (West Supp. 1995). The Michigan statute also includes exceptions for criminal prosecution for a crime committed against the children of either or both parents, for suits for divorce, and for criminal prosecution for bigamy. *Id.*

164 53 N.W. 165 (Mich. 1892).

> to mean, violence, either actual or constructive, to the person .... [T]he wife was not allowed to give testimony in ... any other crime not involving personal violence or corporeal injury to her .... A cause of action growing out of a personal wrong is one designed to protect or secure some individual right. The right, as well as the wrong, must pertain to the person. It must be one that is purely personal in its character, and in no sense can the exception here be said to embrace public wrongs, which are personal only in the sense that they wound the feelings or annoy or humiliate, but inflict no injury upon the person.[165]

In *Michigan v. Love*,[166] the court continued to interpret "personal injury" narrowly. Abner Love accused his estranged wife Sue of "fooling around" with a co-worker, Johnny McQueen. He called McQueen over to his wife's house to discuss the relationship with Sue Love. The three sat in McQueen's car, and Abner Love shot McQueen at close range in the temple. He then pushed the body out of the car, took the driver's seat, pointed the gun in his wife's direction, and threatened to harm her if she tried to leave. Love was charged with murder in the death of McQueen and with the kidnapping of his wife. Although a majority of the court held that Sue Love's testimony was admissible in the kidnapping prosecution, the court also held that her husband could assert the spousal privilege to prevent his wife's testimony in the murder case.[167] Rather than viewing the murder of Sue Love's supposed boyfriend and her kidnapping as one continuous act of spousal violence,[168] the court held that killing McQueen in Sue Love's presence was not a "personal wrong or injury done by one [spouse] to the other" within the meaning of the statute.[169]

This narrow interpretation of spousal violence fails to recognize commonly recurring patterns in battering relationships—threats and assaults against men the batterer believes, because of pathological jealousy, to be his wife's lover.[170] Other jurisdictions have read their

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165 *Id.* at 166. "In response to People v. Quanstrom ... prosecutions for bigamy were excepted [from spousal disqualification] by 1897 P.A. 212." Michigan v. Love, 391 N.W.2d 738, 742 (Mich. 1986).

166 391 N.W.2d 738 (Mich. 1986).

167 *Id.* at 742-45.

168 It is common for a batterer to act out of jealousy and to threaten or harm any man he believes to be involved with his spouse. *See supra* text accompanying notes 52-55.

169 *Love*, 391 N.W.2d at 743. The court noted that some jurisdictions held otherwise. *See* 36 A.L.R.3d 820 (1970). In New Jersey v. Briley, 251 A.2d 442 (N.J. 1969), for example, the court held that the wife was a competent and compellable witness in all cases arising out of a criminal episode in which the husband murdered his wife's male companion and then assaulted his wife with a gun. The *Love* court chose not to follow this case on the grounds that the New Jersey spousal immunity statute used language different from the Michigan statute. The court also found support in other jurisdictions that did not follow the rule permitting a witness-spouse to testify concerning an offense committed against a third party when the defendant also committed an offense against the spouse during the same criminal transaction. *Love*, 391 N.W.2d at 744 n.14.

170 *See supra* text accompanying notes 52-55.

spousal violence exception broadly enough to include crimes committed by the husband against third persons, so long as the wife was also victimized in the same transaction.[171] In *Ohio v. Mowery*,[172] the defendant broke into the house of Harley Laughlin where Laughlin and Mowery's estranged wife were sleeping. Mowery shot Laughlin and Mrs. Mowery five times. Laughlin was killed, but Mrs. Mowery, severely injured, survived.

Mowery was charged with aggravated burglary, aggravated murder of Laughlin, and attempted murder of his wife. The three charges were tried together, and the trial court allowed Mrs. Mowery to testify as to the burglary of Laughlin's residence and Laughlin's murder as well as to her husband's attempt to murder her. On appeal, the Ohio Supreme Court held that Mrs. Mowery was competent to testify as to all three charges:

> It is undisputed Mrs. Mowery was competent to testify as to the three shots fired by appellee at her which resulted in the attempted murder charge. Once it is established Mrs. Mowery is competent to testify as to the second, fourth and fifth shots fired by the appellee, it would be ludicrous to fabricate a justification for excluding Mrs. Mowery's testimony about the first and third shots, or the mechanics of appellee's entrance into the Laughlin residence. These three crimes constitute one continuous transaction or happening culminating in offenses against two individuals. The three offenses were not well-defined and separate, but rather, were overlapping and intertwined. Any attempt to extricate testimony from Mrs. Mowery relating only to the attempted murder charge would be highly artificial in view of the instant facts.[173]

Although the result in *Mowery* is more consistent with what we know of the dynamics of domestic violence, the court relied on a hypertechnical reading of the statute instead of upon a mature understanding of spousal violence. Pathological jealousy on the part of the batterer is common in the well-known pattern of wife abuse.[174] Thus, breaking into Laughlin's house and murdering him can be understood as an expression of spousal violence.

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171 Some states explicitly provide in their spousal privilege statutes that the privilege cannot be claimed in a criminal proceeding when a spouse is charged with a crime against a third person committed in the course of a crime against the other spouse. *See* HAW. R. EVID. 505(c)(1)(D); OR. REV. STAT. § 40.255(4)(a) (1988); WIS. STAT. ANN. § 905.05(3)(b) (West 1993). Other jurisdictions have achieved this result through judicial construction. *See, e.g.*, Colorado v. McGregor, 635 P.2d 912 (Colo. Ct. App. 1981); Iowa v. Bleeker, 327 N.W.2d 728 (Iowa 1982); State v. Briley, 251 A.2d 442 (N.J. 1969); Washington v. Thompson, 564 P.2d 315 (Wash. 1977).

172 438 N.E.2d 897 (Ohio 1982).

173 *Id.* at 900. Of course, the trial court could have severed the attempted murder case from the other two and tried the other two separately, as Mowery requested. This would have prevented the "highly artificial" aspects of the testimony.

174 *See supra* text accompanying notes 52-55.

C. *States with Spousal Crime Exceptions*

Some states have created exceptions to the spousal privilege for other crimes against the testifying spouse, including property crimes.[175] Some jurisdictions have read statutes using "crime against the other" to include certain property crimes.[176] For example, Washington overruled a line of cases requiring personal violence under similar statutory language to apply the exception to burglary of the wife's residence.[177] Arson is also frequently held to fall within the "crime against the spouse" language, particularly if the wife was on the premises at the time of the fire.[178]

Virginia, however, has held that the exception does not apply to arson. In *Creech v. Commonwealth*,[179] Creech threatened to "torch" his wife's belongings when she told him she was leaving him. He set fire to his own house, which contained furniture that Mrs. Creech had brought to the house when she married Creech. The court held that "this case lacks an element essential for invocation of the statutory exception to the general rule of spousal immunity—prosecution of an offense committed by Creech against Mrs. Creech."[180] Here, Creech was charged only with burning down his own house, not with any crime against his wife.

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175 *See* ALASKA R. EVID. 505(a)(2)(D)(i); ARIZ. REV. STAT. ANN. § 13-4062 (1989); CAL. EVID. CODE §§ 972, 985 (West Supp. 1990); COLO. REV. STAT. § 13-90-107 (Supp. 1989); HAW. R. EVID. 505; ILL. COMP. STAT. ANN. 125/6 (Smith-Hurd 1993); IOWA CODE ANN. §§ 622.8, 622.9 (West 1995); KY. R. EVID. 504(c)(2)(A); NEB. REV. STAT. § 27-505 (1989); N.J. STAT. ANN. § 2A:84A-17 (West 1990); N.C. GEN. STAT. § 8-57 (1986); OHIO REV. CODE ANN. § 2945.42 (Baldwin 1994); OHIO R. EVID. 601; OR. REV. STAT. § 40.255 (1988); UTAH CONST. art. I, § 12; UTAH CODE ANN. § 78-24-8 (1990); VA. CODE ANN. § 19.2-271.2 (Michie 1990); WASH. REV. CODE ANN. § 5.60.060 (West 1990); W. VA. CODE § 57-3-3 (Supp. 1995); WYO. STAT. § 1-12-104 (1988).

176 Note that this is the same statutory wording that leads the Ohio court to require a "crime particularly against [the wife], such as domestic violence," City of Huron v. Bass, No. E-90-29, 1991 WL 137009, at *2, (Ohio Ct. App. July 26, 1991) (unpublished opinion), and the Michigan court to require "violence, either actual or constructive, to the person," Michigan v. Love, 391 N.W.2d 738, 743 (Mich. 1986) (quoting Michigan v. Quanstrom, 53 N.W. 165, 256 (Mich. 1892)).

177 Washington v. Thornton, 835 P.2d 216, 217-18 (Wash. 1992). Thornton entered his wife's home while she was at work by breaking a window to gain entry. Thornton proceeded to slash his wife's waterbed with a butcher knife and stole her suitcase. *See also* Washington v. Kilponen, 737 P.2d 1024, 1026 (Wash. Ct. App. 1987) (exception applying when husband broke into his wife's residence intending to tie her up and make her watch him commit suicide with the rifle he had with him, because he attempted a crime of personal violence against his wife—unlawful imprisonment).

