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May 2000 Contest and Consent: A Legal History of Marital Rape

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Introduction

At common law, husbands were exempt from prosecution for raping their wives. Over the past quarter century, this law has been modified somewhat, but not entirely. A majority of states still retain some form of the common law regime: they criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions. The current state of the law represents a confusing mix of victory and defeat for the exemption's contemporary feminist critics. Virtually every state legislature has revisited the marital rape exemption over the last twenty-five years, but most have chosen to preserve the exemption in some substantial manifestation. With rare exception, moreover, courts have not invalidated state laws protecting marital rape. Legislative action, rather than any clear judicial statement of constitutional norms, has driven the partial and uneven modification of the common law rule.

If the modern opponents and defenders of the marital rape exemption agree on any question, it is that their dispute is a new one. The contemporary debate over the exemption operates on the assumption that the law's treatment of marital rape first became controversial in the late twentieth century. Supporters of the exemption frequently assert that women never saw the need to challenge a husband's conjugal rights until approximately twenty-five years ago. The drafters of the American Law Institute's Model Penal Code, who offer the most sophisticated contemporary defense of the exemption, explain that the rule-"so long an accepted feature of the law of rape"-has only "recently come under attack." Judges similarly note that "until 1977 there was no serious challenge to the spousal exemption," or observe that "[u]ntil the late 1970's there was no real examination of" the subject whatsoever. Prominent modern feminists, in turn, identify themselves as part of the first organized political opposition to marital rape, "a reality about which little systematic was known before 1970." To the extent that participants on either side of the debate consider historical questions at all, they generally content themselves with a brief citation to Sir Matthew Hale, who wrote the most influential treatise defending the marital rape exemption at common law.

This consensual account of the history of marital rape is founded on a massive historical erasure. As Parts I through IV of this Article reveal, a husband's conjugal rights became the focus of public controversy almost immediately after the first organized woman's rights movement coalesced in 1848. Over the course of the next half century, feminists waged a vigorous, public, and extraordinarily frank campaign against a man's right to forced sex in marriage. This

nineteenth-century debate over marital rape constitutes a powerful historical record that deserves to be examined in its own right. It also provides a useful framework from which to assess and understand the course of the modern debate over the exemption.

Public discussion and legal decisionmaking about marital rape have proceeded without knowledge of this historical struggle. To some extent, this is because existing historical scholarship has not assimilated into the popular or legal consciousness. But the work that historians of the nineteenth century have done on the feminist call for sexual self-possession in marriage also remains very incomplete. The leading historical accounts do not analyze the feminist effort as a legal protest and a legal demand, made in an attempt to unseat a deeply rooted common law prerogative and denied. Instead, they discuss the feminist argument for a woman's control over her husband's sexual access as a chapter in the history of birth control or a moral campaign to rationalize sexual desire. This Article also reveals nineteenth-century feminism's garrulousness about the supposedly unspeakable. Scholars have frequently assumed that marital rape was a private concern that nineteenth-century feminists feared discussing in any public or systematic way. But the historical record makes clear that these advocates not only publicly demanded the right to sexual self-possession in marriage, they pressed the issue constantly, at length, and in plain language.

Excavating the nineteenth-century contest over the law's treatment of marital rape restores a significant chapter in the history of the first woman's rights movement in the United States, offering a new perspective on the commitments and effectiveness of that movement. Historians have often characterized the first woman's rights movement as narrowly intent on securing gender-neutral rights of access to the public sphere, with suffrage defined as the movement's overriding and most radical goal. Yet leading nineteenth-century feminists argued-in public, vociferously, and systematically-that economic and political equality, including even the vote, would prove hollow, if women did not win the right to set the terms of marital intercourse. Indeed, feminists explained a woman's lack of control over her person as the key foundation of her subordination. This claim was acutely gender-specific, grounded in the argument that women needed to control the terms of marital intercourse in order to regulate the portion of their lives they would have to devote to raising children. Convinced that women's subordination was ultimately rooted in the structure of marital relations, feminists demanded both the right to refuse and viable socio-economic alternatives to submission.

This agenda, admittedly radical, was neither dismissed nor ignored in the latter half of the nineteenth century, although it never fully transformed customary norms. The popular prescriptive (advice and instructional) literature on marriage contains strong evidence that the feminist critique of marital rape resonated with evolving societal understandings of desirable marital conduct. Very soon after nineteenth-century feminists began speaking about a wife's right to her own person, mainstream prescriptive authors began to offer extended analyses of the harm that marital rape inflicted. This prescriptive literature, however, did not challenge a husband's legal right to control marital intercourse. It marshaled, instead, an array of moral, physiological, and strategic arguments designed to convince husbands to voluntarily cede discretion over sex to their wives, promising that the concession would serve the interests of husbands as well as wives. In the hands of the popular prescriptive literature, the feminist demand for enforceable

rights to protect women from subordination to their husbands was recast into a series of suggested strategies for marital mutuality, to be pursued in a husband's interest as he saw fit.

Ultimately, the law of marital rape changed only incrementally in the nineteenth century, and only in the context of divorce. As an episode of law reform, the course of the nineteenth-century feminist campaign against marital rape illuminates a deep cultural resistance to altering this aspect of the law, at a time when other aspects of married women's legal status were beginning to evolve. States willing to augment the property rights of married women in the middle of the nineteenth century, or to ratify woman suffrage in the early twentieth century, were emphatically unwilling to subject husbands to prosecution for marital rape. At least in this arena where sexual and reproductive relations were so directly implicated, authoritative legal sources proved staunchly opposed to the notion of incorporating into the law a vision of marriage as a potentially disharmonious, abusive, even dangerous site of human interaction, in which wives might need and deserve legal rights against their husbands.

The progress of this nineteenth-century debate on marital rape sheds new light on the modern contest over the exemption and helps explain its trajectory. As Part V discusses, one of the most striking aspects of the modern defense of the marital rape exemption-not generally remarked on as such by modern commentators but clear in the light of history-is that it assumes the aligned interests of husband and wife. The exemption's contemporary defenders argue that the rule's continued existence protects marital privacy and promotes marital harmony and reconciliation, leaving both husband and wife better off. In fact, they go farther than that. In the vision of the modern defense of the marital rape exemption, the assumption of aligned interests between husband and wife is so strong that proponents do not acknowledge that a marital rape exemption might cause wives harm. The argument assumes that a wife's interests, like her husband's, are fully and consistently served in a marital relationship shielded from the possibility of criminal intervention for rape.

This line of reasoning has proven extremely successful, despite contemporary feminist efforts to analyze the exemption as an instrument of women's legal subordination. To be sure, the marital rape exemption has undergone more adjustment in the late twentieth century than in the nineteenth. The only change in the law's treatment of marital rape that nineteenth-century feminists lived to see consisted of marginal alterations in the terms on which divorce was available. Over the past quarter century, in contrast, a minority of states have eliminated the exemption and the rest have reduced its scope. But the marital rape exemption still survives in considerable measure in most states, at a time when the repudiation of women's legal subordination that was just beginning in the middle of the nineteenth century has been virtually completed as at least a formal matter. Twentieth-century feminists, like the nineteenth-century woman's rights movement, have had an impact on the law of marital rape, but one that falls far short of their aspirations or their level of success in other legal contexts.

In part, the dominant consensual vision of the history of marital rape helps explain why this modern argument from aligned interests has been so powerful. When one starts with the assumption that women have long accepted the marital rape exemption without protest, the proposition that the exemption continues to operate to the mutual benefit of husbands and wives is more likely to seem plausible and even intuitively convincing. That position might be more

difficult to sustain in light of a history of feminist argument and advocacy describing a husband's conjugal rights as a crucial constitutive element of women's oppression.

