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market for or value of the copyrighted work" (emphasis supplied). § 107. No particular weight, however, was assigned to any of these, and the list was not intended to be exclusive. The House and Senate Reports explain that § 107 does no more than give "statutory recognition" to the fair use doctrine; it was intended "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report 66. See 1975 Senate Report 62; S. Rep. No. 99-982, p. 116 (1974); H. R. Rep. No. 83, 90th Cong., 1st Sess., 32 (1967); H. R. Rep. No. 2237, 89th Cong., 2d Sess., 61 (1966).

A

Despite this absence of clear standards, the fair use doctrine plays a crucial role in the law of copyright. The purpose of copyright protection, in the words of the Constitution, is to "promote the Progress of Science and useful Arts." Copyright is based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create, and that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'" *Mazer v. Stein*, 347 U. S. 201, 219 (1954). The monopoly created by copyright thus rewards the individual author in order to benefit the public. *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 156 (1975); *Fair Film Corp. v. Doyal*, 256 U. S. 123, 127-128 (1921); see H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909).

There are situations, nevertheless, in which strict enforcement of this monopoly would inhibit the very "Progress of Science and useful Arts" that copyright is intended to promote. An obvious example is the researcher or scholar whose own work depends on the ability to refer to and to quote the work of prior scholars. Obviously, no author could create a new work if he were first required to repeat the research of every author who had gone before him.¹ The scholar, like the ordinary user, of course could be said to bargain with each copyright owner for permission to quote from or refer to prior works. But there is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy—albeit at the first author's expense—to permit the second author to make limited use of the first author's work for the public good. See Latman Fair Use Study 31; Gordon, Fair Use as Market Failure: A Structural Analysis of the *Betamax* Case and its Predecessors, 82 Colum. L. Rev. 1600, 1630 (1982).

A similar subsidy may be appropriate in a range of areas other than pure scholarship. The situations in which fair use is most commonly recognized are listed in § 107 itself; fair use may be found when a work is used "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." The House and Senate Reports expand on this list somewhat,² and other examples may be found in the case

law.³ Each of these uses, however, reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author's work.⁴ The fair use doctrine, in other words, permits works to be used for "socially laudable purposes." See Copyright Office, Briefing Papers on Current Issues, reprinted in 1975 House Hearings 2051, 2055. I am aware of no case in which the reproduction of a copyrighted work for the sole benefit of the user has been held to be fair use.⁵

I do not suggest, of course, that every productive use is a fair use. A finding of fair use still must depend on the facts of the individual case, and on whether, under the circumstances, it is reasonable to expect the user to bargain with the copyright owner for use of the work. The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.⁶ The inquiry is necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules. But when a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply. There is then no need whatsoever to provide the ordinary user with a fair use subsidy at the author's expense.

The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copy-

for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being recorded." 1975 Senate Report 61-62; 1976 House Report 66.

¹ See, e.g., *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F. 2d 1171 (CA5 1980) (comparative advertising).

² Professor Seltzer has characterized these lists of uses as "reflect[ing] what in fact the subject matter of fair use has in the history of its adjudication consisted in: it has always had to do with the use by a second author of a first author's work." L. Seltzer, Exemptions and Fair Use in Copyright 21 (1978) (emphasis removed). He distinguishes "the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the 'ordinary' use of it." When copies are made for "ordinary" use of the work, "ordinary infringement has customarily been triggered, not notions of fair use" (emphasis in original). *Ibid.* See also M. Nimmer, Copyright § 13.05[A][1] (1982) ("Use of a work in each of the foregoing contexts either necessarily or usually involves its use in a derivative work").

³ *Williams & Wilkins Co. v. United States*, 203 Ct. Cl. 74, 587 F. 2d 1345 (1973), aff'd by an equally divided Court, 429 U. S. 376 (1975), involved the photocopying of scientific journal articles; the Court of Claims stressed that the libraries performing the copying were "devoted solely to the advancement and dissemination of medical knowledge," 203 Ct. Cl., at 91, 487 F. 2d, at 1354, and that "medical science would be seriously hurt if such library photocopying were stopped." *Id.*, at 95, 487 F. 2d, at 1356.

The issue of library copying is now covered by § 108 of the 1976 Act. That section, which Congress regarded as "authorizing" certain photocopying practices which may not qualify as a fair use," 1975 Senate Report 67; 1976 House Report 74, permits the making of copies only for "private study, scholarship, or research." § 108(d)(1) and (e)(1).

⁴ In the words of Lord Mansfield: "[W]e must take care to guard against two extremes equally prejudicial: the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded." *Saury v. Moore*, 1 East 361 n. (b), 102 Eng. Rep. 139, 140 n. (b) (K. B. 1755). See Register's Supplementary Report 13.

¹ "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" Chafee, Reflections on the Law of Copyright, 13 Colum. L. Rev. 503, 511 (1945).

² Quoting from the Register's 1961 Report, the Senate and House Reports give examples of possible fair uses.

³ Quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work.

righted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." 480 F. Supp., at 453. Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127 (1932). A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may be free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased.

It may be tempting, as, in my view, the Court today is tempted, to stretch the doctrine of fair use so as to permit unfettered use of this new technology in order to increase access to television programming. But such an extension risks eroding the very basis of copyright law, by depriving authors of control over their works and consequently of their incentive to create.⁴ Even in the context of highly productive educational uses, Congress has avoided this temptation; in passing the 1976 Act Congress made it clear that off-the-air videotaping was to be permitted only in very limited situations. See 1976 House Report 71; 1975 Senate Report 64. And, the Senate report adds, "[t]he committee does not intend to suggest . . . that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" *Id.*, at 66. I cannot disregard these admonitions.

B

I recognize, nevertheless, that there are situations where permitting even an unproductive use would have no effect on the author's incentive to create, that is, where the use would not affect the value of, or the market for, the author's work. Photocopying an old newspaper clipping to send to a friend may be an example; pinning a quotation on one's bulletin board may be another. In each of these cases, the effect on the author is truly *de minimis*. Thus, even though these

⁴This point was brought home repeatedly by the Register of Copyrights. Mentioning the "multitude of technological developments" since passage of the 1909 Act, including "remarkable developments in the use of video tape," Register's Supplementary Report xiv-xv, the Register cautioned:

"I realize, more clearly now than I did in 1961, that the revolution in communications has brought with it a serious challenge to the author's copyright. This challenge comes not only from the ever-growing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the public welfare who fully recognize . . . that the real heart of civilization . . . owes its existence to the author; ironically, in seeking to make the author's works widely available by freeing them from copyright restrictions, they fail to realize that they are whittling away the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural progress by securing the author's exclusive rights to him for a limited time." *Id.*, at xv; see 1975 House Hearings 117 (testimony of Barbara Ringer, Register of Copyrights).

uses provide no benefit to the public at large, no purpose is served by preserving the author's monopoly, and the use may be regarded as fair.