178 Kansas v. Johnson, 621 P.2d 992 (Kan. 1981) (arson when husband set fire to residence of another where he knew wife was residing); Michigan v. Butler, 424 N.W.2d 264 (Mich. 1988); Pennsylvania v. John, 596 A.2d 834 (Pa. Super. Ct. 1991) (arson when wife was in the building, for this constituted attempted violence against her); Washington v. Moxley, 491 P.2d 1326 (Wash. 1972) (arson when wife and child were in the residence).

179 410 S.E.2d 650 (Va. 1991).

180 *Id.* at 651.

Like the cases involving personal violence, the property crimes cases use rhetoric suggesting that these crimes are personal to the victim rather than crimes against the entire community. For example, the emphasis in the arson cases in which spousal testimony is allowed is on the fact that the spouse was present and therefore in danger. Property crime exceptions are still structured in terms of crimes *against* a spouse. Thus, even these property crimes are construed as private matters between the spouses.

D. States with No Spousal Crime Exception

Only Missouri,[181] the District of Columbia,[182] Georgia,[183] Louisiana,[184] Massachusetts,[185] and Alabama[186] have no spousal crime exceptions to spousal immunity. Alabama states it succinctly: "The husband and wife may testify either for or against each other in criminal cases, but shall not be compelled so to do."[187] Under such a privilege, an abused wife can choose to testify voluntarily against her husband (even over his objection) but she cannot be compelled to testify.[188] These jurisdictions usually justify the lack of a spousal crime exception on the ground that one is not needed when the wife has the right to testify voluntarily.[189]

A recent case, *Louisiana v. Taylor*,[190] aptly presents the difficulties that arise in a jurisdiction with no spousal violence exception.

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181 Missouri's privilege, in pertinent part, reads as follows:

> No person shall be incompetent to testify as a witness in any criminal cause or prosecution . . . by reason of being the husband or wife of the accused . . . ; [no] wife or husband of [a person on trial], shall be required to testify, but any such person may testify at his or her option either on behalf of or against the defendant . . . .

MO. ANN. STAT. § 546.260 (Vernon 1987).

182 The District of Columbia statute reads as follows: "In civil and criminal proceedings, a husband or his wife is competent but not compellable to testify for or against the other." D.C. CODE ANN. § 14-306(a) (1995).

183 "Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other." GA. CODE ANN. § 24-9-23 (Supp. 1994).

184 Louisiana provides that "[i]n a criminal case . . . a witness spouse has a privilege not to testify against the other spouse." LA. R. EVID. 505.

185 The Massachusetts statute reads as follows:

> Any person . . . may testify in any proceeding, civil or criminal . . . except as follows: . . . [e]xcept as otherwise provided in [child neglect statutes] and except in any proceeding relating to child abuse, including incest, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other.

MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1995).

186 ALA. CODE § 12-21-227 (1995).

187 *Id.*

188 DeBardeleben v. Alabama, 77 So. 979, 980 (Ala. 1918). See *supra* note 148 for a discussion of the historical development of this statutory position.

189 *See, e.g.*, Louisiana v. Taylor, 642 So. 2d 160, 164 (La. 1994). See discussion of problems associated with this view *infra* at text accompanying notes 280-314.

190 642 So. 2d 160 (La. 1994).

Kenneth Taylor, a New Orleans police officer, was charged with aggravated battery of Glenda Richard, whom he married after the beating and before trial. He beat Glenda with his fists, his police-issue flashlight, and his 9mm Beretta service weapon. Several times he forced the gun inside the victim's mouth and threatened to pull the trigger. Glenda spent several days in the hospital following the assault. While Glenda cooperated initially with the police and prosecution, she later told them that she wished to drop the charges.

At the time of preliminary hearing, the prosecution learned that Glenda had married Kenneth ten days before the hearing. She refused to testify, invoking her marital privilege. The trial court excused the witness, remarking:

> I think if this woman's crazy enough to want to get beat up by her husband to within an inch of her life, and she wants to go back and marry him, that's her business. And I couldn't stop her if she wanted to get up on a ledge and jump off the building, if I wasn't close to her. It's her life. I've seen the pictures. I think she's crazy. But what am I going to do?[191]

On appeal,[192] the state asked the court to create an exception to the spousal immunity privilege for crimes of violence against a spouse.

The state supreme court declined, noting that it could not justify reading into the statute an exception purposely omitted by the legislature. The court did, however, recognize that the dynamics of spousal abuse, *e.g.*, fear, self-blame, and other emotional factors, often leave the battered wife unable to make a sound judgment as to whether to testify. "Exercise of the spousal witness privilege may be the result of coercion, fear, subjugation, or undue influence, perhaps not even consciously recognized by the abused spouse."[193] Thus, the court created a narrow exception: when evidence shows that the spouse is invoking the privilege because of fear, threats, or coercion, the trial court *may, in its discretion*, consider the privilege inapplicable.[194] The court then remanded for the trial court to develop further evidence and to determine whether the privilege should apply.

While the Louisiana Supreme Court's recognition of the dynamics of domestic violence is commendable, their solution appears unrealistic. The court's opinion contemplates a sensitive analysis of the facts that would reveal even subtle coercion unrecognized by the battered wife. But consider that in this case, the assessment will be made by the trial court judge who believed the victim was a "crazy" woman who "want[ed] to get beat up by her husband;" a trial judge who felt that there was nothing he could (should) do because, after all, "it's her

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191 *Id.* at 162.

192 The state prior to trial sought a writ in the court of appeals to reverse the trial court's ruling so that Glenda would be required to testify. *Id.* at 163.

193 *Id.* at 166.

194 *Id.*

life."[195] This "sensitive analysis" is thus entrusted to a trial judge who recited a panoply of myths concerning wife-beating.[196] A rule resting on a trial court's discretion, when the trial judge is unaware of the dynamics of domestic violence, is unlikely to benefit battered women.[197]

E. Spousal Immunity in Other Common-Law Countries

Given the fact that United States jurisdictions acquired spousal immunity doctrines through adoption of English common law, it should come as no surprise that England, Canada, and Australia are facing some of the same issues faced in United States jurisdictions with regard to spousal immunity and spousal violence.

In England, the Police and Criminal Evidence Act provides that a defendant's spouse is a competent and compellable witness in a case in which "the offence charged involves an assault on, or injury or a threat of injury to, the husband or wife."[198] This statute changed prior law. In *Hoskyn v. Metropolitan Police Commissioner*,[199] the husband had inflicted serious injuries to his wife.[200] The House of Lords held that the wife could testify voluntarily, but was not a compellable wit-

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195 *Id.* at 162.

196 Lenore Walker described and refuted the following myths about battered women: "Myth No. 2: Battered women are masochistic." WALKER, *supra* note 28, at 20. "Myth No. 3: Battered women are crazy." *Id.* at 20-21. "Myth No. 18: Battered women deserve to get beaten." *Id.* at 29. "Myth No. 19: Battered women can always leave home." *Id.* at 29-30. To this we can add one more: "Domestic violence is a private matter between the spouses."

197 In Pennsylvania v. Hatfield, 593 A.2d 1275 (Pa. Super. Ct. 1991), the appellate court noted that the wife was a compellable witness in a domestic violence case, but held that the trial court did not abuse its discretion in failing to compel the wife's testimony. The appellate court wrote:

> In explaining its decision, the trial court found that the ends of justice would best be served by granting the petition, apparently seeing the termination of the prosecution . . . as a means of preserving the Hatfields' marriage. In so deciding, the court relied upon the assurances of counsel, who stated that the circumstances giving rise to the criminal charges were unique, and that the Hatfields had undertaken counseling to remedy the underlying causes of their discord.

Id. at 1276. The appellate court recognized, however, the increasing numbers of cases in which victimized spouses assert an unwillingness to testify. Thus, the court cautioned that an appropriate record must be made to establish that the trial court properly exercised judicial discretion: "As it is insufficient for a criminal whose victim is not his spouse to avoid prosecution by recourse to therapeutic intervention, so perpetrators of domestic violence should not automatically be exempt from punishment because they have sought counseling." *Id.* In another case of a battered wife's reluctance to testify, the trial court, while telling the reluctant spouse that she had to testify, also explained how she could avoid testifying—he advised the wife that although she had to answer the prosecutor's questions, she could simply say she did not remember. Arizona v. Anaya, 799 P.2d 876, 878 (Ariz. Ct. App. 1990).

198 Ian D. Brownlee, *Compellability and Contempt in Domestic Violence Cases*, 1990 J. SOC. WELFARE L. 107, 107 (quoting Police and Criminal Evidence Act 1984, § 80(3)(a)).

199 [1979] App. Cas. 474.