Yet it would be farfetched to suppose that the current legislative commitment to maintaining the marital rape exemption in substantial form, and the judicial decision not to intervene through equal protection doctrine, would suddenly dissipate if the record of struggle over marital rape were widely known. If the history of the nineteenth-century campaign against marital rape suggests anything, it is that the societal reluctance to acknowledge the possibility of antagonistic interests and hurtful behavior in marriage through the granting of legal rights to women is long-established, deeply embedded, and highly resistant to feminist challenge, particularly where questions of marital intercourse are at stake. On this view, it is hardly surprising that modern defenders of the exemption have been so inclined to assume and assert that the historical survival of a husband's conjugal privileges was uncontested; we have a tremendous cultural need to understand marital relations as consensual and harmonious, notwithstanding the contrary evidence we confront about the nature of some unions. The modern defense of the marital rape exemption is one of the most obvious, if odd, manifestations of that phenomenon. Never do we hear more about the joys of marital love, trust, and intimacy in a contemporary legal context than when courts, lawmakers, and commentators justify the preservation of a husband's legal right to rape his wife.

There is a highly relevant difference between the environment in which the first organized woman's rights movement campaigned against marital rape and present social and legal conditions, however, which suggests that the future course of the modern campaign against marital rape need not run parallel to that of its nineteenth-century predecessor. In the nineteenth century, the harm that a husband's right to marital rape inflicted upon wives was freely and explicitly acknowledged as a social matter. In an era still committed to a wide variety of legal structures subordinating women to men, that acknowledgment was not enough to convince mainstream writers or authoritative legal sources that the creation of legal rights protecting women against their husbands was an appropriate remedy. The modern defense of the marital rape exemption, in contrast, obscures and denies the harm that the rule inflicts upon women. This has been a crucial tactic because the injury that marital rape causes is far harder to defend, and the absence of legal remediation far harder to justify, in a nation now explicitly committed to women's legal equality. The historical record of struggle over marital rape helps reveal this harm, making concrete what the marital rape exemption's contemporary champions have concealed. In the process, this history provides a foundation upon which the modern feminist campaign against marital rape can build.

I. The Marital Rape Exemption as it was Articulated, Understood, and Defended in the Nineteenth Century

A. Women's Legal Status in the Nineteenth Century

1. The Consensual Account of Nineteenth- Century Women's History

The notion that a husband's conjugal rights were not contested until the late twentieth century accords with a common mode of thinking about women's legal status. This consensual account of the history of marital rape does not draw on any factual record, and it would find no comfort there. As this Article demonstrates, a husband's conjugal rights generated profound controversy in the latter half of the nineteenth century, virtually from the moment that the first feminist movement was organized. The account operates, instead, on a presumption: that longstanding aspects of women's legal status must have survived to the modern age because they embody a set of shared norms, long agreed to by women and men alike.

The premise that women's legal status is the product of consensual agreement is prominent even in many historical examinations of the first woman's rights movement. This line of scholarship acknowledges, of course, that nineteenth-century feminists campaigned to overturn laws subordinating women to men. But it depicts the feminist protest as limited in scope, and ultimately successful in convincing legislatures to reform the law wherever feminists pushed forcefully for change. These narratives of the nineteenth-century woman's rights movement stress the passage of the married women's property acts in a number of state legislatures, starting in the 1840s. At common law, married women had little, or no, right to contract, own property, or sue. Some of the first married women's property acts modified this common law regime by codifying court decisions that permitted married women to hold their own property in equitable trusts and by protecting a wife's real property from her husband's debts. Later statutes, enacted from the 1850s onwards, granted wives the right to keep their own earnings. All of this legislation, however, focused on questions of property distribution between husbands and wives that were of immediate practical concern to relatively few women: Only a small subset of wives in the nineteenth century either owned real property or worked outside the home. A number of historians nonetheless describe the married women's property acts as satisfying feminists' demands for the reform of marital status law. In this vision, the passage of the married women's property acts left suffrage as the most important, controversial, and far-reaching claim of the woman's rights movement. Suffrage became, these historians report, "the capstone of women's emancipation." "Nineteenth-century feminists and anti-feminists alike perceived the demand for the vote as the most radical element in women's protest against their oppression;" feminists were willing to "bypass[] women's oppression within the family." This account explains the history of women's legal status in the nineteenth and early twentieth-centuries as a story of steady liberalization and, ultimately, of consensualism. It suggests that the demands of the first feminist movement were all accommodated in turn, with the movement's agenda completed by the ratification of the Nineteenth Amendment in 1920. On this view, feminists never seriously challenged what remained unchanged-every aspect of the law of marriage that the married women's property acts did not reach.

The history of the struggle over marital rape complicates this picture. It reveals that the legal demands of the nineteenth-century feminist movement were not limited to suffrage and the marginal property reforms at stake in the married women's property acts. The first organized woman's rights movement offered a much more systematic critique of women's legal status in marriage. Indeed, feminists repeatedly identified a woman's right to control the terms of marital intercourse as the predicate condition for women's equality, without which full property rights and even suffrage would be meaningless. Nevertheless, the law's treatment of marital rape hardly changed over the course of the nineteenth century, and the modest reform that did occur was

limited to divorce law. The history of women's legal status in the nineteenth century did not follow just one path, of gradual progress and consistent success. Lawmakers willing to enact the married women's property acts or to ratify the Nineteenth Amendment apparently thought there was too much at stake in changing the marital rape exemption. The exemption's survival into the modern era is not evidence that the rule was never contested. The rule was maintained despite decades of feminist objection, because the exemption's defenders were far more powerful than its critics.

2. The Law of Marriage in the Nineteenth Century

To appreciate what the defenders of the marital rape exemption understood to be at issue requires a brief introduction to the law of marriage in the nineteenth century. The frequent identification of the married women's property acts as the culmination of the feminist campaign for the legal reform of marriage might suggest-wrongly-that the law of marriage was somehow equalized in the middle of the nineteenth century. That was hardly the case. The marital rape exemption was explained and defended amidst an elaborate legal regime that continued to explicitly subordinate wives to husbands.

In the nineteenth century, authoritative legal sources agreed that the rights and obligations of husbands and wives were most appropriately understood, explained, and regulated through the organizing rubric of a status/contract distinction. This distinction classified legal rules into two oppositional categories: status rules (like the marital rape exemption), which fixed marital rights and obligations in the law and made them unalterable by private agreement, and contract rules, which permitted husbands and wives, or couples contemplating marriage, to structure their own legal relationship if they preferred not to rely on the default rules set by the state. The marital relation was governed by both types of rules, mainly at alternate parts of its life cycle.

By the first half of the nineteenth century, individuals had a large measure of control over decisions about whether, when, how, and whom to marry. . . .

Status rules were much more consequential and prominent in controlling ongoing marital relationships. A couple could choose whether to marry, but could rarely modify the legal nature of their union. . . .

This structural account of status in the nineteenth-century marital relation only provides a partial picture, however. The rights and obligations of husband and wife also depended enormously, of course, on the substance of these status rules. In the nineteenth century, many of these rules operated along common law principles of coverture, which explicitly subordinated wives to husbands. William Blackstone, whose treatise on the laws of England was extremely influential throughout the United States, offered the classic definition. "By marriage," he wrote,

the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. Coverture united husband and wife

by subsuming a married woman's civil identity and according husbands wide-ranging control over their wives. Legal scholars explained the principle in the language of hierarchical authority and obedience. As James Schouler's family law treatise elaborated, "the laws of nature and divine revelation" jointly designated the husband as "the head of the family." "It [was] for the wife to love, honor, and obey: it [was] for the husband to love, cherish, and protect."

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The marital rape exemption had deep roots in this legal regime. It was understood, explained, and defended in the context of a wide array of marital status rules that conclusively inferred consent from a person's initial agreement to marry and coverture principles that organized marital status so that husbands exercised control over their wives.

B. The Marital Rape Exemption in Nineteenth- Century Criminal Law

There was not the slightest suggestion in nineteenth-century case law and treatises that a husband could be prosecuted for raping his wife. Rape laws stated what a '"male person"' could not do to '"any woman, other than his wife.'" Legal writers took pains to emphasize that "[a] man cannot be guilty of a rape upon his own wife," that "a husband does not become guilty of rape by forcing his wife to his own embraces," that rape "may be committed by any male of the age of fourteen or over, not the husband of the female." This clear prohibition on prosecution had its intended effect. I have been able to locate no nineteenth-century attempts to try a husband for personally raping his wife, and only one prosecution, Frazier v. State, from early in the twentieth century. The Texas court that heard Mr. Frazier's appeal in 1905 reversed his conviction for assault with attempt to rape, which is not surprising. The unexplained-and unique-puzzle of the Frazier case is how it reached a trial court and a jury in the first place.