Courts should move with caution, however, in depriving authors of protection from unproductive "ordinary" uses. As has been noted above, even in the case of a productive use, § 107(4) requires consideration of "the effect of the use upon the potential market for or value of the copyrighted work" (emphasis added). "[A] particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come." Register's Supplementary Report 14. Although such a use may seem harmless when viewed in isolation, "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major invasion of copyright that must be prevented." 1975 Senate Report 65.

I therefore conclude that, at least when the proposed use is an unproductive one, a copyright owner need prove only a potential for harm to the market for or the value of the copyrighted work. See 3 M. Nimmer, *Copyright* § 13.07E(1)(c), p. 13-84 (1982). Proof of actual harm, or even probable harm, may be impossible in an area where the effect of a new technology is speculative, and requiring such proof would present the "real danger . . . of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances." Register's Supplementary Report 14. Infringement thus would be found if the copyright owner demonstrates a reasonable possibility that harm will result from the proposed use. When the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so.

The Studios have identified a number of ways in which VTR recording could damage their copyrights. VTR recording could reduce their ability to market their works in movie theaters and through the rental or sale of pre-recorded videotapes or videndises; it also could reduce their rental audience, and consequently the license fees available to them for repeated showings. Moreover, advertisers may be willing to pay for only "live" viewing audiences, if they believe VTR viewers will delete commercials or if rating services are unable to measure VTR use; if this is the case, VTR recording could reduce the license fees the Studios are able to charge even for first-run showings. Library-building may raise the potential for each of the types of harm identified by the Studios, and time-shifting may raise the potential for substantial harm as well.⁵

⁵A VTR owner who has taped a favorite movie for repeated viewing will be less likely to rent or buy a tape containing the same movie, watch a televised rerun, or pay to see the movie at a theater. Although time-shifting may not replace theater or rerun viewing or the purchase of pre-recorded tapes or discs, it may well replace rental usage: a VTR user who has recorded a first-run movie for later viewing will have no need to rent a copy when he wants to see it. Both library-builders and time-shifters may avoid commercials; the library builder may use the pause control to reset without them, and all users may fast-forward through commercials on playback.

The Studios introduced expert testimony that both time-shifting and library-building would tend to decrease their revenue from copyrighted works. See 480 F. Supp., at 140. The District Court's findings also show substantial library-building and avoidance of commercials. Both sides submitted surveys showing that the average Betamax user owns between 25 and 32 tapes. The Studios' survey showed that at least 40% of users had more than 10 tapes in a "library"; Sony's survey showed that more than 40% of users planned to view their tapes more than once; and both sides' surveys showed that commercials were avoided at least 25% of the time. *Id.*, at 438-439.

Although the District Court found no likelihood of harm from VTR use, 450 F. Supp., at 468, I conclude that it applied an incorrect substantive standard and misallocated the burden of proof. The District Court reasoned that the Studios had failed to prove that library-building would occur "to any significant extent," *id.*, at 467; that the Studios' prerecorded videocassettes could compete with VTR recordings and were "arguably . . . more desirable," *ibid.*; that it was "not clear that movie audiences will decrease," *id.*, at 468; and that the practice of deleting commercials "may be too tedious" for many viewers, *ibid.* To the extent any decrease in advertising revenues would occur, the court concluded that the Studios had "marketing alternatives at hand to recoup some of that predicted loss." *Id.*, at 452. Because the Studios' prediction of harm was "based on so many assumptions and on a system of marketing which is rapidly changing," the court was "hesitant to identify 'probable effects' of home-use copying." *Id.*

The District Court's reluctance to engage in prediction in this area is understandable, but, in my view, the court was mistaken in concluding that the Studios should bear the risk created by this uncertainty. The Studios have demonstrated a potential for harm, which has not been, and could not be, refuted at this early stage of technological development.

The District Court's analysis of harm, moreover, failed to consider the effect of VTR recording on "the potential market for or the value of the copyrighted work," as required by 17 U.S.C. § 107(d). The requirement that a putatively infringing use of a copyrighted work, to be "fair," must not impair a "potential" market for the work has two implications. First, an infringer cannot prevail merely by demonstrating that the copyright holder suffered no net harm from the infringer's action. Indeed, even a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work. Second, the fact that a given market for a copyrighted work would not be available to the copyright holder were it not for the infringer's activities does not permit the infringer to exploit that market without compensating the copyright holder. See *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F. 2d 57 (CA2 1980).

In this case, the Studios and their amici demonstrate that the advent of the VTR technology created a potential market for their copyrighted programs. That market consists of those persons who find it impossible or inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are

willing to pay for the privilege of watching copyrighted work at their convenience, as is evidenced by the fact that they are willing to pay for VTRs and tapes; undoubtedly, most also would be willing to pay some kind of royalty to copyright holders. The Studios correctly argue that they have been deprived of the ability to exploit this sizable market.

It is thus apparent from the record and from the findings of the District Court that time-shifting does have a substantial adverse effect upon the "potential market for" the Studios' copyrighted works. Accordingly, even under the formulation of the fair use doctrine advanced by Sony, time-shifting cannot be deemed a fair use.

V

Contributory Infringement

From the Studios' perspective, the consequences of home VTR recording are the same as if a business had taped the Studios' works off the air, duplicated the tapes, and sold or rented them to members of the public for home viewing. The distinction is that home VTR users do not record for commercial advantage; the commercial benefit accrues to the manufacturer and distributors of the Betamax. I thus must proceed to discuss whether the manufacturer and distributors can be held contributorily liable if the product they sell is used to infringe.

It is well established that liability for copyright infringement can be imposed on persons other than those who actually carry out the infringing activity. *Kelton Co. v. Harper Brothers*, 222 U. S. 55, 62-63 (1911); 3 M. Nimmer, Copyright §12.01[A] (1982); see *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 160, n. 11 (1975); *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 198 (1931). Although the liability provision of the 1976 Act provides simply that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright," 17 U. S. C. §501(a), the House and Senate Reports demonstrate that Congress intended to retain judicial doctrines of contributory infringement. 1975 Senate Report 57; 1976 House Report 61.¹⁰

The doctrine of contributory copyright infringement, however, is not well-defined. One of the few attempts at definition appears in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159 (CA2 1971). In that case the Second Circuit stated that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Id.*, at 1162 (footnote omitted). While I have no quarrel with this general statement, it does not easily resolve the present case; the District Court and the Court of Appeals, both purporting to apply it, reached diametrically opposite results.