200 She sustained two stab wounds to her chest, a nine-centimeter cut from her temple to her right ear, smaller cuts to her lip and chin, and a four-centimeter cut on her left forearm. *Id.* at 499.

ness. Lord Wilberforce recited the usual rule that the wife was not a competent witness against her husband in a criminal case because to allow a wife to give evidence against her husband "would give rise to discord and to perjury and would be to ordinary people, repugnant."[201] He noted that the spousal violence exception would render her competent to testify, but "the fact of marriage and her status as a wife" would allow her to resist compulsion to testify.[202] Compare this with a Canadian court's opinion that "[a] rule which leaves the husband or wife the choice of testifying is more likely to be productive of family discord than to prevent it."[203] By statute in Australia a victim spouse cannot refuse to testify in certain offenses, including crimes by one spouse against the other.[204]

F. Summary and Future Implications

Undeniable progress has been made in restructuring the common-law doctrine of spousal immunity in order to combat domestic violence. Because the testifying spouse is the holder of the privilege in a majority of jurisdictions, she can testify voluntarily about spousal abuse. In addition, in a majority of jurisdictions, the spousal violence exception allows the prosecution to compel a reluctant wife's testimony. Nonetheless, misunderstandings about what constitutes domestic violence and about why battered wives are reluctant to testify lead to injustice in a number of cases.

Spousal crime exceptions, structured in terms of crimes *against* a spouse, employ rhetoric likening wife-beating to tort rather than crime, leaving it in the hands of the plaintiff victim to bring the charges, produce the evidence, and ultimately prosecute the case. Narrow interpretations of what constitutes spousal violence under an exception exacerbate the problem—disregarding what we know about battering behavior allows courts to render hypertechnical judgments

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201 *Id.* at 488; *see also* Susan Edwards, *Compelling a Reluctant Spouse*, 139 NEW L.J. 691 (1989).

202 *Hoskyn*, [1979] App. Cas. at 488. Viscount Dilhorne quoted with approval from counsel's argument in another, similar case:

> In the case of an ordinary person if he may be called as a witness, the usual consequences follow, *i.e.*, he must give evidence, but the wife has never, as regards her husband, been in the position of an ordinary witness by reason of the common law, and she can no more be compelled than the prisoner himself can be compelled.

Id. at 494. Only Lord Edmund-Davies wrote in dissent, asserting that the law as the majority conceived it was "inimical to the public weal, and particularly so at a time when disturbing disclosures of great violence between spouses are rife." *Id.* at 500.

203 Edwards, *supra* note 201, at 691 (quoting R. v. McGinty, 52 Crim. Rep. 3d 161 (1986)).

204 *Id.* (citing the Crimes (Domestic Violence) Ordinance § 17 (1986); Crimes (Domestic Violence) Amendment Act amending § 407AA of the Crimes Act 1900). Edwards notes that the Report of the New South Wales Task Force on Domestic Violence recommending compellability argued that "the placing of a choice in the hands of the woman herself is almost an act of legal cruelty." *Id.*

ignoring the reality of battered women's lives. Violent and controlling behavior such as stalking, threats, destruction of property, and violence against other men, magically becomes "public harm" (unlike beating one's wife, which is private harm?) and thus outside the exception.

One of the most promising legal reforms in fighting domestic violence is the development of protective orders.[205] Virtually every state now has domestic violence legislation providing for orders of protection for women abused by their husbands.[206] "Using [protective orders] to combat domestic violence anticipates a two-step process. First the civil protection order is sought. . . . The second step . . . is enforcement. Once [an order] is obtained and served on an abuser, violation of the order is a crime, enforced either by contempt proceedings or ordinary criminal process."[207] However, it is likely that a state with only a spousal violence exception will be unable to marshall evidence to enforce the order in situations when the violation is short of beating the wife.[208]

In an Ohio case, Raymond Eichenberger was charged with violating a protective order thirty times within six days.[209] The court noted that Ohio precedent allowed the wife to testify in cases in which the wrongdoer injures his spouse.[210] But here, the court said, the only harm caused by the violations of the protective order was to the public.[211] The *Eichenberger* court made a clear distinction between public harm and private harm; the private harm did not fall within the spousal violence exception. In other jurisdictions following similar reasoning, the spouse's testimony would be disallowed because it did not involve spousal violence that was "personal" to the wife. Protec-

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205 *See* Kin Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes,* 2 TEX. J. WOMEN & L. 163 (1993); *Legal Responses to Domestic Violence, supra* note 3, at 1509-18.

206 Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse,* 23 FAM. L.Q. 43, 43 (1989).

207 Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction,* 42 HASTINGS L.J. 1325, 1404-05 (1991) (citing Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse,* 21 HARV. J. ON LEGIS. 61, 117, 122-23 (1984)).

208 A majority of states define violations of protective orders as a misdemeanor or other crime. *See* Finn, *supra* note 206, at 160-61; *see also* Cheh, *supra* note 207, at 1404-06 (noting criminal enforcement via contempt proceeding or violation of criminal statute). Thus, spousal immunity would apply in this criminal proceeding like in any other.

209 City of Reynoldsburg v. Eichenberger, No. CA-3492, 1990 WL 52467, at *1 (Ohio Ct. App. Apr. 18, 1990) (unpublished opinion).

210 *Id.* (citing Ohio v. Antill, 197 N.E.2d 548 (Ohio 1964)).

211 The court ultimately allowed the wife's testimony on dual grounds: (1) the husband's failure to object to the testimony at trial was a waiver of the privilege; and (2) the refusal of testimony would offend the clear legislative purpose in passing the domestic violence legislation, which included an offense of violation of protective order. The court did not, however, consider the exception for spousal violence. *Id.* at *3.

tive orders provide little protection if violations cannot be established in court. A right without a remedy is hollow indeed.

Those jurisdictions with no spousal violence exception at all satisfy themselves by saying that the battered wife can always choose to testify voluntarily. This smug approach ignores what we have learned about why beaten women are reluctant to testify. The rule leaves the wife to be manipulated by her husband and his attorney into invoking her privilege not to testify. The legal system, once again, tells wife and husband both that domestic violence is a private matter between the two of them and that the state does not care to intervene.

IV. A FEMINIST CRITIQUE OF SPOUSAL IMMUNITY

Two commentators have noted that, despite frequent critiques of the doctrine of spousal immunity, the doctrine has not been critiqued from a feminist perspective.[212] Perhaps the first question to be addressed is whether rules of evidence should be subjected to feminist critique. Kit Kinports approaches the problem as follows:

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212 WRIGHT & GRAHAM, *supra* note 93, § 5572, at n.338. The authors describe "proto-feminist" attacks on the privilege and further state:

> We use the term [proto-feminist] advisedly because, so far as we have been able to determine, no person self-identified as a "feminist" or "womanist" has ever written on the privilege. Most of the people who make the argument discussed in the text appear to be men without any great familiarity with feminist writing on the family (a class that includes the present authors).

Id. The authors go on to say, "The question of whether or not the proto-feminist arguments are truly 'feminist' may safely be left to those with better credentials for answering it." *Id.* at 512. In a footnote, the authors state:

> The remark in the text is not intended to suggest that we think a feminist analysis of the privilege would not be worth considering. The problem is that so far as we are aware, no feminist writer has ever addressed this issue. This means that we would have to attempt to construct a feminist critique from our own readings of feminist writers. This would, we think, be a foolhardy undertaking for persons who have just suggested that feminist analyses from males are inherently suspect.

Id. at n.355; *see also* Kenneth W. Graham, Jr., *What's the Matter with Evidence?*, 25 LOYOLA L.A. L. REV. 773 (1992). Professor Graham remarks:

> It is to be expected that evidence scholarship will be caught up in academic fads. But it is remarkable that so far the law of evidence has been relatively untouched by recent ideological fashions other than the so-called "law-and-economics" movement. Feminists, except for some splendid early writing about character evidence in rape cases, have generally ignored the law of evidence. Perhaps the desire to avoid self-ghettoization sometimes associated with family law may explain why there is no womanist writing on spousal privilege. While their sisters in science have been able to find sexist assumptions in the epistemology of the men in white coats, surely it is reasonable to suppose that the same virus has infected those in black robes.

Id. at 779-80. Professor Michael Seigel offers an alternative explanation for why feminist legal thought, and other major intellectual movements, have left evidence scholarship virtually untouched. He traces the phenomenon to evidence scholars' near-universal acceptance of " 'optimistic rationalism,' that is, the belief that the overarching function of evidence law is to maximize the . . . probability that factfinders in our adjudicatory system will accurately determine objective historical truth." Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 Nw. U. L. REV. 995, 996 (1994) (footnote omitted). Because of this rationalist perspective, evidence scholars fail to see any worth to feminist jurisprudential critique. *Id.*

> The reader without a background in feminist theory may approach this article [entitled *Evidence Engendered*] with some skepticism, wondering how a feminist perspective can possibly be relevant to the study of "neutral" procedural rules that are unrelated to the history of discrimination against women. . . . I believe . . . that the evidence rules are gendered in a number of important respects but could be improved by including a feminist perspective.[213]

This is not to say that there is only one feminist perspective, or only one school of feminist legal thought.[214] A common thread, however, is a belief that the legal system, created by privileged white men, ignores the reality of women's lives: "Feminists generally agree—it should go without saying—that women suffer in ways which men do not, and that the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture."[215] Feminist jurisprudence, or feminist legal theory, is an attempt to examine "the relationship between law and society from the point of view of all women."[216]

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213 Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 413-14.