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The reasons cited to explain and justify the exemption in nineteenth-century authoritative legal sources originated in the work of Sir Matthew Hale, a former Chief Justice of the Court of King's Bench in England. Hale's seminal treatise, the History of the Pleas of the Crown, was first published in England in 1736 and became extraordinarily influential in American legal circles almost immediately thereafter. Even more than a century after Hale's work appeared, American treatises and case law had not supplemented Hale's arguments for the marital rape exemption with alternate theories of their own.

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These sources depended on Hale so heavily because his arguments, grounded in principles of marital status law and common law coverture, still seemed so convincing to them. In the nineteenth century, American judges and lawyers who confronted the marital rape exemption routinely cited Hale's argument from irretractible consent. Hale's explication read, in full, as follows: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." The statement included no supporting citations, and

this appears not to have been an oversight. Even scholars who believe that ample common law authority already sanctioned the marital rape exemption when Hale wrote, posit that the theory of irretractible consent originated with him. Yet treatises and cases would repeat Hale's words, virtually verbatim, throughout the nineteenth century, often as the only explanation they offered for the exemption: "A man cannot be guilty of a rape upon his own wife; for the matrimonial consent cannot be retracted," they noted. "[T]he husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract." Several aspects of Hale's theory suggest why it proved so compelling.

Hale's understanding of presumed legal consent made enormous sense in the framework of nineteenth-century marital status law. As we have seen, all of these status rules operated automatically, subjecting every husband and every wife to predetermined constraints without permitting individual negotiation or waiting for individual consent. These status rules, moreover, remained in place as long as the marital relation itself: Opting-out was impossible while one's marriage lasted (and the prospects for securing a divorce were very limited). Whether a husband or wife actually supported these rules, or would have liked to contract around them, was irrelevant as a matter of law. The only occasion for actual agreement was a person's decision to marry in the first place. Hale's theory applied this same understanding of legal consent to one of the many status rules that organized the marital relation at common law, namely, the rape exemption. His work explained that, in this context as elsewhere, a married person's original agreement to marry justified a legal presumption of permanent and irretractible consent to marital status law.

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Hale's argument for the marital rape exemption also resonated deeply with the coverture principles that shaped the content of most marital status rules in the nineteenth century. His explanation started by noting the "mutual matrimonial consent and contract" of husband and wife, evidenced by their shared agreement to marry. But it proceeded to outline only the obligation that a wife owed her husband: "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband." In other words, Hale presented a couple's mutual decision to marry as grounds for subjecting wives and husbands to very different obligations and rights. Both a wife and her husband agreed to marry, but where this agreement gave the husband a right of sexual access to his wife, it bestowed an obligation on the wife to submit. One might think, as a purely theoretical matter, that this explicit sex-based differentiation required justification. But in historical context, of course, such an explanation could easily be understood as superfluous. Hale's theory accorded with coverture principles that generally subjected wives to a wide array of limitations and obligations that husbands did not bear. This is not to say that the relationship between husband and wife was not a reciprocal one at common law. It was; a wife had the right to support and protection from her husband. But while the marital relationship was reciprocal, it was also explicitly hierarchical. Wives were vastly more constrained; they surrendered many more legal rights by marrying. The marital rape exemption, with its unequal demands on husband and wife, was just one more example of coverture principles at work. And the widespread commitment to the operative tenets of coverture was another reason that Hale's irretractible consent theory struck authoritative legal sources in the nineteenth century as so satisfactory.

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Authoritative legal sources in the nineteenth century agreed that a husband could not, and should not, be prosecuted for raping his wife. Their explanations, grounded in principles and presumptions evident throughout nineteenth-century regulation of the marital relation and sexuality, explicitly presumed and supported the legal subordination of wives to husbands. Judges, lawyers, and legislators may have been willing to oversee some modification of other aspects of women's legal status at common law in the latter half of the nineteenth century, but they remained emphatically unwilling to tamper with a husband's marital rape exemption.

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Yet this is hardly the full story of the marital rape exemption in the nineteenth century. Authoritative legal sources unambiguously endorsed the exemption, and the popular understanding of a man's marital rights seems to have tracked the legal rule. This does not mean, however, that a husband's conjugal prerogatives went uncontested in the nineteenth century. As Part II recounts, the nineteenth-century woman's rights movement fought against a husband's right to control marital intercourse in a campaign that was remarkably developed, prolific, and insistent, given nineteenth-century taboos against the public mention of sex or sexuality. Leading feminists identified a husband's conjugal rights as the crucial constitutive element of women's subordination. They called for both an enforceable right to refuse a husband's sexual demands and realistic socio-economic alternatives to submission. The record of this struggle dramatically expands our understanding of the history of marital rape, and also provides important new insights into the goals, progress, and efficacy of the first organized woman's rights movement, which historians now frequently describe as overwhelmingly dominated by the battle for suffrage.

At the level of prescriptive norms about marital behavior, discussed in Part III, the organized feminist critique had genuine resonance, but ultimately not transformative power. The advocates of "free love," who operated on the leftward fringe of organized feminism in the nineteenth century, articulated the arguments of the woman's rights movement in a more radical voice. More surprisingly, popular tracts on marriage, reproduction, and health agreed that the exemption's consequences should be curbed in actual practice. Very soon after the organized woman's rights movement mobilized against a husband's conjugal rights, these mainstream authors began to describe and denounce the harm that marital rape inflicted on wives. This prescriptive literature, though, did not contest a husband's legal right to determine the terms of marital intercourse. Instead, it called on husbands to voluntarily refrain from exercising their legal prerogatives, on the ground that such restraint would benefit them as much as their wives. Where feminists demanded a structure of rights to free women from subordination in marriage, the prescriptive literature turned the concern over marital rape into a call for voluntary strategies to enhance marital happiness and harmony, to be pursued to the extent that they served a husband's interests.

In the end, as Part IV explains, the nineteenth-century feminists lived to see no legal reform of a husband's conjugal prerogatives beyond marginal adjustments in the terms on which divorce was available. The marital rape exemption outlasted the rise of the first organized woman's rights

movement in the United States, the enactment of the first married women's property acts, and the ratification of woman suffrage, but not because the issue was uncontroversial or unspeakable. In this realm where sex and reproduction were so clearly at issue, authoritative legal sources, like mainstream prescriptive authors, were unwilling to translate the growing social recognition that marital rape inflicted severe harm on wives into a legal acknowledgment of the dangers potentially posed by the marital relation, through the granting of legal rights that women might enforce against their husbands.

II. The First Organized Feminist Campaign Against a Husband's Conjugal Rights

Almost immediately after the Seneca Falls Convention in 1848 sparked the formation of the first organized woman's rights movement in the United States, feminists began to argue that full political and economic rights, including even the vote, would not be nearly sufficient to establish women's equality with men. Although the woman's rights movement was committed to each of these reforms, feminists simultaneously contended that all of them would ultimately prove hollow unless a married woman also had the right to regulate her husband's sexual access-the right to her own person, in the language of the nineteenth century. Nineteenth-century Americans were reluctant to speak openly about sex, and the leaders of organized feminism were well aware of the social sanctions for sexual frankness. But their commitment to establishing a woman's right of self-possession as the foundation of her equality led feminists to offer a systematic and thorough critique of marital rape in language wholly understandable to contemporary audiences.

The consensual account of the history of marital rape now accepted by the exemption's supporters and critics alike is simply wrong as a factual matter. The nineteenth-century woman's rights movement contested a husband's right to determine the terms of marital intercourse vociferously and profoundly. Indeed, this campaign constitutes an important chapter in the history of organized feminism in the nineteenth century, one that sheds new light on the nature and dimensions of that movement.