A

In absolving Sony from liability, the District Court reasoned that Sony had no direct involvement with individual

¹⁰ Concern over the impact of a use upon "potential" markets is to be found in cases decided both before and after 1976: *United States v. American University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F. 2d 57, 60 (CA2 1980) ("the effect of the use on the copyright holder's potential market for the work"); *Metropol v. Nizer*, 360 F. 2d 1061, 1070 (CA2 1975) ("A key issue in fair use cases is whether the defendant's work tends to diminish or pre-empt the potential sale of plaintiff's work"); *cert. denied*, 431 U. S. 1013 (1978); *Williams & Wilkins Co. v. United States*, 293 Cl. Cl. 74, 88, 467 F. 2d 1345, 1352 (1973) ("the effect of the use on a copyright owner's potential market for and value of his work"); *aff'd by an equally divided Court*, 420 U. S. 376 (1975); *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1173 (WDNY 1982). "The concern here must be focused on a copyrighted work's potential market. It is perfectly possible that plaintiffs' profits would have been greater, but for the kind of videotaping in question" (*emphasis in original*).

¹¹ This intent is manifested further by provisions of the 1976 Act that exempt from liability persons who, while not participating directly in any infringing activity, could otherwise be charged with contributory infringement. See 1108(f)(1) (library not liable "for the unsupervised use of reproducing equipment located on its premises," provided that certain warnings are posted); 1110(6) ("governmental body" or "nonprofit agricultural or horticultural organization" not liable for infringing performance by concessionaire "in the course of an annual agricultural or horticultural fair or exhibition").

Betamax users, did not participate in any off-the-air copying, and did not know that such copying was an infringement of the Studios' copyright. 480 F. Supp., at 460. I agree with the *Gershwin* court that contributory liability may be imposed even when there has been no direct contact between the defendant and the infringer. The defendant in *Gershwin* was a concert promoter operating through local concert associations that it sponsored; it had no contact with the infringing performers themselves. 443 F. 2d, at 1162-1163. See also *Twentieth Century Music Corp. v. Aiken*, 422 U. S., at 160, n. 11. Moreover, a finding of contributory infringement has never depended on actual knowledge of particular instances of infringement; it is sufficient that the defendant have reason to know that infringement is taking place. 443 F. 2d, at 1162; see *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (SDNY 1966).² In the so-called "dance hall" cases, in which questions of contributory infringement arise with some frequency, proprietors of entertainment establishments routinely are held liable for unauthorized performances on their premises, even when they have no knowledge that copyrighted works are being performed. In effect, the proprietors in those cases are charged with constructive knowledge of the performances.³

Nor is it necessary that the defendant be aware that the infringing activity violates the copyright laws. Section 504(c)(2) of the 1976 Act provides for a reduction in statutory damages when an infringer proves he "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," but the statute establishes no general exemption for those who believe their infringing activities are legal. Moreover, such an exemption would be meaningless in a case such as this, in which prospective relief is sought; once a court has established that the copying at issue is infringement, the defendants are necessarily aware of

² In *Screen Gems*, on which the *Gershwin* court relied, the court held that liability could be imposed on a shapper of unauthorized "bootleg" records and a radio station that broadcast advertisements of the records, provided they knew or should have known that the records were infringing. The court concluded that the records' low price and the manner in which the records were marketed could support a finding of "constructive knowledge" even if actual knowledge were not shown.

³ See, e.g., *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc.*, 554 F. 2d 1213 (CA1 1977); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F. 2d 354 (CA7 1929); *M. Witmark & Sons v. Tremont Social & Athletic Club*, 188 F. Supp. 767, 790 (Mass. 1960); see also *Twentieth Century Music Corp. v. Aiken*, 422 U. S., at 157; *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 198-199 (1931); 3 M. Nimmer, Copyright § 12.04[A], pp. 12-35 (1982).

Courts have premised liability in these cases on the notion that the defendant had the ability to supervise or control the infringing activities; see, e.g., *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 601, 607 (CA2 1963); *KECA Music, Inc. v. Douglas McGee's Co.*, 432 F. Supp. 72, 74 (WD Me. 1977). This notion, however, is to some extent fictional; the defendant cannot escape liability by instructing the performers not to play copyrighted music, or even by inserting a provision to that effect into the performers' contract. *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn., Inc.*, 554 F. 2d, at 1214-1215; *KECA Music, Inc. v. Douglas McGee's Co.*, 432 F. Supp., at 75; *Shapiro, Bernstein & Co. v. Veltin*, 47 F. Supp. 648, 649 (WD La. 1942). Congress expressly rejected a proposal to exempt proprietors from this type of liability under the 1976 Act. See 1975 Senate Report 141-142, 1976 House Report 159-160, 1975 House Hearings 1812-1814 (testimony of Barbara Ringer, Register of Copyrights); *id.*, at 1813 (colloquy between Rep. Pattison and Barbara Ringer).

The Court's attempt to distinguish these cases on the ground of "control," *ante*, at 19, is obviously unpersuasive. The direct measure ordinarily is not employed by the person held liable; instead, he is an independent contractor. Neither is he always an agent of the person held liable. *Screen Gems* makes this apparent.

that fact for the future. It is undisputed in this case that Sony had reason to know the Betamax would be used by some owners to tape copyrighted works off the air. See 480 F. Supp., at 459-460.

The District Court also concluded that Sony had not caused, induced, or contributed materially to any infringing activities of Betamax owners. 480 F. Supp., at 460. In a case of this kind, however, causation can be shown indirectly; it does not depend on evidence that particular Betamax owners relied on particular advertisements. In an analogous case decided just two Terms ago, this Court approved a lower court's conclusion that liability for contributory trademark infringement could be imposed on a manufacturer who "suggested, even by implication" that a retailer use the manufacturer's goods to infringe the trademark of another. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U. S. 844, 851 (1982); see *id.*, at 860 (concurring opinion). I think this standard is equally appropriate in the copyright context.