214 Admittedly there has been a tendency in Western feminist thought to assume an essential "womanness" that all women share despite racial, class, religious, ethnic, and cultural differences. *See* ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT at ix (1988); *see also* DRUCILLA CORNELL, BEYOND ACCOMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 4-6 (1991) (critiquing Robin West and Catherine MacKinnon as essentialist). This tendency toward essentialism has resulted in a feminist movement that is often meaningless for women who differ from the "essential woman." *See, e.g.*, Kimberle Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING, JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992); Lisa R. Green, *Homeless and Battered: Women Abandoned by a Feminist Institution*, 1 UCLA WOMEN'S L.J. 169, 170 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Some see the 1980s for feminism as "a decade of intense mutual criticism and internal divisiveness; a decade in which the feminist illusion of 'sisterhood' and the 'dream of a common language' gave way to the realities of fractured discourses." CONFLICTS IN FEMINISM 1 (Marianne Hirsch & Evelyn Fox Keller eds., 1990); NAOMI WOLFE, FIRE WITH FIRE 57-132 (1993). This "internal divisiveness" can be seen as strength rather than weakness in that feminism encompasses a diversity of ideas.

215 Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 81-82 (1987); *see also* Kinports, *supra* note 213, at 414; Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1906 (1988); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990); *cf.* NANCY COTT, THE GROUNDING OF AMERICAN FEMINISM 4-5 (1987) ("Men and women are alike as human beings, and yet categorically different from each other; their sameness and differences derive from nature *and* culture, how inextricably entwined we can hardly know.").

216 Heather Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 64 (1985) (quoting Catharine MacKinnon, Panel Discussion, "Developing Feminist Jurisprudence," at the 14th National Conference on Women and Law, Washington, D.C. (Apr. 9, 1983)).

Evidence law should not be left out of this examination of the relationship between law and society from the point of view of all women. No amount of legal "rights" will aid women if they (we) are unable to procure admissible evidence by which to prove an issue in court. Thus, rape shield rules[217] and laws allowing the admission of evidence of rape trauma syndrome[218] and battered women syndrome[219] are necessary predicates to accessing "justice" through the courts. Another necessity is a law of spousal privilege that recognizes the dynamics of spousal violence and the reality of women's lives.

A. Overview of Feminist Jurisprudence

Feminist jurisprudence is often broken down into three[220] or four[221] general schools of thought, although attempting to sort and classify the diversity of feminist legal theory leads to oversimplification and distortion.[222] Focusing on the differences in feminist legal thought does, however, provide an organizational framework for an overview of feminist jurisprudence. One can tentatively divide the feminist legal movement into three principal strands: (1) liberal feminism, (2) relational feminism, and (3) radical feminism.

1. Liberal Feminism.—Feminist theory that focuses on the ways men and women are alike is perhaps the most familiar strand of feminist legal thought. It is associated with the early years of the modern American feminist movement and attempts to eradicate formal barri-

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217 Rape shield laws were enacted in most jurisdictions during the 1970s. *See* Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOYOLA L.A. L. REV. 757 (1992); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 765 n.3 (1986) (noting that rape shield rules have been enacted by Congress and 48 state legislatures and created by judicial action in one other state).

218 Kansas v. Marks, 647 P.2d 1292, 1298-99 (Kan. 1982); Montana v. Liddell, 685 P.2d 918, 923 (Mont. 1984).

219 *See* New Jersey v. Kelly, 478 A.2d 364, 369-73, 377-78 (N.J. 1984); Fielder v. Texas, 756 S.W.2d 309, 319-20 (Tex. Crim. App. 1988); *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL *passim* (1987) (discussing the law's treatment of battered women's syndrome evidence); *cf.* State v. Wanrow, 559 P.2d 548 (Wash. 1977) (court's recognition of women's lack of access to self-defense training and differences in size and strength as important in self-defense law).

220 Christine Littleton analyzed feminist legal theory as "three interrelated theories to explain and resist women's inequality." Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1045 (1987). She sets out the three theories as (1) theories of sex discrimination, (2) theories of gender oppression, and (3) theories of sexual subordination. *Id.* at 1045-46.

221 Others have sorted theories of feminist legal thought into four categories: (1) equality or sameness or liberal feminists, (2) "difference" feminists, (3) cultural feminists, and (4) radical feminists. *See* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 626-29 (1989).

222 "The richness and diversity of feminist legal theory that has developed over the last two decades is hard to reduce to a simple schema." Littleton, *supra* note 220, at 1045.

ers that excluded women from employment and other areas of public life.[223] Liberal, or "sameness," feminism focuses on the ways in which men and women are alike in arguing for particular treatment. The line of thought goes something like this: If men enjoy rights that women want, then the only way for women to obtain these rights under existing equal protection doctrine is to argue that, as to the right in question, women are similarly situated to men.[224]

Critics of the sameness approach point out that in some ways women and men are different. Consider the one unquestionable difference between men and women—pregnancy. Christine Littleton critiques the traditional concept of equality as assimilation to male norms. She recognizes that equality doctrine has provided access for some women to formerly male enclaves, like law firms, but notes that this notion of equality does not allow challenges to the institutional structure itself—

> a structure that moves you *off* the partnership track if you call any attention to the fact that you are, either biologically or socially, female. You could call attention to the fact that you are biologically female by doing something as radical as having a baby. You could call attention to the fact that you are acting in a socially female way by asking for parental leave, whether you are a mother or a father. Despite significant progress in combatting overt sex discrimination at the hiring stage, it seems clear that young attorneys are moved off the "fast track" to partnership if they behave in such a socially female manner.[225]

Professor Littleton thus proposes a model of equality—equality as acceptance—that requires social institutions to react to gender differences so as to make those differences costless. For example, employers

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223 *See* Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1374 (1986). For example, equality rhetoric—Aristotelian notions that likes should be treated alike—persuaded the Supreme Court that a state statute that preferred men over women as estate administrators amounted to impermissible sex discrimination. Reed v. Reed, 404 U.S. 71 (1971). Equality feminists were also able to petition Congress, using equality rhetoric, to eradicate barriers to equal opportunity in employment, housing, credit, and education. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994), provide that employers cannot discriminate in hiring, firing, promotion, or pay on the basis of gender. In 1968, the Fair Housing Act, 42 U.S.C. §§ 3604-3676 (1994), and in 1974 the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1994), attacked sex discrimination in sale or rental of housing and with respect to any credit transaction. In 1972, the Education Amendments, 20 U.S.C. § 1681 (1994), prohibited sex discrimination in federally funded educational programs. *See also* Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the ACLU Women's Rights Project, 1971-76*, 8 COLUM. HUM. RTS. L. REV. 373 (1976); Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161; Nadine Strossen, *The ACLU and Women's Rights*, 66 N.Y.U. L. REV. 1940 (1991).

224 *See, e.g.*, Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 817-19 (1990); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982).

225 Littleton, *supra* note 220, at 1051-52.

could be required to restructure workplaces to fit female life patterns to the same extent they fit male ones.[226] Littleton views her proposal as incorporating and transcending traditional sex discrimination theory "by insisting that equality need not be limited to sameness, but can in fact be applied across difference."[227]

2. *Relational Feminism.*—A discussion of relational feminism, sometimes called cultural feminism[228] or "different voice" feminism, must begin with the work of psychologist and researcher Carol Gilligan. Gilligan discovered that psychological theory about the moral development of humans was developed from tests and observations of boys and men.[229] When she began to explore how girls and women resolved moral dilemmas she discovered "a different voice," one heretofore ignored in psychological literature. Gilligan reported that boys resolved conflicts by employing a "hierarchical ladder of values,"[230] while girls used a very different reasoning process, an "ethic of care," focused on preserving relationships.[231] Gilligan argues that girls and women see "a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules."[232]

The relevance of this psychological work to law is obvious. Feminist legal scholars have used Gilligan's work to argue that law is an essentially male discourse, with the woman's voice marginalized. Law operates within Gilligan's male-identified "hierarchy of rights" instead of the female-identified "ethic of care."[233]

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226 *Id.* at 1052. Littleton views "male" and "female" as social constructs:

> A society constructed from the male point of view is acting quite *rationally* when it first constructs the social categories of "male" and "female" and then says to those who it has defined as female, "All you have to do to be included is to prove that you 'really' are the same as we are." In other words, "prove that you really belong in the category that we have constructed in order to exclude you."

Id. at 1051. She also views "equality" and "inequality" as created concepts rather than natural ones. Thus, in her view redefining those terms is less than radical. *Id.* at 1052.

227 *Id.* at 1057. See *infra* text accompanying note 241 for a radical feminist's critique of both sameness and difference doctrines.

228 Gary Minda explains the denomination of "cultural feminism" as follows: "Feminists who advocate the different voice perspective have been called 'cultural feminists' because they tend to equate women's liberation with the development and maintenance of a female-centered counterculture." Minda, *supra* note 221, at 627.

229 CAROL J. GILLIGAN, IN A DIFFERENT VOICE 24-63 (1982); *see also* Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law—a Conversation*, 34 BUFF. L. REV. 11, 39-40 (1985) (panel discussion including comments by Carol Gilligan).

230 GILLIGAN, *supra* note 229, at 26.

231 *Id.* at 28.

232 *Id.* at 29.