Many historians have described the leadership of the nineteenth-century woman's rights movement as classically liberal, meaning intent on securing a gender-neutral distribution of political and economic rights and uninterested in transforming the structure of familial relations. On this account, the first organized feminist movement sought to apply the principles of the Declaration of Independence to women, without challenging any of the document's other premises. Specifically, these historians contend that feminists grounded their appeal for gender-neutral rights of access to the public sphere in a natural rights argument that stressed "that women were essentially human and only incidentally female" and regarded any mention of women's particular position, especially in the family, "as suspect." All men and women were created equal, and the appropriate way to recognize their equality was by distributing political liberty, namely the right to vote for democratically-elected representatives. This historical interpretation of the woman's rights movement is grounded in a reading of women's demands for suffrage. But historians have extrapolated from the debate over suffrage to conclude that the nineteenth-century feminist movement was not alert to sources of inequality within the family that affected women's power and resources as a class or committed to gender-specific structural reform. Even where these historians briefly allude to the feminist claim for self-ownership in marriage, they do not indicate that this discussion might challenge their understanding of the

movement. Nineteenth-century feminists certainly did rely on arguments grounded in classic liberalism, which was the dominant philosophical tradition of the era and well suited to the suffrage demand. Indeed, the Declaration of Sentiments adopted at Seneca Falls was explicitly modeled on the Declaration of Independence. Yet, as the feminist argument for a wife's right to control her own person makes clear, the notion that the woman's rights movement limited itself to applying established liberal principles to women vastly understates the scope of the movement's theoretical commitments. These feminists began with liberalism's dedication to freedom and autonomy, but took it in radically new directions.

In defining what the right to one's own person meant, articulate feminists did not focus on gender-neutral rights to the public sphere or freedom from coercion by the state. They were concerned about married women who submitted to their husbands' sexual demands as the result of force, or threats, or because they lacked palatable alternatives. The woman's rights movement sought to establish a wife's right of refusal and to remake women's social and economic possibilities to create realistic alternatives to marriage. In making this claim, feminists recognized that some of the most important barriers to female self-possession were located within the structure of marriage, as well as the behavior of individual husbands. Feminists criticized both a husband's legal right of sexual access and the coverture rules that stripped married women of control over their family's resources. They also objected to the tenuous circumstances under which many never-married, separated, and divorced women lived, subject to both explicit employment discrimination that left women with few ways to support themselves outside of marriage and the social stigma associated with living outside a husband's household. Indeed, feminists called unwanted marital intercourse, where the wife had acquiesced because of her economic and social dependence on her husband, legalized prostitution. By that, they meant that the wife who was structurally compelled to have sex when she did not desire the act or its reproductive consequences was different only in name from the woman without any available option but to sell her body to strange men on the street. In this vision, women's economic, legal, and bodily vulnerability in marriage were all intricately connected. In demanding a woman's right to her own person, feminists fought all of these inequalities simultaneously.

This claim, moreover, was intensely gender-specific. Feminists campaigning against marital rape focused solely on a woman's right to control marital intercourse, and they did not articulate their demand as a call for women to receive the same protections that men enjoyed. Their argument for self-ownership was not based on a theory of bodily inviolateness that would apply to man and woman like. Rather, it looked to women's exclusive responsibility for raising children. Nineteenth-century feminists did not celebrate the norm assigning women all of the work of childcare. Nonetheless, they took it to be such a profound social expectation that they reasoned within it, contending that women needed to have control over marital intercourse so that they could regulate the amount of their lives they devoted to motherhood. In demanding a woman's right to her own person, the nineteenth-century feminist movement was asserting an equal right, and challenging gender-based subordination, in a completely gender-specific way. This is not to suggest that the woman's rights movement would have countenanced sexual violence against men. But organized feminism explained the right to self-ownership in an idiom radically different from that employed by the nation's founders: one that was grounded in a gender-specific understanding of the comparative social position of women and men.

A. A Wife's Right to Her Person as the Predicate for Women's Equality

The feminist critique of women's legal subordination quickly focused on a married woman's lack of control over her own person. This concern, moreover, was evident throughout the woman's rights movement; feminists' substantive views on the issue differed far less than their strategic appraisals about how it could best be pursued. The most useful starting point for understanding what organized feminism took to be at stake in demanding a wife's right to her person lies in the work of Elizabeth Cady Stanton, the most prominent and brilliant theorist of the movement.

As early as 1852, Stanton argued that marital intercourse was inappropriate under certain conditions. Addressing a temperance convention, she warned of the dire eugenic consequences of having children with an alcoholic husband and informed the wives of such men that they should cease sexual relations at once. "[L]ive with him as a friend," Stanton advised, "watch over and pray for him as a mother would for an erring son, soothe him in his wretchedness, comfort and support him, as best [you] may-but for woman's sake, for humanity's sake, be not his wife-bring no children to that blighted, dreary, desolate hearth." This exhortation, of course, left the key question ambiguous: How exactly was a wife to carry out her responsibility when her husband insisted on sexual access? Did Stanton expect a wife to rely solely on moral suasion? If so, what if persuasion did not work? Indeed, one might read this statement as placing married women in a double bind, wherein they would be held morally responsible for reproduction that they did not, in fact or in law, have the ability to control. Stanton's early ambiguity was deliberate. As she explained in a letter to Susan B. Anthony, her closest ally, Stanton had grave doubts about "whether the world [was] quite willing or ready to discuss the question of marriage." But Stanton's commitment to securing a married woman's right to her own person was clear. Indeed, in the same letter, she identified the issue as the pivotal site of women's subordination:

It is in vain to look for the elevation of woman so long as she is degraded in marriage. . . . Man in his lust has regulated long enough this whole question of sexual intercourse. Now let the mother of mankind, whose prerogative it is to set bounds to his indulgence, rouse up and give this whole matter a thorough, fearless examination. . . . I feel, as never before, that this whole question of woman's rights turns on the pivot of the marriage relation, and, mark my word, sooner or later it will be the topic for discussion. I would not hurry it on, nor would I avoid it.

In 1855, Stanton found the appropriate occasion for public frankness. That year, her cousin, Gerrit Smith, a leading antislavery reformer who was sympathetic to feminism, wrote her a public letter about the woman's rights movement. In this letter, he argued that women's continued inequality was largely the result of their dress, which was admittedly constraining and impractical. Stanton, in a forceful and public reply, explained women's inequality as rooted in their lack of control over their person. She identified this right as the most important that women hoped to achieve, more significant than any of the rights for which women had been publicly agitating since 1848. Indeed, Stanton articulated a view of woman's citizenship that began, locationally, with the body. She understood a woman's right to control her person as the foundational right upon which political and economic equality needed to rest if they were to have any value. Yet when Stanton considered what was at stake in having control over one's person, she did not speak in terms of physical transgression, condemning the bodily invasion of

unwanted intercourse or unwanted gestation. Instead, she focused on the social work of reproduction, the work of raising children. Stanton recognized that this work fell exclusively to women, and her demand for self-possession spoke only to women's claims. Stanton's argument about the right of self-ownership was, more accurately, an intensely gender-specific argument about a woman's particular right. She contended that women needed to have full control over marital intercourse so that they could determine how many children they would raise and when. As Stanton explained:

The rights, to vote, to hold property, to speak in public, are all-important; but there are great social rights, before which all others sink into utter insignificance. The cause of woman is . . . . not a question of meats and drinks, of money and lands, but of human rights-the sacred right of a woman to her own person, to all her God-given powers of body and soul. Did it ever enter into the mind of man that woman too had an inalienable right to life, liberty, and the pursuit of her individual happiness? Did he ever take in the idea that to the mother of the race, and to her alone, belonged the right to say when a new being should be brought into the world? Has he, in the gratification of his blind passions, ever paused to think whether it was with joy and gladness that she gave up ten or twenty years of the heyday of her existence to all the cares and sufferings of excessive maternity? Our present laws, our religious teachings, our social customs on the whole question of marriage and divorce, are most degrading to woman . . . . Here, in my opinion, is the starting-point; here is the battleground where our independence must be fought and won.

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Stanton's argument for a woman's right to her person, first fully developed in public in 1855, remained her pressing concern for years. She consistently pursued the issue, with more or less explicitness, although she was well aware that a demand to restructure the most intimate relations of marriage would be extremely controversial. A year after Stanton's reply to Smith, Lucy Stone, another leader of the woman's rights movement, wrote Stanton privately, asking her to speak out again on "a wife's right to her own body" at an upcoming National Woman's Rights Convention, notwithstanding "the censure which a discussion of this question [would] bring." Stanton agreed to write to the convention, although her public letter was less direct than Stone's private correspondence. Rather than offer a complete account of the claim for control over one's person, Stanton effectively referenced and invoked her earlier argument. "Is it any wonder," she asked, "that woman regards herself as a mere machine, a tool for men's pleasure? Verily is she a hopeless victim of his morbidly developed passions." In the feminist reordering, woman would be "the rightful lawgiver in all our most sacred relations." Women reading this letter would have had no difficulty understanding its intent. In the years to follow, Stanton spoke about a married woman's right "to her person" again and again. She remained convinced that a wife's right to refuse her husband's sexual demands was the bedrock foundation needed to support equality. "Woman's degradation is in man's idea of his sexual rights," Stanton wrote to Anthony. "How this marriage question grows on me. It lies at the very foundation of all progress."