The District Court found that Sony has advertised the Betamax as suitable for off-the-air recording of "favorite shows," "novels for television," and "classic movies." 480 F. Supp., at 436, with no visible warning that such recording could constitute copyright infringement. It is only with the aid of the Betamax or some other VTR, that it is possible today for home television viewers to infringe copyright by recording off-the-air. Off-the-air recording is not only a foreseeable use for the Betamax, but indeed is its intended use. Under the circumstances, I agree with the Court of Appeals that if off-the-air recording is an infringement of copyright, Sony has induced and materially contributed to the infringing conduct of Betamax owners.⁴

B

Sony argues that the manufacturer or seller of a product used to infringe is absolved from liability whenever the product can be put to any substantial noninfringing use. Brief for Petitioners 41-42. The District Court so held, borrowing the "staple article of commerce" doctrine governing liability for contributory infringement of patents. See 35 U. S. C. § 271.⁵ This Court today is much less positive. See *ante*, at 22. I do not agree that this technical judge-made doctrine of

⁴ My conclusion respecting contributory infringement does not include the retailer defendants. The District Court found that one of the retailer defendants had assisted in the advertising campaign for the Betamax, but made no other findings respecting their knowledge of the Betamax's intended uses. I do not agree with the Court of Appeals, at least on this record, that the retailers "are sufficiently engaged in the enterprise to be held accountable," 659 F. 2d, at 376. In contrast, the advertising agency employed to promote the Betamax was far more actively engaged in the advertising campaign, and petitioners have not argued that the agency's liability differs in any way from that of Sony Corporation and Sony Corporation of America.

⁵ The "staple article of commerce" doctrine protects those who manufacture products incorporated into or used with patented inventions—for example, the paper and ink used with patented printing machines, *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912), or the dry ice used with patented refrigeration systems, *Carbone Corp. v. American Patents Corp.*, 283 U. S. 27 (1931). Because a patent-holder has the right to control the use of the patented item as well as its manufacture, see *Moham Patent Patent Co. v. Universal Film Co.*, 243 U. S. 502, 509-510 (1917); 35 U. S. C. § 271(a), such protection for the manufacturer of the incorporated product is necessary to prevent patent-holders from extending their monopolies by suppressing competition in unpatented components and supplies suitable for use with the patented item. See *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U. S. 176, 197-198 (1980). The doctrine of contributory patent infringement has been the subject of attention by the courts and by Con-

patent law, based in part on considerations irrelevant to the field of copyright, see generally *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U. S. 176, 187-199 (1980), should be imported wholesale into copyright law. Despite their common constitutional source, see U. S. Const., Art. I, § 8, cl. 8, patent and copyright protections have not developed in a parallel fashion, and this Court in copyright cases in the past has borrowed patent concepts only sparingly. See *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 345-346 (1908).

I recognize, however, that many of the concerns underlying the "staple article of commerce" doctrine are present in copyright law as well. As the District Court noted, if liability for contributory infringement were imposed on the manufacturer or seller of every product used to infringe—a typewriter, a camera, a photocopying machine—the "wheels of commerce" would be blocked. 480 F. Supp., at 461; see also *Kalem Co. v. Harper Brothers*, 222 U. S., at 62.

I therefore conclude that if a significant portion of the product's use is noninfringing, the manufacturers and sellers cannot be held contributorily liable for the product's infringing uses. See *ante*, at 22. If virtually all of the product's use, however, is to infringe, contributory liability may be imposed; if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed. In such a case, the copyright owner's monopoly would not be extended beyond its proper bounds; the manufacturer of such a product contributes to the infringing activities of others and profits directly thereby, while providing no benefit to the public sufficient to justify the infringement.

The Court of Appeals concluded that Sony should be held liable for contributory infringement, reasoning that "[v]ideo-tape recorders are manufactured, advertised, and sold for the primary purpose of reproducing television programming," and "[v]irtually all television programming is copyrighted material." 659 F. 2d, at 975. While I agree with the first of these propositions,³ the second, for me, is problematic. The key question is not the amount of television programming that is copyrighted, but rather the amount of VTR usage that is infringing.⁴ Moreover, the parties and their amici have argued vigorously about both the amount of television programming that is covered by copyright and the amount for which permission to copy has been given. The proportion of VTR recording that is infringing is ultimately a question of fact,⁵ and the District Court specifically declined to make

gross, see *id.*, at 202-212, and has been codified since 1952, 66 Stat. 792, but was never mentioned during the copyright law revision process as having any relevance to contributory copyright infringement.

³ Although VTRs also may be used to watch prerecorded video cassettes and to make home motion pictures, these uses do not require a tuner such as the Betamax contains. See n. 1, *supra*. The Studios do not object to Sony's sale of VTRs without tuners. Brief for Respondents 5, n. 9. In considering the noninfringing uses of the Betamax, therefore, those uses that would remain possible without the Betamax's built-in tuner should not be taken into account.

⁴ Noninfringing uses would include, for example, recording works that are not protected by copyright, recording works that have entered the public domain, recording with permission of the copyright owner, and, of course, any recording that qualifies as fair use. See, e.g., *Brazzoni v. Miller Brewing Co.*, 202 U. S. P. Q. 599 (ND Cal. 1979) (use of home VTR for market research studies).

⁵ Sony asserts that much or most television broadcasting is available for home recording because (1) no copyright owner other than the Studios has brought an infringement action, and (2) much televised material is ineligible for copyright protection because videotapes of the broadcasts are not kept. The first of these assertions is irrelevant; Sony's liability does not turn on the fact that only two copyright owners thus far have brought suit.

findings on the "percentage of legal versus illegal home-use recording." 480 F. Supp., at 468. In light of my view of the law, resolution of this factual question is essential. I therefore would remand the case for further consideration of this by the District Court.

VI

The Court has adopted an approach very different from the one I have outlined. It is my view that the Court's approach alters dramatically the doctrines of fair use and contributory infringement as they have been developed by Congress and the courts. Should Congress choose to respond to the Court's decision, the old doctrines can be resurrected. As it stands, however, the decision today erodes much of the coherence that these doctrines have struggled to achieve.

The Court's disposition of the case turns on its conclusion that time-shifting is a fair use. Because both parties agree that time-shifting is the primary use of VTRs, that conclusion, if correct, would settle the issue of Sony's liability under almost any definition of contributory infringement. The Court concludes that time-shifting is fair use for two reasons. Each is seriously flawed.