233 Marcus et al., *supra* note 229, at 51-54 (comments of Carrie Menkel-Meadow); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); *see also* Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886

Gilligan's work has not, however, been free from criticism by legal feminists. Catharine MacKinnon disputes the attribution of the "ethic of care" to women as if it is women's voice rather than "what male supremacy has attributed to us for its own use."[234]

> Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced.[235]

Further, the "essentialist" tendency of Gilligan's work—its attempt to define *all women* and *all men*—is troubling, particularly in a society in which the difference between the sexes is seen as an excuse to discriminate against women. Ann Scales cautions that Gilligan's work could become "the Uncle Tom's Cabin of our century."[236]

3. Radical Feminism.—Radical feminism sees gender inequality not as the result of mistaken differentiation based on gender, but as the result of the systematic social subordination of women.[237] Perhaps the best known "radical feminist" is Catharine MacKinnon, who has called radical feminism the only true feminism—feminism unmodified.[238] She explains gender as an "inequality of power," and posits that the differences society attributes to sex are lines drawn by inequality.[239]

MacKinnon argues that "sex equality" is something of an oxymoron, because sex presupposes difference and equality presupposes sameness.[240] She criticizes the sameness and difference approaches to equality for their reliance on the male standard as the reference point:

> Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our

(1989). Kit Kinports suggests that evidentiary privileges are "feminist" in that they recognize relationships. Kinports, *supra* note 213, at 440. This is certainly a "relational feminist" perspective of privileges. Kinports does point out that the privileges recognize only certain relationships—"relationships accorded a high status by traditional, male norms." *Id.* at 441. She also notes the patriarchal assumptions about women that mark the origins of the marital privilege. *Id.* at 441 n.163.

234 MacKinnon, *supra* note 14, at 39.

235 *Id.*

236 Scales, *supra* note 223, at 1381.

237 MacKinnon, *supra* note 14, at 42.

238 Catharine A. MacKinnon, Toward a Feminist Theory of the State 117 (1989) ("Feminism has been widely thought to contain tendencies of liberal feminism, radical feminism, and socialist feminism. But just as socialist feminism has often amounted to traditional marxism . . . liberal feminism has been liberalism applied to women. Radical feminism is feminism."); *see also* MacKinnon, *supra* note 14, at 15-16.

239 MacKinnon, *supra* note 14, at 8.

240 *Id.* at 33.

> distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.[241]

Under the theory of radical feminism, women are unequal because they are subordinate. MacKinnon's solution, of necessity, is to dismantle the hierarchy that disempowers women, thus equalizing the power between men and women.[242]

MacKinnon's feminist theory identifies sex as the situs of women's oppression: "Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away."[243] Thus, MacKinnon views the objectification of women—and sexuality in general—as a central cause of sexual subordination.[244] A frequent challenge to MacKinnon's work comes from feminists who do not share her view of sexuality. Robin West argues that MacKinnon ignores women who find the experience of dominance and submission "sexually desirable, exciting and pleasurable—in fantasy for many; in reality for some."[245] Patricia Cain suggests that MacKinnon's view that all women are dominated by men all the time discounts the experience of lesbians who are often free from male domination in that they live their private lives removed from the intimate presence of men.[246]

B. A Feminist Critique

With this basic understanding of the theories of feminist legal thought, it is clear that a feminist critique of the spousal immunity doctrine must address the legal theories as well as the reality of women's lives. Feminist critique is necessarily experiential, calling for "theory without Theory[,] . . . fewer universal frameworks and more contextual analysis."[247]

1. The Private-Public Dichotomy.—"Historically, the dichotomy of 'public' and 'private' has been viewed as an important construct for understanding gender."[248] Early struggles for women's

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241 *Id.* at 34.

242 West, *supra* note 215, at 84.

243 Catharine A. MacKinnon, *Feminism Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 515 (1982).

244 Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 835 (1988) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987)).

245 West, *supra* note 215, at 116-17.

246 Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 202-03 (1989-90).

247 DEBORAH L. RHODE, JUSTICE AND GENDER 316 (1989).

248 Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 976 (1991); *see also* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 967 (1993) ("The 'public-domestic distinction' arose as a deeply gendered ideological construct associating

rights, exemplified by the suffrage movement, protested women's exclusion from the public sphere.[249] Denying women the vote and barring them from numerous occupations all but forced women to remain in their "separate sphere"—the home.[250] The private sphere of the home was seen as a place of refuge, a haven in a heartless public world of politics and business.[251] Even the U.S. Constitution was interpreted to recognize a "private realm of family life which the state cannot enter."[252]

Feminists have long realized that the absence of the state, of law, from the private sphere has itself contributed to male dominance and female subordination.[253] "The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation."[254]

The battered women's movement has been, in the past twenty years, enormously successful in bringing the "private" problem of wife abuse to public attention and in igniting an explosion of law reform efforts to assist battered women.[255] However, wife abuse continues and there is much social resistance to change. Elizabeth Schneider explains the resistance as follows:

> Battering is deeply threatening. It goes to our most fundamental assumptions about the nature of intimate relations and the safeness of family life. The concept of male battering of women as a "private" issue exerts a powerful ideological pull on our consciousness because, in some sense, it is something that we would like to believe. By seeing woman-abuse as "private," we affirm it as a problem that is individual, which only involves a particular male-female relationship, and for which there is no social responsibility to remedy.[256]

Despite the existence of some legal remedies that bring domestic violence into the public sphere, spousal immunity is often justified on the ground of privacy interests.[257] Under this justification, a spouse who

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the amorality of the public sphere with men and the morality of the private sphere with women.").

249 Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 392 (1984); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW 151, 151-52 (David Kairys ed., rev. 1990).

250 Olsen, *supra* note 249, at 392.

251 Dailey, *supra* note 248, at 966-67 (citing CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESEIGED (1979)).

252 Prince v. Massachusetts, 321 U.S. 158, 166 (1944), *cited in* Dailey, *supra* note 248, at 984.

253 Taub & Schneider, *supra* note 249, at 154.

254 Schneider, *supra* note 248, at 978.

255 *Id.* at 974.

256 *Id.* at 983 (footnote omitted).

257 Courts presented with a constitutional privacy argument in support of the privilege have consistently rejected it. *See* Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985); United States v.

testifies voluntarily violates a defendant spouse's privacy interest in "prevent[ing] dissemination of any personal information."[258] The use of contempt powers to compel a reluctant spouse's testimony constitutes blatant governmental intrusion into private relationships.[259]

Spousal immunity, especially in cases of domestic violence, can be seen as a way to leave that violence back in the private sphere. Courts' interpretations of spousal violence exceptions rely on distinctions between private and public harm. While other crimes may be considered public harm, domestic violence is "personal" to the victim. Courts applying the spousal violence exception fall back on traditional notions of the public-private dichotomy.

Further, the argument that the government should not compel a reluctant spouse to testify is merely a version of the traditional argument that the law does not belong in the private sphere of family relations. Nonetheless, there is something unsettling in the picture of a battered woman jailed for contempt as a consequence of her refusal to testify against her husband.[260] This is the dilemma feminists face:

> The freedom promised by the right to privacy runs up against women's right to security in the home, and rights rhetoric cannot decide the conflict. Any effort to protect women from private oppression by their husbands may expose them to public oppression by the state; any effort to keep the state out of our personal lives will leave us subject to private domination.[261]

Although much good has inured to the cause of women through the doctrine of privacy,[262] the privacy doctrine has also encouraged, reinforced, and supported violence against women:

Lefkowitz, 618 F.2d 1313, 1319 (9th Cir.), *cert. denied*, 449 U.S. 284 (1980); United States v. Doe, 478 F.2d 194, 195 (1st Cir. 1973). However, arguments about privacy are frequently offered as rationales for one or both of the marital privileges. *See* Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 47; Lee W. Borden, *In Defense of the Privilege for Confidential Marital Communications*, 39 ALA. LAW. 575, 581 (1978); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110 (1956); Mark Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 CAL. L. REV. 1353, 1370-71 (1973); Jaymi B. Zwain, Note, *Privilege Against Adverse Spousal Testimony—In a Federal Criminal Proceeding Choice of Whether to Testify Against a Defendant Spouse Belongs to Witness Spouse Alone*, 55 TUL. L. REV. 961, 970 (1981); *Privileged Communications*, *supra* note 94, at 1584-85; *see also* WRIGHT & GRAHAM, *supra* note 94, § 5572, at 493-95.

258 *Privileged Communications*, *supra* note 94, at 1583 (citing Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 648 (1976)).

259 *Id.* at 1584-85.

260 *See* Waits, *supra* note 39, at 323 & n.317 (citing John Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J., Aug. 22, 1983, at 4).