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B. Structural Consent and Marriage as Legalized Prostitution

Nineteenth-century feminists often spoke of a woman's right to her person by explaining that, without this right, economic and political equality would be meaningless. The statements reflected their view that equal citizenship needed to be grounded in self-ownership, because a wife's right to control her husband's sexual access would enable her to determine the conditions under which she performed reproductive labor. Yet this point constitutes only part of the feminist claim, and overstates the distinction that these women drew between personal self-possession, and political and economic rights. When feminists elaborated their understanding of consent, they made clear that they would not be satisfied with legal reform recognizing a wife's right to herself. Instead, they argued that a wife could only freely consent to marital intercourse under circumstances in which she had both the legal right to refuse and realistic alternatives to submission. This was a structural understanding of consent that considered how the structure of the marital relation, rather than simply the behavior of individual husbands, shaped women's opportunities as a class. Feminists noted, and attacked, the tremendous legal, social, and economic pressures that pushed women to marry and kept them there. A woman who lived outside a husband's household, or worse yet divorced or separated, was marginalized and often found it extremely difficult to support herself, given laws and practices that explicitly excluded women from most jobs and suppressed the wages for women's work. In marriage, coverture principles stripped a wife of almost all legal claims to her household's resources and power, leaving her to confront her husband as an economic, social, and political dependent.

The language of "legalized prostitution" became one of the most powerful idioms in which nineteenth-century feminists articulated this structural understanding of consent. Even before the organization of the first woman's rights movement, Hale and his successors had anxiously recognized the similarities between the situation of wives subjected to the marital rape exemption and prostitutes. . . . [T]hese lawyers and judges were never willing, or able, to present a substantive explanation differentiating the work of prostitution from the sexual services that husbands were entitled to take from their financially dependent wives. Instead, the authoritative legal sources sought to distinguish the two classes of women in jurisdictional terms. They argued that only extramarital intercourse could constitute prostitution, that sex could only be illicit and degrading if a woman's sexual partner was not her husband. The woman's rights movement emphatically rejected that notion and was convinced that it had spotted a crucial weakness in the defense of a husband's conjugal rights. Precisely countering the claims of the exemption's supporters, feminists employed the term legalized prostitution to describe the condition of wives who acquiesced to marital intercourse because they had no practical alternative, nowhere else to go and no other means of negotiating their marital relationship. They argued that the legitimacy of sexual intercourse depended on a woman's genuine consent (understood structurally), contending that there was little relevant difference between married women who effectively traded sexual access in return for their husbands' socio-economic support, and prostitutes who explicitly sold their sexuality to strangers because they, too, did not have a better way to earn a living. Legal and illegal prostitution were mirrored phenomena in the feminist vision, understandable on the same terms.

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III. Alternate Iterations of the Nineteenth- Century Critique of Marital Rape

Criticism of marital rape in the nineteenth century was not limited to the members of the organized woman's rights movement. Accounts of the harm that marital rape inflicted on wives appeared in other iterations, both on the fringes of feminism and, more remarkably, in the popular prescriptive literature on marriage, health, and reproduction. The nature and direction of the causal links between these social conversations is, to be sure, difficult to trace precisely. Most likely, the causation was circular, so that the organized feminist campaign was facilitated by growing opposition to marital rape outside the movement, at the same time that the efforts of organized feminism helped foster and give momentum to this wider opposition. What is striking, though, is that there was a near simultaneous broaching of the question of marital rape in a number of different social communities in the latter half of the nineteenth century, suggesting that the woman's rights discourse about a supposedly unspeakable subject was far more centrist and in dialogue with customary norms than one might have otherwise assumed.

One site of opposition to marital rape outside of the organized woman's rights movement in the nineteenth century centered on the advocates of what was then known as "free love." These figures, less the constituents of a cohesive movement than a series of loosely affiliated individual thinkers, occupied the left-most part of nineteenth-century feminism, although at the margins there was some overlap in membership with the woman's rights movement. The free lovers agreed with the essential elements of the organized feminist argument for a woman's right to her own person. But they articulated their critique of the current structure of marital relations more radically and expansively, and called for even more transformative change than the woman's rights movement envisioned. Many members of the woman's rights movement resented the controversial free lovers and labored to disassociate themselves from free love in the popular mind. Yet it is hardly clear that the advocates of free love hampered the woman's rights movement's campaign against marital rape. The work of the free lovers added to the reasoning underlying the organized feminist attack on a husband's conjugal prerogatives. And the free lovers' deliberately provocative style may have made the woman's rights movement appear less radical by comparison.

More importantly perhaps, the popular prescriptive literature contains powerful evidence that the feminist campaign against marital rape resonated with changing social norms about good marital behavior. Dozens of mainstream prescriptive writers began to publish extensive discussions of the moral, physiological, and eugenic harm caused by marital rape almost immediately after the organized feminist movement began to address the issue. This literature, however, did not contest a husband's legal right to determine the terms of marital intercourse. Rather, it sought to convince husbands to voluntarily refrain from exercising their acknowledged legal prerogatives, assuring them that the accommodation would benefit men as much as their wives. Feminists insisted on a wife's right to control her own person, to be pursued in the interest of ending women's marital subordination. The prescriptive literature certainly helped disseminate societal recognition of the proposition that marital rape inflicted injury on women. But that literature's version of the claim recommended only noncompulsory strategies for marital health, happiness, and harmony, to be pursued at a husband's discretion so long as they furthered his self-interest.

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A. The Advocates of Free Love

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B. The Popular Prescriptive Literature

The prescriptive literature on marriage in the second half of the nineteenth century was preoccupied with warning husbands to refrain from marital intercourse when they did not have their wives' consent. Popular authors, like the woman's rights reformers, were remarkably frank, even verbose, in their discussion of the issue. Marriage manuals, written by both men and women and widely read, warned husbands that subjecting one's wife to marital intercourse when she did not want to risk the possibility of motherhood was immoral and dangerous to the health of man, woman, and unwillingly produced child. They called on husbands not to exercise their legal prerogatives and proposed a wide array of stratagems to facilitate that result. In this way, criticism of marital rape registered and reverberated in a wider popular conversation about intimacy in marriage in the nineteenth century.

It is important to recognize, however, the differences between the feminist rights discourse on marital rape and the work of mainstream prescriptive writers. First, the popular prescriptive literature focused on each individual husband's behavior. These texts wanted husbands to refrain from nonphysical coercion, as well as physical force compelling a wife to submit to marital intercourse. But their understanding of a wife's consent did not include the structural concerns about marriage that occupied feminists; these writers did not suggest an inquiry into the limited economic and social opportunities that pushed women into marriage and kept them there.

More fundamentally, the operative premise behind the popular prescriptive literature's argument for a husband's voluntary restraint was that he had the authority to act differently. This literature explicitly addressed social norms, rather than the law. Yet the two were never fully separable. The law shaped the prescriptive literature's understanding of society, even as that literature urged husbands to act better in practice than the law required. The prescriptive literature's entire discussion of manly self-restraint assumed and accepted the baseline proposition that a husband had the right to control the terms of marital intercourse. He might be persuaded not to avail himself of that entitlement, by tracts promising that marital mutuality would benefit a husband at least as much as his wife. But prescriptive writers acknowledged that the choice was ultimately his. This was the very proposition that the woman's rights activists vigorously disputed. Nineteenth-century feminists explained a husband's conjugal prerogatives as an instrument of women's subordination and demanded rights that women could enforce against their husbands. In the prescriptive literature, this rights discourse was transformed into suggested strategies for marital health, happiness, and harmony, to be pursued in a husband's interest and at his discretion.