The Court's first reason for concluding that time-shifting is fair use is its claim that many copyright holders have no objection to time-shifting, and that "respondents have no right to prevent other copyright holders from authorizing it for their programs." *Ante*, at 23. The Court explains that a finding of contributory infringement would "inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting." *Ante*, at 26. Such reasoning, however, simply confuses the question of liability with the difficulty of fashioning an appropriate remedy. It may be that an injunction prohibiting the sale of VTRs would harm the interests of copyright holders who have no objection to others making copies of their programs. But such concerns should and would be taken into account in fashioning an appropriate remedy once liability has been found. Remedies may well be available that would not interfere with authorized time-shifting at all. The Court of Appeals mentioned the possibility of a royalty payment that would allow VTR sales and time-shifting to continue unabated, and the parties may be able to devise other narrowly tailored remedies. Sony may be able, for example, to build a VTR that enables broadcasters to scramble the signal of individual programs and "jam" the unauthorized recording of them. Even were an appropriate remedy not available at this time, the Court should not misconstrue copyright holders' rights in a manner that prevents enforcement of them when, through development of better techniques, an appropriate remedy becomes available.⁶

The amount of infringing use must be determined through consideration of the television market as a whole. Sony's second assertion is based on a faulty premise; the Copyright Office permits audiovisual works transmitted by television to be registered by deposit of sample frames plus a description of the work. See 37 CFR §§ 202.20(c)(2)(iii) and 202.21(g) (1982). Moreover, although an infringement action cannot be brought unless the work is registered, 17 U. S. C. § 411(a), registration is not a condition of copyright protection. § 408(a). Copying an unregistered work still may be infringement. Cf. § 509(a) (liability for criminal copyright infringement; not conditioned on prior registration).

⁶ Even if concern with remedy were appropriate at the liability stage, the Court's use of the District Court's findings is somewhat cavalier. The Court relies heavily on testimony by representatives of professional sports leagues to the effect that they have no objection to VTR recording. The Court never states, however, whether the sports leagues are copyright holders, and if so, whether they have exclusive copyrights to sports broadcasts. Of course, one who does not hold an exclusive copyright does not have authority to consent to copying.

The Court's second stated reason for finding that Sony is not liable for contributory infringement is its conclusion that even unauthorized time-shifting is fair use. *Ante*, at 28. This conclusion is even more troubling. The Court begins by suggesting that the fair use doctrine operates as a general "equitable rule of reason." That interpretation mischaracterizes the doctrine, and simply ignores the language of the statute. Section 107 establishes the fair use doctrine "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research." These are all productive uses. It is true that the legislative history states repeatedly that the doctrine must be applied flexibly on a case-by-case basis, but those references were only in the context of productive uses. Such a limitation on fair use comports with its purpose, which is to facilitate the creation of new works. There is no indication that the fair use doctrine has any application for purely personal consumption on the scale involved in this case,⁴ and the Court's application of it here deprives fair use of the major cohesive force that has guided evolution of the doctrine in the past.

Having bypassed the initial hurdle for establishing that a use is fair, the Court then purports to apply to time-shifting the four factors explicitly stated in the statute. The first is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1). The Court confidently describes time-shifting as a noncommercial, nonprofit activity. It is clear, however, that personal use of programs that have been copied without permission is not what § 107(1) protects. The intent of the section is to encourage users to engage in activities the primary benefit of which accrues to others. Time-shifting involves no such humanitarian impulse. It is likewise something of a mischaracterization of time-shifting to describe it as noncommercial in the sense that that term is used in the statute. As one commentator has observed, time-shifting is noncommercial in the same sense that stealing jewelry and wearing it—instead of reselling it—is non-commercial.⁵ Purely consumptive uses are certainly not

⁴ Assuming that the various sports leagues do have exclusive copyrights in some of their broadcasts, the amount of authorized time-shifting still would not be overwhelming. Sony's own survey indicated that only 7.3 percent of all Betamax use is to record sports events of all kinds. Def. Exh. OT, Table 20. Because Sony's witnesses did not represent all forms of sports events, moreover, this figure provides only a tenuous basis for this Court to engage in fact-finding of its own.

⁵ The only witness at trial who was clearly an exclusive copyright owner and who expressed no objection to unauthorized time-shifting was the owner of the copyright in *Mister Rogers' Neighborhood*. But the Court cites no evidence in the record to the effect that anyone makes VTR copies of that program. The simple fact is that the District Court made no findings on the amount of authorized time-shifting that takes place. The Court seems to recognize this gap in its reasoning, and phrases its argument as a hypothetical. The Court states: "If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as *Mister Rogers' Neighborhood*, and if the proprietors of those programs welcome the practice," the sale of VTR's "should not be stifled" in order to protect respondent's copyrights. *Ante*, at 26 (emphasis supplied). Given that the Court seems to recognize that its argument depends on findings that have not been made, it seems that a remand is inescapable.

⁶ As has been explained, some uses of time-shifting, such as copying an old newspaper clipping for a friend, are fair use because of their de minimis effect on the copyright holder. The scale of copying involved in this case, of course, is of an entirely different magnitude, precluding application of such an exception.

⁷ Home Recording of Copyrighted Works: Hearing before Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess., pt. 2, p. 1250 (1982) (memorandum of Prof. Laurence H. Tribe).

what the fair use doctrine was designed to protect, and the awkwardness of applying the statutory language to time-shifting only makes clearer that fair use was designed to protect only uses that are productive.

The next two statutory factors are all but ignored by the Court—though certainly not because they have no applicability. The second factor—"the nature of the copyrighted work"—strongly supports the view that time-shifting is an infringing use. The rationale guiding application of this factor is that certain types of works, typically those involving "more of diligence than of originality or inventiveness," *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 241 (NJ 1977), require less copyright protection than other original works. Thus, for example, informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment. Sony's own surveys indicate that entertainment shows account for more than 80 percent of the programs recorded by Betamax owners.⁸

The third statutory factor—"the amount and substantiality of the portion used"—is even more devastating to the Court's interpretation. It is undisputed that virtually all VTR owners record entire works, see 480 F. Supp., at 454, thereby creating an exact substitute for the copyrighted original. Fair use is intended to allow individuals engaged in productive uses to copy small portions of original works that will facilitate their own productive endeavors. Time-shifting bears no resemblance to such activity, and the complete duplication that it involves might alone be sufficient to preclude a finding of fair use. It is little wonder that the Court has chosen to ignore this statutory factor.⁹

The fourth factor requires an evaluation of "the effect of the use upon the potential market for or value of the copyrighted work." This is the factor upon which the Court focuses, but once again, the Court has misread the statute. As mentioned above, the statute requires a court to consider the effect of the use on the potential market for the copyrighted work. The Court has struggled mightily to show that VTR use has not reduced the value of the Studios' copyrighted works in their present markets. Even if true, that showing only begins the proper inquiry. The development of the VTR has created a new market for the works produced by the Studios. That market consists of those persons who desire to view television programs at times other than when they are broadcast, and who therefore purchase VTR recorders to enable them to time-shift.¹⁰ Because time-shifting of the Studios' copyrighted works involves the copying of them, however, the Studios are entitled to share in the benefits of that new market. Those benefits currently go to Sony through Betamax sales. Respondents therefore can show harm from VTR use simply by showing that the value of their

⁸ See A Survey of Betamax Owners, R. 2053, Def. Exh. OT, Table 20, cited in Brief for Respondents 32.