261 Olsen, *supra* note 249, at 393.

262 Roe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); *see also* Jean L. Cohen, *Redescribing Privacy: Identity, Difference, and the Abor-*

> Privacy says that violence against women is immune from sanction, that it is permitted, acceptable and part of the basic fabric of American family life. Privacy says that what goes on in the violent relationship should not be the subject of state or community intervention. Privacy says that it is an individual, and not a systemic problem. Privacy operates as a mask for inequality, protecting male violence against women.[263]

As Deborah Rhode notes, "the state's refusal to intervene in private matters has not necessarily expanded individual autonomy; it has often simply substituted private for public power."[264]

2. The (Mis)Value of Autonomy.—In critiquing liberal feminism, Robin West argues that liberal-legal feminism mistakenly focuses on autonomy and maximizing choice as its strategy for achieving equality between men and women.[265] This focus on choices is misdirected, she argues, in that it directs critical attention outward rather than inward. West suggests that feminist legal theory should posit subjective happiness as the direct goal of legal reform and subjective suffering as the direct evil to be eradicated. She recognizes that liberal feminists are concerned about women's subjective well-being, but seek to achieve it indirectly by changing the objective, external condition of lack of choices.[266] Liberal feminism assumes that human beings will choose what will make them happy, and thus expanding women's choices will expand their happiness.[267] Professor West does not find "women" in the liberal's definition of "human being."[268] She contends that the liberal feminist claim that women consent to transactions in order to maximize happiness may be false. "It may be that women consent to changes so as to increase the pleasure or satisfy the desires of *others*."[269]

> The rather inescapable fact is that much of the misery women endure is fully "consensual." That is, much of women's suffering is a product of a

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tion Controversy, 3 COLUM. J. GENDER & L. 43 (1992) (criticizing feminist critiques of the right of privacy); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119 (1992) (reaffirming legitimacy of right to privacy arguments).

263 Schneider, *supra* note 248, at 984-85.

264 Rhode, *supra* note 215, at 631. Invocation of privacy to support spousal immunity also ignores the many invasions of government on the privacy of families and women. Anne C. Dailey has challenged the notion that family is a "private" sphere free from government regulation. She argues that "the modern family has never constituted a purely private institution, but has always been subject to state regulation and public control." Dailey, *supra* note 248, at 994. Although Dailey's article focuses on constitutional privacy, her thesis can inform discussions of other aspects of legal regulation of the family.

265 West, *supra* note 215, at 83.

266 *Id.* at 87-88.

267 *Id.*; *see also* Dailey, *supra* note 248, at 1004 ("The liberal conception of abstract individualism, under which individuals interact as independent, autonomous, rational equals, has no connection to family life, where individuals are, above all, dependent, related, and unequal.").

268 West, *supra* note 13, at 4 ("Women, though, are not human beings.").

269 West, *supra* note 215, at 92.

> state of being which was *itself* brought into being through a transaction to which women unquestionably tendered consent. A woman's experience of marital sexuality, for example, may range from boring to irritating to invasive to intensely painful. . . . But the fact is that . . . the wife . . . was [not] brought to the altar in shackles. . . . Put affirmatively, the conditions which create our misery—unwanted pregnancies, violent and abusive marriages, sexual harassment on the job—are often traceable to acts of consent. Women—somewhat uniquely—consent to their misery.[270]

Women are different from men, in acting for the benefit of others rather than themselves, because their lives are different from those of men. Professor West believes that several factors explain this difference: biological pregnability and social training as primary caretakers are two. She focuses on another explanation for the difference that she thinks "has great explanatory force" —pervasive violence in the lives of women.[271] Violence, particularly sexual violence, causes women to "define themselves as 'giving selves' so as to obviate the threat, the danger, the pain, and the fear of being self-regarding selves from whom their sexuality is taken."[272]

Professor West's analysis is particularly germane to domestic violence. She reveals her own experience in a violent intimate relationship, and notes that the total fear that accompanies daily violence in the home taught her "to view as literally incongruous the mere suggestion that I should expect to reap pleasure for myself from anything at all. . . . The notion that I would act—or *consent*—so as to further my own welfare or to create pleasure for myself was both inconceivable and unconceived."[273]

Kathleen Waits has also addressed the question of the proper weight prosecutors and judges should give to the battered wife's expressed wishes.[274] She suggests that the victim's views "should be accorded great deference when she wants the law to take action against the batterer, but should be given less weight when she says she wants to protect him."[275] She notes that "because of learned helplessness[,] expressions of disinterest in deterring him are far less likely to represent the true state of her feelings than when she claims the converse."[276] Waits also recognizes that sometimes the legal system,

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270 *Id.* at 92-94.

271 *Id.* at 94.

272 *Id.*

273 *Id.* at 98.

274 Waits, *supra* note 39, at 306-07.

275 *Id.* at 307.

276 *Id.*; *see also* Debbie S. Holmes, Note, *Marital Privileges in the Criminal Context: The Need for a Victim Spouse Exception in Texas Rule of Criminal Evidence 504*, 28 HOUS. L. REV. 1095, 1111-19 (1991) (suggesting that psychological effects of domestic abuse may render the victim incapable of making a logical, rational choice regarding invocation of the spousal privilege).

having a duty to deter batterers and to protect their wives and children, has an obligation to act even when the victim refuses to help.[277]

Arguments in support of spousal immunity relying on the value of autonomy[278] seem almost cruel in light of Professor West's critique. One commentator states that the "privilege is best served by leaving the decision as to its invocation in the hands of the victim."[279] The privilege may be "best served," but is the battered wife best served?[280] Professor West suggests the following standard for analyzing laws: "[A] law is a good law if it makes our lives happier and less painful and a bad law if it makes us miserable, or stabilizes the conditions that cause our suffering."[281] Under this standard, a spousal privilege that allows the husband to threaten or manipulate his battered wife into invoking the privilege—thus insulating him from criminal liability—is a bad law.

3. The Reality of Women's Lives.—"The starting point of feminist work must be found in women's lives and not in legal definitions."[282] Thus, feminism's method is consciousness-raising—"the collective critical reconstitution of the meaning of women's social experience, as women live through it."[283] In forging an appropriate spousal immunity law, then, it is important to consider the law's im-

277 Waits, *supra* note 39, at 307.

278 "Autonomy" arguments ignore the fact that being a witness to a crime renders one less than autonomous, in that the state is ordinarily free to compel any person to testify. *See supra* notes 83-91 and accompanying text. Further, autonomy arguments fail to address the hypocrisy of allowing choice when the crime is against the spouse, but not allowing choice when the crime is against some person the state is willing to protect. Child welfare arguments are, of course, persuasive when a spouse commits a crime against a minor child. The state's interest in protecting children clearly outweighs an interest in preserving marriage. When a young child needs an adult's testimony in order to convict an abuser and thereby prevent further abuse, notions of choice and autonomy vanish. The argument breaks down, however, when autonomy gives way when an adult, fully competent child is abused. Nonetheless, a number of jurisdictions have interpreted their spousal immunity provisions to allow state compulsion of a reluctant spouse when one spouse is charged with a crime against an adult child. California v. McGraw, 190 Cal. Rptr. 461, 463 (Ct. App. 1983); Michigan v. Simpson, 347 N.W.2d 215, 217 (Mich. Ct. App. 1984), *vacated*, 380 N.W.2d 11 (Mich. 1985); Ohio v. Abd' Allah Abd' Rahman, No. CA-2210, 1984 WL 7547 (Ohio Ct. App. Oct. 25, 1984) (unpublished opinion), *rev'd*, 492 N.E.2d 401 (Ohio 1986).

279 33 STEVEN GOODE ET AL., TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 504.8, at 278 (1988).

280 This is not to suggest that the battered wife should be made to testify "for her own good." She should be made to testify; every witness to a crime must testify for society is offended by the crime and has an interest in bringing the miscreant to justice.

281 West, *supra* note 215, at 142.

282 *Introduction to Special Issue: Feminist Perspectives on Law*, 14 INT'L J. SOC. L. 233 (1986). Deborah Rhode explains the importance of experiential analysis to critical feminism: "A standard practice [of critical feminism] is to begin with concrete experiences, integrate these experiences into theory, and rely on theory for a deeper understanding of the experiences." Rhode, *supra* note 215, at 621; *see also* Cain, *supra* note 246, at 195.

283 MACKINNON, *supra* note 238, at 83.

pact on the lives of women. How does women's experience of violence in marriage differ from the law's conception of that experience? Is it empowering or disempowering for the state to take the decision out of a woman's hands and force her to testify? Will it expose her to violent retaliation from her abuser? Will she feel she must lie on the witness stand, subjecting herself to perjury prosecution?[284] Will she refuse to testify, and be jailed for contempt?

In a series of interviews with fifteen domestic violence victims at shelters in Dallas and Tarrant Counties, Texas, Marina Mata-de la Garza[285] asked women about their experiences with spousal violence:

Q: Define domestic violence.

A: HELL.[286]

A: When physical force is used to make a point, get your way.[287]

When getting into specifics, the victims revealed a variety of battering behaviors:

Q: What did he do?

A: [After explaining that she had been in three abusive relationships] . . . The first one he knocked me down and made my head bleed. The second one stomped on me, pulled a wad out of my hair, choked me so hard I almost lost my breath and he cut me with a knife. The third one . . . pushed me down and knocked me to the floor, and I hit my head, neck, and back. He would also threaten to kick me out of my home, and he would sexually assault me.[288]

In describing how she felt the first time her husband hit her, one woman described her guilt and talked about shouldering the responsibility: "Guilty, responsible, why couldn't I have shut up? Maybe if I

284 I ask this question only because others who have read this Article have raised it. The question comes uncomfortably close to frequently expressed ideas that women lie about abuse. *See* Mack, *supra* note 12, at 329 ("The law's lack of belief in women's stories can be seen as a direct manifestation . . . of male dominance. . . . [M]any of men's stories about women—the myths and stereotypes—have become part of the law's story about women."); Torrey, *supra* note 12, at 1045.