1. The Prescriptive Account of the Harm of Marital Rape

Like the nineteenth-century feminists, prescriptive writers elaborated at length on the harm that marital rape inflicted. But the prescriptive literature's focus was not on wives alone. This literature warned that marital rape inflicted severe injuries on wives that were morally untenable. It went on, however, to report that marital rape ultimately operated against a husband's self-interest as well, appealing directly to the party who retained the right of control.

Prescriptive writers put forth three prominent moral arguments explaining the harm that marital rape caused wives. These arguments were not feminist in their reasoning; they did not consistently recognize the fundamental equality of men and women. But they were real and empathetic nonetheless. . . .

The prescriptive literature supplemented these moral claims against marital rape with a series of physiological arguments that made clear that the injury caused by marital rape was not limited to wives. This literature warned that the practice of marital rape actually endangered the health of its male perpetrator. It also indicated that the physiological injury that marital rape inflicted on women and the children they unwillingly bore inevitably redounded to men's material, emotional, and dynastic detriment as husbands and fathers. Nineteenth-century feminists, demanding a woman's enforceable right to her own person, focused on the injury that marital rape caused women. Prescriptive writers, hoping to appeal to the self-interest of husbands, explained the physiology of marital rape in much more male-centered terms than those feminists employed, using their own health claims to establish their own (male-centered) case for voluntary restraint.

In contending that husbands put their own health at risk when they subjected their unwilling wives to marital intercourse, prescriptive writers built on a widespread understanding that a man could endanger his prospects by expending sexual energy. Many articulate Americans in the nineteenth century envisioned the male body as a closed energy system and sexual activity as a taxing drain, so that the outlay of sexual effort would leave a man physically weakened and with less vigor to devote to intellectual, economic, and moral pursuits. This presupposition was endorsed by leading medical professionals, popular guides to men's health, and even some of the utopian experimental communities of the day, which taught their male followers to avoid sexual climax.

The prescriptive literature on marriage contained analogous warnings about the still more severe physiological consequences for men who had marital intercourse without their wives' consent. Dr. Cowan issued one of the most complete accounts of the potential dangers. "[I]f the husband demands his rights from the wife, who only accedes through dread of consequences," he warned, "the effect on the man's brain and nervous system is very little different from that produced by self-abuse." Indeed, Cowan elaborated a progression of symptoms with starkly debilitative consequences: "a general weakness of the nervous system;" the "inability to promptly digest ordinary food;" "a weakening of the joints, and especially the joints of the knees, a softening of the muscles, a want of strength, and a motion of an unsteady, dragging nature, differing so noticeably from the springing, strong, elastic carriage of the continent individual;" "dyspepsia;" "general debility;" "consumption;" "weakened and impaired" memory; "disordered vision;" "impaired" hearing; and "[p]aralysis of the lower extremities.". . .

The prescriptive literature also described the marital disfunction, financial strain, and household disorder that would come to pass if wives were physiologically damaged by unwanted marital intercourse, explaining women's welfare in terms of their husband's self-interest. . . .

The physiological dangers confronting the children that these wives unwillingly conceived were hardly less severe. In this context too, the prescriptive literature advised husbands that they

would ultimately bear the cost of the injury they inflicted through marital rape, in this case through a diminution in the quality of their offspring. . . .

2. Manly Self-Restraint and Self-Interest

The marriage manuals and health guides of the second half of the nineteenth century offered an extensive account of the injury that marital rape inflicted, on husbands along with their wives and children. But this literature did not proceed to advocate legal reform. Unlike the nineteenth-century feminist movement, it accepted a husband's right to determine the terms of sex in marriage. The prescriptive literature described the harm that marital rape caused in order to set the stage for the presentation of a variety of strategies designed to encourage husbands to refrain voluntarily from exercising their admitted legal prerogatives. Having recognized a husband's sexual entitlement, these strategies appealed to a man's self-interest explicitly and without apology. Prescriptive writers acknowledged that a husband's conjugal restraint would benefit his wife, but hastened to reassure their male readers that voluntarily ceding control over marital intercourse would always strengthen and solidify a husband's power and position in his family. Their arguments for voluntary restraint were directed at a man's self-esteem and his property interest in his wife's welfare. Storer, the leader of the anti-abortion movement, offered the quintessential explanation for his recommendation that husbands no longer subject their wives to unwanted intercourse, characterizing a wife's improved health and longevity solely as an aspect of her husband's well-being:

And here let me say, that I intend taking no ultra ground; that I am neither a fanatic nor professed philanthrope; and that in loosing, as I hope to do, some of woman's present chains, it is solely for professional purposes, to increase her health, prolong her life, extend the benefits she confers upon society-in a word, selfishly to enhance her value to ourselves.

Much of the prescriptive literature evoked similar themes, albeit in somewhat less blatant and extreme form.

A number of writers proposed that a husband think of voluntarily ceding control over intercourse to his wife as the best possible manifestation of manliness, a way to confirm and display his noble character. This was a particularly powerful approach because it connected to an enormous body of existing sentiment which insisted that the key characteristic of successful masculinity was self-restraint in the face of strong temptation. . . . In the latter half of the nineteenth century, prescriptive writers brought the weight of this understanding of masculinity to bear on the question of forced sex in marriage. Boyd emphasized that "it is for woman to determine when (and when only) the closest relations may be assumed," by reminding husbands that "[i]t is the part of a true man to render instinct and desire wholly subject to reason and conscience." Indeed, he compared a husband's sexual desire to a formidable racehorse that needed to be broken by masculine human will. "If a mettlesome young blood-horse becomes your property, do you let him tame you and drive you?," Boyd asked. If a husband did, "such failure would betray weakness and lack of manhood. Just so with regard to the amative propensity; you are to get the upperhand and keep it. Your manliness is shown when you possess yourself and master passion, not when passion overpowers and possesses you." . . .

Many authors also counseled husbands that ceding control over marital intercourse was the only way to preserve the enormous personal benefits of marital love, happiness, and harmony. . . .

On a related note, the prescriptive literature promised husbands that their voluntary restraint would ultimately lead to more pleasurable marital intercourse, making a husband's self-interest in his wife's welfare clearer still. Duffey predicted that a husband who continued to court his wife's affection after marriage and wait for reciprocation, would find "greater delight" in a "monthly marital conjunction" than a selfish sensualist could obtain from "daily or semi-weekly excesses." A husband, she wrote, "will have only himself to blame, if he is bound all his life to an apathetic, irresponsive wife." Cowan, a less elegant if more direct writer, surmised that "nearly all women . . . who are used by their husbands simply as chattels . . . lie passive and motionless." "As to the possible pleasure to him of such a union," Cowan suggested that a husband "might as well practice solitary indulgence." . . .

Even outside the woman's rights movement and the domain of the free lovers, the question of marital rape was hardly unthinkable or unspeakable in the latter half of the nineteenth century. The popular prescriptive literature agreed with feminists, publicly and at length, that marital rape inflicted severe harm. But feminists made a rights claim putting forth women's interests, as distinct from and defined against the interests of men. They wanted a wife to have the legal right and socio-economic ability to refuse her husband's sexual demands against his will, recognizing that voluntary concessions were an unreliable defense against potentially recalcitrant, dangerous, and selfish husbands. The popular prescriptive literature, in contrast, did not situate its opposition to marital rape in an analysis of women's subordination, and did not support giving women enforceable rights against men. It left decisive control over marital intercourse in the husband's hands, to be exercised in his own interest as he saw fit. Popular prescriptive writers promised that the interests of husband and wife coincided on the issue of marital rape (although one could deduce from their descriptions of contemporaneous marital relations that many husbands had been slow to recognize that fact). The prescriptive account of the injury that marital rape produced focused as much attention on the costs to husbands as wives. Yet it was clear which party to the marriage would prevail when marital mutuality broke down.

IV. Circumscribed Legal Reform in the Nineteenth Century: The Law of Divorce

In the end, authoritative legal sources in the latter half of the nineteenth century refused to alter the law's treatment of marital rape, with the exception of marginal changes in the terms on which divorce was available. The fate of the feminist campaign for a woman's right to her own person reveals a deep reluctance to tamper with a husband's conjugal prerogatives, in an era when lawmakers were willing to ameliorate the property rights of married women and, eventually, to ratify woman suffrage. Social recognition of the proposition that marital rape inflicted severe harm on women was widely disseminated. But in this context where marital intercourse and reproduction were so manifestly at stake, legal authorities-like popular prescriptive writers-were strongly disinclined to incorporate into the law a recognition of marriage as a possible site of antagonism and danger, in which women might need and merit enforceable legal rights protecting them from their husbands.