⁹ The Court's one oblique acknowledgement of this third factor, *ante*, at 29, seems to suggest that the fact that time-shifting involves copying complete works is not very significant because the viewers already have been asked to watch the initial broadcast free. This suggestion misses the point. As has been noted, a book borrowed from a public library may not be copied any more freely than one that has been purchased. An invitation to view a showing is completely different from an invitation to copy a copyrighted work.

¹⁰ The Court implicitly has recognized that this market is very significant. The central concern underlying the Court's entire opinion is that there is a large audience who would like very much to be able to view programs at times other than when they are broadcast. *Ante*, at 26. The Court simply misses the implication of its own concerns.

copyrights would increase if they were compensated for the copies that are used in the new market. The existence of this effect is self-evident.

Because of the Court's conclusion concerning the legality of time-shifting, it never addresses the amount of noninfringing use that a manufacturer must show to absolve itself from liability as a contributory infringer. Thus, it is difficult to discuss how the Court's test for contributory infringement would operate in practice under a proper analysis of time-shifting. One aspect of the test as it is formulated by the Court, however, particularly deserves comment. The Court explains that a manufacturer of a product is not liable for contributory infringement as long as the product is "capable of substantial noninfringing uses." *Ante*, at 22 (emphasis supplied). Such a definition essentially eviscerates the concept of contributory infringement. Only the most unimaginative manufacturer would be unable to demonstrate that an image-duplicating product is "capable" of substantial noninfringing uses. Surely Congress desired to prevent the sale of products that are used almost exclusively to infringe copyrights; the fact that noninfringing uses exist presumably would have little bearing on that desire.

More importantly, the rationale for the Court's narrow standard of contributory infringement reveals that, once again, the Court has confused the issue of liability with that of remedy. The Court finds that a narrow definition of contributory infringement is necessary in order to protect "the rights of others freely to engage in substantially unrelated areas of commerce." *Ante*, at 22. But application of the contributory infringement doctrine implicates such rights only if the remedy attendant upon a finding of liability were an injunction against the manufacture of the product in question. The issue of an appropriate remedy is not before the Court at this time, but it seems likely that a broad injunction is not the remedy that would be ordered. It is unfortunate that the Court has allowed its concern over a remedy to infect its analysis of liability.

VII

The Court of Appeals, having found Sony liable, remanded for the District Court to consider the propriety of injunctive or other relief. Because of my conclusion as to the issue of liability, I, too, would not decide here what remedy would be appropriate if liability were found. I concur, however, in the Court of Appeals' suggestion that an award of damages, or continuing royalties, or even some form of limited injunction, may well be an appropriate means of balancing the equi-

ties in this case.¹¹ Although I express no view on the merits of any particular proposal, I am certain that, if Sony were found liable in this case, the District Court would be able to fashion appropriate relief. The District Court might conclude, of course, that a continuing royalty or other equitable relief is not feasible. The Studios then would be relegated to statutory damages for proved instances of infringement. But the difficulty of fashioning relief, and the possibility that complete relief may be unavailable, should not affect our interpretation of the statute.

Like so many other problems created by the interaction of copyright law with a new technology, "[t]here can be no really satisfactory solution to the problem presented here, until Congress acts." *Twentieth Century Music Corp. v. Aiken*, 422 U. S., at 167 (dissenting opinion). But in the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must "take the Copyright Act . . . as we find it." *Fortnightly Corp. v. United Artists*, 392 U. S. 390, 401-402 (1968), and "do as little damage as possible to traditional copyright principles . . . until the Congress legislates." *Id.*, at 404 (dissenting opinion).

DEAN C. DENHAFF, Los Angeles, Calif. (DONALD E. SLOAN, GIBSON, DUNN & CRITCHER, MARSHALL RUTTER, and RUTTER, EBERT & O'SULLIVAN, with him on the brief for petitioners; STEPHEN A. KROFT, Beverly Hills, Calif. (JOHN G. DAVIS, SONDRAX E. BURCHIN, and ROSENFIELD, MEYER & SUSMAN, with him on the brief for respondents).

¹¹Other Nations have imposed royalties on the manufacturers of products used to infringe copyright. See, e.g., Copyright Laws and Treaties of the World (UNESCO BNA 1982) (English translation), reprinting Federal Act on Copyright in Works of Literature and Art and Related Rights (Austria, § 125-7), and An Act dealing with Copyright and Related Rights (Federal Republic of Germany), Art. 33(5). A study produced for the Commission of European Communities has recommended that these requirements "serve as a pattern" for the European community. A. Dietz, Copyright Law in the European Community 135 (1978). While these royalty systems ordinarily depend on the existence of authors' collecting societies, see *id.*, at 119, 136, such collecting societies are a familiar part of our copyright law. See generally *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U. S. 1, 4-5 (1979). Fashioning relief of this sort, of course, might require bringing other copyright owners into court through certification of a class or otherwise.

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COMMITTEE REPORT
SENATE

FURTHER:

Date 12-15-19

Mr. President

The Committee on JUDICIARY considered SI 15

and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass
- do pass with attached amendment(s)
- replace with/or adopt CS for _____
- new title
- same title and recommends _____
- and attached a "LETTER OF INTENT" NEW FISCAL NOTE
- reports it back without recommendation
- recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS

Chairman

Chairman recommendation

CAUTION
Alaska State Legislature

SENATOR
ROBERT H. ZIEGLER, SR.
307 BAWDEN STREET
KETCHIKAN, ALASKA 99901

While in Juneau
POUCH V
JUNEAU, ALASKA 99811



Senate

VICE CHAIRMAN
SENATE RESOURCES COMMITTEE

MEMBER
SENATE JUDICIARY COMMITTEE

WESTERN STATES LEGISLATIVE
FORESTRY TASK FORCE

WESTERN CONFERENCE COUNCIL
OF STATE GOVERNMENTS

March 7, 1984

Senator Bill Ray,
Chairman - Senate Judiciary Committee
Alaska State Legislature
Juneau, Alaska

Re: SB 513, An Act relating to
• renunciation of rights in
decedents' death.

Dear Mr. Chairman:

This Act relates to renunciation of rights in decedents' death.

The Code Revision Commission's commentary pretty well spells out what the legislation is all about.

Sometimes I think this particular commission doesn't have enough to do.

Essentially the bill boils down to the proposition that anyone who has a share of an estate coming to him or her may renounce that particular share or any portion thereof.

Big deal.

Sincerely,

Robert H. Ziegler, Sr.