285 *See supra* note 16.

286 Interview with H.B., *supra* note 16 (Apr. 1, 1995). H.B. is a 72-year-old former nurse with four adult children.

287 Interview with D.W., *supra* note 16 (Feb. 21, 1995). D.W. has two children, divorced her first abusive husband, and is now married to another abuser.

288 Interview with H.B., *supra* note 16 (Apr. 1, 1995). A similar story is told by a 23-year-old who has also been involved in three abusive relationships: "The first one he broke a tooth, hit me on the head, choked me, [and] punched me. The second one he drove me to a field and beat me up. And the third one was mainly emotional and verbal. He called me names like whore, slut, and bitch and tell [sic] me I was no good. I think the second one was the worst one because he held a gun to my head and laughed about it." Interview with M.D., *supra* note 16 (Apr. 1, 1995).

wouldn't have pushed it, he wouldn't have gotten so mad."[289] She offered this explanation for why her husband abused[290] her:

> He accused me of sleeping around and being unfaithful. I guess he'd hit me because of anger, frustration and hurt and sometimes he had been drinking. After it happened, he would say he was sorry and say, "If you wouldn't have made me so angry . . . ."[291]

Most of the women offered excuses for why their husbands beat them. Several said their husbands' drug or alcohol use was to blame.[292]

The women were asked about a pending change in Texas law, creating a spousal violence exception to the spousal immunity privilege that would allow compulsion of testimony.[293] Almost all of the women said they felt the new rule would be a good idea, and all of them said they would tell the truth if they did testify.[294] One woman said she definitely would not testify if she were given a choice:

> If I had any choice, I can honestly say, based on any experience with abuse that I have been involved with, I would not have testified. And, no, I don't think fear would have played a part in my decision not to testify.[295]

Most of the women were aware of the spousal privilege in Texas that allowed the wife to testify voluntarily but did not allow the state to compel her testimony. They were then asked about the new rule:

> Q: Suppose the law had changed and you would no longer have the right to invoke the spousal privilege, and you had no choice but to testify against your abuser. What would you have done?
> A: I don't know. If I would have had no choice, I guess I would have had to testify, but I wouldn't have liked it. The problem is that the feelings of being scared, angry, hurt, etc., go away just like the bruises, and

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289 Interview with D.W., *supra* note 16 (Feb. 21, 1995). Other women similarly spoke about feelings of guilt. D.L.P. explained that she could not leave her abuser sooner because she felt guilty that he was ill—he was manic depressive and would beat her when he did not take his medicine. Interview with D.L.P., *supra* note 16 (Apr. 1, 1995). M.C. also said the beatings made her feel guilty. Interview with M.C., *supra* note 16 (Feb. 24, 1995).

290 D.W. did not like the word "beatings"; she preferred to talk about "abuse." Interview with D.W., *supra* note 16 (Feb. 21, 1995).

291 *Id.*

292 Interview with I.H., *supra* note 16 (March 27, 1995): "He would hit me when he was drunk or stoned or when he was angry that he had no money." Interview with J.S., *supra* note 16 (March 28, 1995): "He was a drug addict."

293 Under the old Texas statute, the wife could testify voluntarily but could not be compelled to testify. TEX. R. CRIM. EVID. 504. Effective September 1, 1995, the state can compel the victim spouse's testimony when an offense is committed against her by the other spouse. TEX. CODE CRIM. PROC. ANN. art. 38.10 (West Supp. 1996).

294 Girlfriends of abusers cannot claim the privilege and thus have often had to testify even when reluctant. One prosecutor in Dallas County said in an interview that she has never had a reluctant girlfriend lie—or at least tell a story different from the story she first told the police—on the witness stand. Interview with Cynthia Findahl, Domestic Violence Unit, Dallas County District Attorney's Office (March 21, 1995). The implications of this for any spousal violence exception which may be enacted in the future are obvious.

295 Interview with D.W., *supra* note 16 (February 21, 1995).

> then I wouldn't feel like I should punish him, even though I know that being abused was and is wrong. . . . It is very easy, when you care about someone more than you care about yourself, to not want to punish them. It's easier to pretend that it didn't happen, that it will go away, [and] that it will change, never happen again.[296]
>
> A: Yes, [I would have testified because] everyone should be required to talk about their abuse.[297]
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> A: It should be a mandatory law. . . . It would force women to come clean.[298]

While some commentators express concern that compelling the victim's testimony will undermine battered women's attempts at empowerment,[299] several interviewees seemed to consider it liberating that the state would remove the choice from them:

> A: Yes, I would testify for the children. . . . I would feel relief and testifying against him might make him go for help.[300]
>
> A: Absolutely. . . . I could have gotten on with my life sooner.[301]
>
> A: It would help me make a decision quicker.[302]

These responses are consistent with those commentators who believe that victims may be empowered by seeing their abusers prosecuted[303] and by seeing that the state takes seriously their problems.[304] Further, women's empowerment can occur when men admit in court what they have done—transforming the violence from "a private familial matter, for which many women blame themselves, to a public setting where men are made accountable for their acts."[305]

Only one woman said it was probable that she would not testify even if the law required it.[306] One said she would testify only if she could get protection.[307] Several others also expressed safety concerns

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296 *Id.*

297 Interview with G.P., *supra* note 16 (Mar. 28, 1995).

298 Interview with H.B., *supra* note 16 (Apr. 1, 1995).

299 *Legal Responses to Domestic Violence*, *supra* note 3, at 1541.

300 Interview with N.T., *supra* note 16 (Apr. 1, 1995).

301 Interview with D.L.P., *supra* note 16 (Apr. 1, 1995).

302 Interview with I.H., *supra* note 16 (Mar. 27, 1995).

303 *Cf.* Angela West, *Prosecutorial Activism: Confronting Heterosexism in a Lesbian Battering Case*, 15 HARV. WOMEN'S L.J. 249, 255-56 (1992) ("I believe that the victim *is* empowered by seeing the defendant prosecuted. . . . Seeing the abuser in a position of social disapproval may be the first step toward realizing that there is help available . . . .").

304 *Cf.* Waits, *supra* note 39, at 323 (arguing that no-drop policies convey the message that domestic violence is a crime against the public order, not just the victim).

305 Schneider, *supra* note 248, at 990-91 (citing Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience with Male Violence and Legal Process*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE (E. Buzawa ed., 1992)). The latter authors also suggest that empowerment occurs "when attorneys listen to battered women, giving them time and attention, and when judges understand their situations, giving them support and courage." Chaudhuri & Daly, *supra*, at 246.

306 Interview with M.D., *supra* note 16 (Apr. 1, 1995).

307 Interview with R.E.H., *supra* note 16 (Mar. 28, 1995).

if they did testify: "I would be scared that he'll try to get revenge."[308] Several seemed to feel that their abusers would hurt them whether or not they testified, or that there was nothing worse the abuser could do:

> Q: If the law was changed making it so that women had no choice but to testify would you have?
>
> A: Maybe. I would be too scared. . . . [But] he has hurt me so much I'm calloused now.[309]
>
> Q: What would he have done in your opinion?
>
> A: What could he have done? I don't think I would have been scared that he would have hurt me more, or been more violent, although I guess that's a possibility. I know he would have not wanted me to testify, but if the decision to testify or pursue charges was not a choice, then the situation is out of one person's control. . . . Maybe, if the choice had been taken out of my hand, then I wouldn't have stayed in the relationship, which would have made my life take a different course.[310]

Fear of retaliation is frequently expressed by women faced with the decision whether to testify.[311] While this fear should not be minimized,[312] some current empirical data suggest that prosecution does not increase the victim's risk of being subjected to repeat violence.[313] In fact, one study by David Ford and Mary Jean Regoli found that prosecutorial action through an initial court hearing significantly reduced the chance of further violence during the first six months after disposition of the case.[314]

While the Ford and Regoli study does not specifically address the issue of whether the victim testifies, its results do lend support to the notion that requiring the victim to testify will not subject her to further violence. In fact, some batterers may cease harassing their victim

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308 Interview with S.V.C., *supra* note 16 (Apr. 1, 1995).

309 Interview with A.A., *supra* note 16 (Apr. 1, 1995).

310 Interview with D.W., *supra* note 16 (Feb. 21, 1995).

311 As one battered woman observed:

> I was afraid every second. If I refused to testify he would maybe not blame me for getting arrested. If I testified and he didn't get convicted he'd have more power over me than ever before. If I testified and he didn't get jail time, I'd be in the same boat. It seemed like there were about eight scenarios that would go against me and only one that would work out.

Corsilles, *supra* note 4, at 873 (citing Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 130 (1991)).

312 Martha Mahoney has named as "separation assault" the batterer's "urgent control moves that seek to prevent the woman from ending the relationship." Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6-7 (1991).

313 David A. Ford, *Preventing and Provoking Wife Battery through Criminal Sanctioning: A Look at the Risks*, *in* ABUSED AND BATTERED, *supra* note 20, at 207-08.