Authoritative legal sources considering marital rape in the last decades of the nineteenth century were only willing to make limited adjustments at the peripheries of the divorce regime. Over time, in some jurisdictions and in some extreme circumstances, it became easier for a (privileged) woman to secure a divorce based on her husband's unwanted sexual demands, or to prevent her husband from divorcing her because she refused marital intercourse. These changes took feminists' concerns into account, but in a severely modified form.

A. A Husband's Unwanted Sexual Demands as Legal Cruelty

The first site of change in the law's treatment of marital rape in the nineteenth century revolved around the question of whether, and when, a husband's unwanted sexual demands might constitute legal cruelty entitling his wife to divorce. This was a significant issue because divorce in the nineteenth century was available only for cause and the recognized grounds of fault were highly limited, the most important being adultery, desertion, and cruelty. In the first half of the nineteenth century, courts were almost completely silent on the question of whether marital rape could ever be cruelty. The one notable case on the subject during this period, Shaw v. Shaw, suggested that wives would encounter extreme difficulty in establishing the claim.

Emeline Shaw's petition for a divorce on the ground of intolerable cruelty reached the Connecticut Supreme Court of Errors in 1845. Mrs. Shaw needed to avoid sexual intercourse for clear and undisputed health reasons, which the court acknowledged. But her husband, Daniel Shaw, had repeatedly and forcibly compelled her to submit, despite her protests and attempts to escape. The supreme court of errors agreed with Mrs. Shaw that involuntary marital intercourse might constitute cruelty in cases where the wife had physiological grounds for refusal. Yet it denied her a divorce, on the theory that there was insufficient evidence that her husband had known the state of her health and understood the consequences of his behavior. Mrs. Shaw, the court admitted, had told her husband that his sexual demands endangered her health. But she could not prove, the court reasoned, that he believed her. . . .

Within less than a decade, however, the Shaw decision was being criticized, even in legal treatises. . . .

In the last quarter of the nineteenth century, some courts found legally cognizable cruelty where a husband had subjected his wife to excessive sexual demands and those demands had endangered her health. Allowing these women to divorce their husbands was, it should be noted, a liberalization. Indeed, the decisions were part of a larger liberalization of divorce law in postbellum America, a period in which the number of divorces granted to women claiming cruelty escalated dramatically. These successful divorce suits for sexual cruelty suggest that the critique of marital rape articulated, in different forms, by feminists and popular prescriptive writers was influencing social understandings about appropriate marital behavior, at least in arenas otherwise receptive to change.

But the liberalization was strictly limited. First, the potential availability of divorce for cruelty did not change the law governing intact marriages. The legal possibility of exit may have given some wives more leverage in negotiating the terms of marital intercourse. But it did not do more than that to protect wives from their husbands' sexual demands while the marriage lasted.

Husbands retained their prerogatives without the threat of either criminal sanction or any other legal intervention. Until divorce, Hale's theory of irretractible consent remained in place.

Second, divorce was not an available or attractive option for wide segments of the female population in the nineteenth century. Pursuing a divorce petition for sexual cruelty was expensive and risky. Judicial recognition of cruelty could be explicitly class-conscious, with poorer wives expected to endure more. The public exposure involved in such a divorce suit might also be highly humiliating. As Dall observed, "women know that the coarsest woman [would have to] have suffered in no ordinary degree, before she could [be] driven into a public statement of such grievances." More fundamentally, many women, even if they could have successfully weathered a divorce suit, lacked real socio-economic alternatives to marriage-a point feminist critics made abundantly clear. Women were likely to be particularly concerned about the well-being of their children and their ability to support them. Indeed, the economic vulnerability that most women, and children, experienced upon divorce led a number of nineteenth-century feminists to actively oppose the liberalization of divorce laws as a general matter. In addition, many women had profound religious or moral objections to divorce. Opposition to divorce remained widespread among American churches in the second half of the nineteenth century (especially in the absence of adultery). Even some members of the woman's rights movement argued that marriage vows represented an unseverable commitment.

Third, the cruelty decisions accepting a husband's unwanted sexual behavior as ground for divorce only recognized harm in a confined category of cases. Under this case law, a wife could not secure a divorce simply because her husband had raped her. Marital rape, standing alone, was not a recognized cause for divorce. Instead, petitioning wives had to demonstrate: (a) that their husband's unwanted demands were unusual, either quantitatively excessive or particularly brutal; and (b) that these demands had jeopardized their health.

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The law's treatment of marital rape was not the product of consensual agreement in the nineteenth century. The vision of marital rape as uncontested terrain until the last quarter of the twentieth century effaces a vibrant movement in opposition. Feminists, in the first organized woman's rights movement and on its left-ward periphery, demanded a woman's right to control her own person in marriage, arguing for both an enforceable prerogative to refuse marital intercourse and palatable socio-economic alternatives to submission. This campaign was intense, public, and remarkably frank. It recognized marriage as a potentially antagonistic or abusive relation, and strove to provide women with rights and resources they could utilize independent of their husbands' agreement, to defend themselves from a husband's unwanted sexual demands.

This was a radical agenda, yet criticism of marital rape was neither unthinkable or unspeakable in the popular discourse of the latter half of the nineteenth century. Very soon after the woman's rights movement initiated its public battle against marital rape, sustained accounts of the harm that marital rape inflicted on wives began to appear in the mainstream prescriptive literature on marriage, reproduction, and health. This literature, however, did not support legal change. Instead, it urged husbands to practice voluntary restraint, on the ground that the concession would benefit them at least as much as their wives. In the pages of the prescriptive literature, the

feminist rights discourse was recast as a series of suggested strategies for marital harmony, health, and happiness. The popular prescriptive literature promised that the interests of husbands and wives were actually and always aligned on the question of marital rape, but left final control over a wife's person with her husband, to be wielded at his discretion.

Ultimately, the law's treatment of marital rape changed just marginally in the latter half of the nineteenth century. Women never won the right to control their own persons in marriage that feminists had sought. Indeed, by century's end, the only legal protection a wife could muster against an uncooperative husband was the slender solace provided by tepid liberalization of the divorce law. Social recognition of the harm and prevalence of marital rape was widely disseminated. Yet authoritative legal sources-like popular prescriptive authors-remained unwilling to structure women's legal rights around the proposition that spousal negotiations over the terms of marital intercourse might be a site of divergent interests and danger, where wives needed and justly deserved the ability to protect themselves from their husbands.

V. The Modern Debate over the Marital Rape Exemption

As the feminist movement increasingly turned its attention to suffrage in the early twentieth century and then lost much of its organizational spark after suffrage was won, debate over marital rape dwindled. The first sustained contest over marital rape was coterminous with the life span of the first woman's rights movement in the United States. Begun almost immediately upon the organization of nineteenth-century feminism, it dissipated when the movement disbanded. It was not until the last quarter of the twentieth century that the legal status of marital rape was again subject to significant attack, led this time by the second organized women's movement. Here too, however, the resulting reform has been partial and uneven.

Divorce is now widely available. Indeed, every state has enacted some form of no-fault divorce in recent years, so that the law of cruelty and desertion has become far less important and developed. But the possibility of divorce, now as in the nineteenth century, does nothing to alter the law governing intact marriages. Moreover, many of the practical obstacles to divorce that women confronted in the nineteenth century remain in place to a significant extent today. Most notably, divorce is still economically disastrous for the average woman, especially if she is raising children.

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Reform of the criminal exemption has also been fragmentary. A majority of states still retain some form of the rule exempting a husband from prosecution for raping his wife. This is where modern courts, legislators, and commentators defending or contesting the legal status of marital rape have focused their attention. The history of the nineteenth-century campaign against marital rape casts new light on this modern debate over a husband's conjugal prerogatives and helps explain its course.