314 David A. Ford & Mary J. Regoli, *The Preventive Impacts of Policies for Prosecuting Wife Batterers*, *in* DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE, *supra* note 305, at 193.

after they realize she no longer controls the case.[315] Testimony at hearings conducted by the Texas Gender Bias Task Force support this:

> I'm working with a client right now who was battered by her husband severely. . . . She did file charges against the man. However, because of his threats, he was able to convince her to drop the charges.
>
> In our judicial system, as it stands, a spouse cannot be forced to testify against the other spouse unless it's a case of child abuse. . . . Therefore, the court puts the burden on the woman for going through with the charges, which gives the batterer a wedge to use. [What i]f the courts took the decision out of the woman's hands and the courts went ahead and said, "No, it's the state that's filing charges. It's out of your hands. It's the state that files charges," she would then have a little protection from his, and sometimes his attorney's, threats.[316]

What lessons can we learn from listening to these battered women? Perhaps the most important lesson is that society *must* take seriously the crime of spousal violence.

V. CONCLUSION—A PROPOSAL

Spousal crime exceptions to spousal immunity, structured in terms of crimes *against* a spouse, blur distinctions between tort and crime,[317] leaving it in the hands of the plaintiff victim to bring the charges, produce the evidence, and ultimately prosecute the case. Ann Jones concisely states the problem:

> Today in the eyes of the law, any assault is both a criminal offense and a personal tort, or wrong. . . . But in a great many jurisdictions, even today, a domestic assault is not regarded as a *real* assault—that is, not really criminal. When police refuse to arrest, prosecutors to prosecute, and judges to sentence a man because the victim he assaulted is (or was) his wife or girlfriend, the state redefines this criminal assault against a woman as a special category of violence immune from criminal law. The state magically transforms a crime into a noncrime.[318]

"Criminal laws are the rules by which we define what we stand for as a society."[319] When criminal behavior such as domestic violence is treated as only tortious conduct a distinct symbolic injury remains:

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315 Corsilles, *supra* note 4, at 873-74.

316 Testimony of Ms. Peggy Salinas, HPH, THE GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT, at 70-71 (1994).

317 The line between torts and crime did not always exist. Prior to the Norman Conquest in the 12th century, English common law addressed "crimes" with the objective of obtaining monetary compensation for victims and their families. *See* 2 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 448-67 (2d ed. 1968).

318 JONES, *supra* note 15, at 27-28.

319 Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 304 (1990).

"sexual inequality would be symbolically reinforced" by a legal rule that effectively entitles men to abuse women.[320]

Although domestic violence may fit the definition of crime, the treatment of this conduct by the legal system suggests that it is less than criminal. The doctrine of spousal immunity, with its exceptions structured as "crimes against a spouse," arguably leaves enforcement in the hands of the individual victim rather than the state. Narrow judicial interpretation of what constitutes spousal violence, disregarding what we know about battering behavior, ignores the reality of battered women's lives. Controlling and violent behavior short of beating one's wife becomes "public harm"—contrasted with the "private harm" of wife-beating—and thus outside the spousal violence exception to spousal immunity.

Those jurisdictions with no spousal crime exception to spousal immunity feel that they have dealt with the matter appropriately because their statutes allow the wife to testify voluntarily. These states overlook the reasons why beaten women are reluctant to testify. When the battered wife invokes her privilege, we shift our focus from the battering husband to his victim by blaming her for not leaving and for not testifying.[321] "Focusing on the woman, not the man, perpetuates the power of patriarchy. Denial supports and legitimates this power; the concept of privacy is a key aspect of this denial."[322] A spousal immunity rule that gives the wife an election simply leaves her to be harassed, threatened, and manipulated by her husband into invoking her privilege not to testify. The legal system, once again, tells the spouses that domestic violence is a private matter in which the state does not care to intervene.

Mary Cheh suggests that the significance of the criminal law—and guilt adjudication—is the "public restatement of societal boundaries and a public reinforcement of the concept of individual responsibility."[323] She cogently states:

> Viewing criminal cases as ceremonies of guilt adjudication may also explain the disappointment of some groups, such as women . . . who consider vindication of harms against them through the civil process as inadequate. When wife beating is not treated as a crime, but instead as a matter for mediation or counseling, . . . society undoubtedly has readjusted its consensus on the moral acceptability of th[is] type . . . of conduct.[324]

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320 John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 222 (1991). Coffee makes this point with reference to the crime of rape, but its applicability to domestic violence is readily apparent.

321 Schneider, *supra* note 248, at 983.

322 *Id.*

323 Cheh, *supra* note 207, at 1359.

324 *Id.* at 1360.

Elizabeth Schneider has also noted the tendency to relegate domestic violence to more private and informal processes such as mediation. She sees this shift as a reflection of the low priority accorded battered women's problems by the law.[325] Relegation of domestic violence to private, informal, or noncriminal modes of resolution suggests that the conduct is not serious enough to be treated as a crime. A doctrine of spousal immunity that characterizes domestic violence as a crime only if the injured wife chooses to testify similarly suggests that the conduct is less than criminal, thus diminishing the moral force of the criminal law. By elevating the desire to preserve a family "haven in a heartless world,"[326] the law denies women a safe harbor.

An appropriate spousal immunity statute must allow a spouse's testimony in the broadest possible circumstances of domestic violence and must signify the importance of domestic violence to the state by allowing the state to use all measures to prosecute wrongdoers, including compelling a reluctant spouse's testimony. The best solution would be the abolition of spousal immunity, a step taken by a number of states.[327] For states facing political resistance to such a change, there are some appropriate middle grounds.

For example, in defining spousal violence for purposes of a spousal crime exception, a state should consider crimes against property as well as crimes giving rise to physical injury. A number of states, including Oregon, recognize an exception when the crime is one against the "person or property" of the spouse.[328] North Carolina's exception extends to "prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other . . . ."[329] States should consider crimes against persons other than the spouse, who are often victimized because of the batterer's attempts to control his wife. For example, West Virginia has drafted an exception for crimes against "child, father, mother, sister or brother" of a spouse.[330] California includes any relative, as well as a cohabitant, of either spouse.[331]

There is no appropriate substitute for the state's power to compel a reluctant spouse. The true value is not in the exercise of such power, but in the ability to exercise it. Prosecutors will not be jailing victims for contempt on a regular basis because most victims will likely testify

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325 Schneider, *supra* note 248, at 988-89.

326 *See supra* note 251.

327 *See supra* note 153.

328 OR. REV. STAT. § 40.255 (1993).

329 N.C. GEN. STAT. § 8-57 (1986).

330 W. VA. CODE § 57-3-3 (1966).

331 CAL. EVID. CODE § 972 (West 1995). A California court of appeal has interpreted "cohabitant" to include a female roommate of the wife. People v. Siravo, 21 Cal. Rptr. 2d 350, 352-53 (Ct. App. 1993). The court noted that "cohabitation means simply to live or dwell together in the same habitation; evidence of lack of sexual relations is irrelevant." *Id.* at 353.

when told they must.[332] Further, batterers who can no longer rely on force or their persuasive powers to make the victim invoke the privilege will be more likely to accept a plea bargain offer from the prosecution. In such a case, there would be no need for the victim's testimony.

Maryland, which did not have a spousal violence exception until 1994, has achieved something of a compromise with an exception that reads as follows:

> The spouse of a person on trial for a crime may not be compelled to testify as an adverse witness unless the charge involves: . . .
> (2) Assault and battery in which the spouse is a victim if:
> (i) The person on trial was previously charged with assault and battery of the spouse;
> (ii) The spouse was sworn to testify at the previous trial; and
> (iii) The spouse refused to testify at the previous trial on the basis of the provisions of this section.[333]

While Maryland has created an "every dog gets one bite" rule (a bite that may be fatal), this may be a compromise acceptable to those remaining states that do not allow compulsion of the wife's testimony.[334]

A change in the evidentiary rule of spousal immunity cannot, by itself, solve the problem of domestic violence. Nor can criminal prosecution, by itself, solve the problem. But the fact that the criminal justice system cannot solve a problem is not usually accepted as a justification for lawlessness. Stringent criminal intervention, together with social service responses, holds the most promise for a cure.[335] Existing policies of spousal immunity hamper criminal intervention. But perhaps more importantly, the existence of the privilege perpetuates the notion that spousal violence is a private matter between the spouses to which the criminal law does not really apply. The law is an important social force—it can lead as well as follow. We cannot ignore the symbolic value of the law.

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[332] For example, in Michigan v. Ellis, 436 N.W.2d 383 (Mich. 1988), the husband was charged with kidnapping and raping his wife. At trial, the wife indicated that she did not want to testify against her husband because she was afraid of how her husband would react and because she had received a threatening letter from him. When instructed that she must testify, she did so. *Id.* at 384. *But see* Ohio v. Karnes, No. WD-81-24, 1981 WL 5749 (Ohio Ct. App. Aug. 7, 1981) (unpublished opinion) (finding wife in direct contempt of court and ordering her to be jailed until she was willing to, and did, testify in a pending domestic violence case against her husband).

[333] MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1995).

[334] Of course, the Maryland spousal violence exception needs to be expanded to include crimes other than assault and battery.

[335] *Legal Responses to Domestic Violence*, *supra* note 3, at 1520 (suggesting combined efforts of public education; criminal intervention, including strict enforcement and stringent punishment; and social service responses to address the problem of domestic violence; and noting how effective this strategy was in efforts to curb drunk driving).