One of the most remarkable characteristics of the modern defense of the marital rape exemption-apparent when considered in light of the historical contest over a husband's conjugal prerogatives but generally unnoticed in contemporary commentary-is that it presupposes the aligned interests

of husband and wife. The two arguments that modern defenders of the exemption have chosen to stress most prominently are that the law protects marital privacy and promotes marital harmony and reconciliation. These claims are slightly different, but they have a common project, which is to explain how the exemption advances the shared concerns of men and women, benefitting both. Indeed, contemporary supporters of the exemption go beyond that contention. Their assumption of conjoined interests in marriage is so absolute that proponents do not concede that a marital rape exemption might inflict harm on wives. Their argument assumes that a wife's interests, like her husband's, are always and wholly served in a marital relationship where her husband cannot be prosecuted for raping her. In the exemption's modern defense, the potential harm of marital rape is rendered invisible.

This strategy has been very successful, modern feminist efforts against the exemption notwithstanding. . . .

In part, the consensual account of the history of marital rape, now accepted by supporters and opponents of the exemption alike, helps explain the success of the exemption's modern defenders. The proposition that the marital rape exemption serves the shared interests of husbands and wives is likely to appear more reasonable, even commonsensical, if one approaches the exemption with the assumption that it has long been the subject of consensual agreement between men and women. That proposition would be more difficult to maintain if the historical contest over marital rape, in which feminists vociferously opposed a husband's conjugal prerogatives as the ultimate foundation of women's subordination in marriage, was widely known. As this Article has revealed, the marital rape exemption did not survive into the twentieth century because it lacked opposition or because no organized cohort of women thought that the exemption operated to the benefit of husbands but the great detriment of their wives.

Still, it would be implausible to suggest that the present legislative commitment to preserving some substantial form of the marital rape exemption, and the judicial decision to not intercede under the Equal Protection Clause, would instantly collapse, if the historical struggle over marital rape became common knowledge. If the fate of the nineteenth-century campaign against a husband's conjugal prerogatives illuminates anything, it is that society's reluctance to acknowledge that marriage is a potentially antagonistic and dangerous relation by giving women legal rights against their husbands is long-standing, well-entrenched, and extremely resistant to feminist opposition, especially where marital sex and reproduction are directly implicated. Even the nineteenth-century prescriptive authors who expounded at length on the harm that marital rape was inflicting on wives were unwilling to translate that social recognition into support for granting women legal entitlements. Where feminists made a rights claim advancing women's interests as they were distinct from and defined in opposition to those of men, the prescriptive literature put forth a series of suggested strategies for marital harmony and happiness. Authoritative legal sources, in turn, absolutely refused to alter a husband's exemption from prosecution for raping his wife. After a half-century of writing and advocacy (feminist and otherwise) exploring sexual abuse in marriage, the only change in the legal status of marital rape consisted of a marginal amelioration in the terms on which divorce was available to (privileged) women.

Phrased another way, then, one reason that people are so attracted to the consensual account of the history of marital rape in the first place is that we greatly prefer to envision marital relations as loving, mutually supportive, and harmonious, rather than loathsome, abusive, and conflict-ridden-even though, as a practical matter, we necessarily and all the time encounter evidence that the latter state of affairs characterizes some relationships. That cultural denial helps explain, for instance, the studies finding that even people who know current divorce rates, believe that the possibility that they will divorce is negligible and fail to plan rationally for the contingency. The contemporary defense of the marital rape exemption is one of the most conspicuous, if bizarre, expressions of this phenomenon. Modern courts, lawmakers, and commentators never talk more about the wonders of marital love, trust, intimacy, and respect than when they champion a husband's freedom from prosecution for raping his wife.

The cultural need to understand marital relations as consensual and harmonious also helps explain another phenomenon of approximately the last quarter-century. During this period, dozens of states revisited their marital rape exemptions, but decided to retain them in substantial form nonetheless. One result of this review was that states modified the scope of their exemptions. Another result was that virtually every one of these states rewrote its marital rape exemption in gender-neutral terms, in contrast to the explicit and enthusiastic gender-specificity of the common law formulation. This latter, linguistic change has almost no practical consequences, given the accuracy with which one can predict that marital rapes will be committed by husbands on wives. But as a matter of modern equal protection doctrine, it is very important.

Statutes that explicitly classify by sex are automatically subject to heightened scrutiny under the Equal Protection Clause, which relatively few statutes have managed to survive. Once a statute has been made formally gender-neutral, however, it is subject to heightened scrutiny only if a plaintiff can establish the equivalent of legislative malice: that the gender-neutral statute was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" women. This is precisely the sort of malignant motivation that is least likely to be uttered in the constitutionally conscious age in which we live. So, as a practical matter, modern marital rape exemptions are subject to rational basis review. Although a small number of state courts have found exemptions unconstitutional on a rational basis analysis, a marital rape exemption is likely to survive this relatively unrigorous level of constitutional scrutiny, which asks only whether the legislature has articulated one reason for the exemption that the court is willing to accept as rational.

Modern feminist critics, including most prominently Robin West, have provided an excellent doctrinal analysis of the status of gender-neutral laws under contemporary equal protection doctrine, and explained the difficulties that the modern feminist campaign against the marital rape exemption has encountered as rooted in the inadequacy of that doctrine. But feminists have not devoted nearly as much attention to the question of why the Supreme Court might have chosen to privilege gender-neutral laws in the first place, and whether there is something more behind the states' move to gender-neutral marital rape exemptions than a desire to survive constitutional scrutiny. The fate of the historical struggle over marital rape, and the nature of the modern arguments put forth in the exemption's defense, suggest that the focus on gender-

neutralization is tapping into a larger cultural story about mutuality in relations between the sexes, particularly in marriage.

The effect of the current equal protection doctrine on gender-neutrality is to treat men and women as occupying interchangeable roles, in all cases except where the text of the statute or explicit legislative statements of malicious intent force the court to do otherwise. It is a doctrinal methodology for denying the possibility that the interests of men and women may be unaligned, differentially affected, even antagonistically opposed to one another, and not interchangeable at all. Marital rape exemptions are not the only statutes to have undergone recent revision into a gender-neutral idiom. . . . Yet the strength of the yearning to insist within the law that the interests of men and women always harmoniously coincide is nowhere more apparent than with the marital rape exemption, where the sex-specificity of the underlying conduct is extraordinarily pronounced, but equal protection doctrine nonetheless treats husbands and wives as though they occupy unassigned positions.

All this indicates that there are deep-seated reasons why the course of the modern effort against marital rape importantly resembles that of its nineteenth-century predecessor, where feminists campaigning to unseat a husband's conjugal prerogatives had much less of an impact on the law than they sought, or won elsewhere. There is no easy path upon which contemporary feminists might proceed, given the profound and long-lived societal reluctance-particularly where marital intercourse and reproduction are at issue-to formulate women's legal rights around the understanding that marital relations are potentially antagonistic and dangerous. There is, however, a very pertinent difference between the arena in which the first organized woman's rights movement operated and the contemporary environment, which suggests that the future fate of the modern feminist campaign against marital rape need not track the historical record.

In the latter half of the nineteenth century, the proposition that marital rape inflicted severe harm upon married women was widely acknowledged. The prescriptive literature described this harm in great detail. Authoritative legal sources, moreover, never denied the proposition, and courts occasionally remarked upon it themselves while deciding divorce cases later in the century. . . .

In an age that still accepted and endorsed a vast range of legal structures explicitly subordinating women to men, this recognition of injury was not enough to persuade either popular experts on marriage or lawmakers to repudiate a husband's legal right to rape his wife.

The modern defenders of the marital rape exemption, in contrast, submerge and deny the harm that the rule causes women. This has been good strategy for a reason. It is much more difficult to justify the harm that marital rape inflicts upon wives, and explain the absence of legal remediation, in a nation now formally committed to women's legal equality and the undoing of women's subjection at common law. The historical record helps make this harm concrete, revealing the ways in which it is buried by the contemporary defense of the marital rape exemption. If the injury that marital rape inflicts was more systematically put at issue, and arguments presuming that marital relations never cause women harm were more systematically resisted, it might be harder for the legal system to continue to shelter a husband's conjugal prerogatives. Certainly, building on this excavation of injury would be a useful place for the modern feminist opposition to marital rape to begin its work anew.