RHZ:lk

HB 694 & SB 512 --

ALASKA CODE REVISION COMMISSION
COMPANY BILL ON
DECEDENTS' ESTATES

single purpose--to adjust for
changes in certain neglected
estate Code.

Alaska in 1972. From July, 1972
the Price Index for All Urban
"Metropolitan Area" moved from 1.159
to the past several months.
At the CPI on January 1, 1985,
it will be 2.056, an increase of
80% in the bill are adjusted
percentage. Broadly rounded figures

in the bill, the figures used for
of the homestead exemption in
AS 13.11.295. That is a recent Act, ch.
But not necessary, that the
estate Code and the homestead
the same.

provisions in the bill are tied to
of living that have already

using fixed figures would be
price index, such as is provided
Alaska Exemptions Act. If that
Statute could be required to
adopted. The formula could be
revised a year in advance of its
and appear in the supplement to
alternative could readily be
adopted, however, since it may
provisions in the Exemptions Act
elsewhere.

-- COVERS IDENTICAL BILLS: HB 695 & SB 513 --

ALASKA CODE REVISION COMMISSION
COMMENTARY TO ACCOMPANY BILL ON
RENUNCIATION OF RIGHTS IN DECEDENTS' ESTATES

This bill deals with refusal to accept
property or an interest in property from a decedent's
estate. Referred to as "renunciation" or "disclaimer",
it is a valuable option for estate planning to avoid a
taxable transfer.

The right to renounce is provided for in AS
13.11.295 (Section 2-801 of the Uniform Probate Code).
This bill would make three changes to facilitate estate
planning:

- (1) The right to renounce would survive the
death of the person having it;
- (2) The permissible disclaimer period would
be extended from six to nine months after a death; and
- (3) Accepting one interest in property would
not prevent renouncing another interest in the same
property.

The concept of the changes proposed by this bill is
the Uniform Disclaimer of Transfer by Will, Intestacy
Appointment Act (1978). Because Alaska has already adopted
the Uniform Probate Code contained in AS 13, minimal changes to
13.11.295 will give Alaska the main benefits of the uniform
disclaimer statute. The bill does not extend beyond disclaimer
of transfers resulting from death. Disclaimer of other kinds
of transfers could be the subject of another bill.

The changes in (b) extend the time for renunciation
from the nine months period in which renunciation is permitted under
the Internal Revenue Code, 26 U.S.C., Sec. 2518. The current
version of the Uniform Probate Code recommends that states
conform their laws to the nine month period. Failure to do so
may deny to Alaskans the full period the federal law permits
for taking advantage of a tax planning tool.

Sometimes an heir with a right to disclaim will die
within this nine month period. For example, an elderly husband
and wife may not survive each other by nine months. In this
situation, a disclaimer would avoid an extra taxable transfer
before property is inherited by their children. The changes
(a) would allow a personal representative (executor of the estate)

of the second to die) to exercise the right of disclaimer. However, the period for disclaimer would not be extended: the personal representative of the second to die would have to act within nine months of the first death.

The changes in (d) would permit disclaiming one interest in property without forfeiting the right to accept another interest in the same property. Under federal Internal Revenue law, it is possible for a beneficiary to refuse to accept an income interest in property while accepting transfer of the principal asset, or to refuse a transfer of a principal asset while accepting an income interest in the asset. The change in (d) would delete language that infers that the acceptance of any interest in property would totally bar a renunciation of any other interest in the same property.

AS 13.11.295(f) is deleted as obsolete law. A similar section is not needed as temporary law in this bill because the changes in AS 13.11.295 liberalize renunciation, do not restrict it.

-- COVERS IDENTICAL

ALASKA CODE
COMMENTARY TO
MARRIED PERSONS

This bill would and would repeal certain cause uncertainty in the principal provisions 34.15.015(b), (c) and conveyances of "the fact"

The other two sections with dower, a common law concept Alaska in its pure form since 1905 (AS 397 (1905)). It was altered, the law in 1913 (sec. 50, ch. 1913) afforded a widow by the various options under the law in 1972, as are the protection related "curtesy" right. The Probate Code includes:

"The provisions of common law concepts and their statutory counterparts."

The main subjects of (c) and (d), are subsections apparently in a patchwork of protections once afforded a widow and curtesy.

Common law dower is one-third of the lands her husband owned at the time of his death. Her husband could not be a tenant in common with Alaska's statutory dower and the husband at the time of his death. In its statutory form, similar to dower but was a right of a wife. In its statutory form, 1913, since repealed) it applied at the wife's death.

To compensate for the statutory forms of dower and the signature of both spouses "homestead" (ch. 107, SLA 1913)

Unless both spouses



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COMMITTEE REPORT
SENATE

FURTHER:

1/29/54

Date April 15, 1954

Mr. President

The Committee on INDEPENDENT considered SI 514

and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass
- do pass with attached amendment(s)
- replace with/or adopt CS for _____
- new title
- same title and recommends _____
- and attached a "LETTER OF INTENT" NEW FISCAL NOTE
- reports it back without recommendation
- recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS

Chairman

Chairman recommendation

FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 514
 Title: "...married persons' rights in a family home."
 Sponsor: Sen. Rules/Code Rev. Committee
 Requestor: Sen. Judiciary
 Date of Request: 3/13/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: General Government
 Program or Subprogram(s) Affected: Legal Services Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Piquas Phone: 465-3672
 Division: Administrative Services Division Date: 3-13-84
 Approved by Commissioner: Norman C. Gorsuch Date: 3-13-84
 Agency: Department of Law

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

Fiscal Note
Analysis
SB 514

March 13, 1984

This bill was requested by the Code Revision Commission to remove certain anachronisms and would repeal certain statutory provisions that cause uncertainty in titles to Alaska real property. The protections afforded a widow by the right of dower are now afforded by various options under the Uniform Probate Code, as are the protections afforded a widower under the related "curtesy" right. This bill would repeal some of the protections once afforded a married person under common law dower and curtesy. Because the bill only deals with private property rights, it will not have a fiscal impact on state government operations.

FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 514
 Title: "...married persons' rights in a family home."
 Sponsor: Sen. Rules/Code Rev. Comm
 Requestor: Sen. Judiciary
 Date of Request: 3/13/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: General Government
 RU, Program or Subprogram(s) Affected: Legal Services Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Peguas Phone: 465-3672
 Division: Administrative Services Division Date: 3-13-84
 Approved by Commissioner: Norman C. Gorsuch Date: 3-13-84
 Agency: Department of Law

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

S

B

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15

FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 515
 Title: "...disposition of certain property rights at death."
 Sponsor: Sen. Rules/Code Rev. Comm.
 Requestor: Sen. Judiciary
 Date of Request: 3/13/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: _____
 General Government
 Program or Subprogram(s) Affected: _____
 Legal Services Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 85	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Pegues
 Division: Administrative Services Division

Phone: 465-3672
 Date: 3-12-84

Approved by Commissioner: Norman C. Gorsuch
 Agency: Department of Law

Date: 3-13-84

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget

FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 515
 Title: "...disposition of certain property rights at death."
 Sponsor: Sen. Rules/Code Rev. Comm.
 Requestor: Sen. Judiciary
 Date of Request: 3/13/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: General Government
 Program or Subprogram(s) Affected: Legal Services Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 85	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Pegues Phone: 465-3672
 Division: Administrative Services Division Date: 3-13-84
 Approved by Commissioner: Norman C. Gorsuch Date: 3-13-84
 Agency: Department of Law

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget

Fiscal Note
Analysis
SB 515

March 13, 1984

This bill was requested to prescribe the rights, at death, of a married person who has community property acquired prior to a change in domicile to Alaska, or which is traceable to community property, where the spouses have not indicated an intention that their community rights be severed.

The Act codifies what the Code Revision Commission believes is now common law in Alaska. The Act should help eliminate the necessity of stating that common law through litigation, thus saving private parties some litigation expense and reducing court costs. Because the bill deals only with private estate interests, it will not have a fiscal impact on state government operations, other than slightly reducing crowded court calendars.

FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 515
 Title: "...disposition of certain property rights at death."
 Sponsor: Sen. Rules/Code Rev. Comm.
 Requestor: Sen. Judiciary
 Date of Request: 3/13/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: General Government
 Program or Subprogram(s) Affected: Legal Services Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Richard I. Pogues Phone: 465-3672
 Division: Administrative Services Division Date: 3-13-84
 Approved by Commissioner: Norman C. Gorsuch Date: 3-13-84
 Agency: Department of Law

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget

S

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211 4th Street, # 304
Juneau, Alaska 99801

April 18, 1984

Senate Judiciary Committee
Pouch V
Juneau AK 99811

Dear Committee Members,

This letter is in strong support of SB528, which would abolish the marital rape defenses under the Alaska criminal code.

Domestic violence and marital rape are strongly related. In our counseling program for men who batter we use a descriptive definition of domestic violence that includes four forms of abuse: physical, psychological, sexual and destruction of property and pets. These four forms of domestic violence have certain aspects in common. First they are done without concern for the physical or mental well being of the victim; second, they are done to show domination and control over the victim and third, they will increase in severity and frequency unless the batterer accepts responsibility for changing this behavior.

These four forms of domestic violence tend to go hand in hand. The more severe the physical violence, the more likely the offender is to sexually assault his wife.

And this sexual assault is not always directly accompanied by physical force. The past use of physical violence and the implicit threat of physical violence if she does not follow his demands, are enough to force the victim to comply with the sexual assault.

Unfortunately, marital rape is much more common than we would like to admit. It is estimated that of the 2 million women who are physically abused by their husbands each year, 20% are also sexually assaulted by their mates. Marital rape does not occur in a vacuum; it is a culmination of sexually and psychologically degrading behavior including: sexual criticisms, unwanted or uncomfortable touching, withholding sex, coercive sex and finally rape. A batterer is at high risk to rape his wife as he moves along the continuum of abusive behavior.

Senate Judiciary Committee

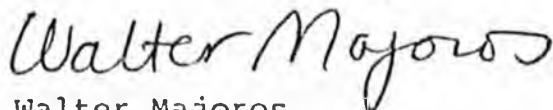
April 18, 1984

Page Two

Sexual assault within the family needs to be treated with the same seriousness as stranger assaults. In fact, sexual assault by a husband is even more severe and traumatic because it comes from someone who is supposed to be trusted by the victim. The emotional scars of marital rape will linger for longer than the scars of physical assault.

The State of Alaska has made a progressive stand regarding physical abuse within the home, and victims now have increased protection under the law. Let us not be guilty of saying to a domestic violence offender, "It's illegal for you to hit your wife, but it's alright for you to rape her." Please remove the archaic marital rape exemption from the Alaska statutes.

Sincerely,

A handwritten signature in cursive script that reads "Walter Majoros".

Walter Majoros
Executive Director

RECEIVED

MAR 21 1984



S.T.A.R.

Josephson,

Bus. 278-7279
24-hr.
Crisis 278-RAPE

Senator Joe Josephson
Alaska State Legislature
Pouch V (MS 5100)
Juneau, Alaska 99811

March 16, 1984

Dear Senator Josephson,

I am writing this letter in support of Senate Bill 528. Alaska should enact this legislation to abolish its marital rape defenses. Under current law a victim is not accorded protection if she is raped by her spouse while living with him or if she has not sustained physical injury.

A rationale exists in our society that a wife consents to sexual intercourse by marrying her spouse. To accept this incredible notion indicates that an exchange of wedding vows implies the right to have sexual intercourse at any moment, even by force with one's spouse. Clearly forcing one's spouse to engage in sexual relations violates her contractual marriage agreement, but also, physically abuses her body and violates her right to privacy.

In the past emphasis has been placed on the appropriateness of using the criminal justice system in domestic disputes. The notion being that the family should solve their own problems. The victim in a domestic disturbance may be in grave danger for her safety and the crime should be treated the same as if she were assaulted by a stranger. We have recognized this by recent changes in statutes regarding child sexual assault. Indeed the violence by a husband is even more traumatic than that by a stranger because the wife has been sexually assaulted by someone she trusted.

Recently someone suggested to me that immunity from prosecution is justified because marital rape is hard to prove. Granted there are many rape cases and other crimes which are hard to prove, however no one suggests ignoring those crimes for that reason. Victims should have the same rights whether assaulted by a friend, husband or loved one.

Further there is a notion that a wife will bring false and malicious accusations of rape against her husband. Women in rape trials often feel that they are on trial, so the rationale that wives will bring malicious accusations can be discounted.

STANDING TOGETHER AGAINST RAPE
PO BOX 103358 ANCHORAGE, ALASKA 99510

Thanks to you
it works
for all of us



A United Way Agency

page 2 continued:

Rape is not matrimonial misconduct. It is a violent act of abusing the victim's body, violating her right to privacy and inflicting physical, emotional and psychological harm to the victim. The legislature should abolish Alaska's marital rape defenses by enacting SB 528. Alaska could then join sixteen other states who have acknowledged the violence of rape and removed marital rape exemptions.

Should you have any questions regarding my position on SB 528 please do not hesitate to call.

Sincerely,



Paula M. Haley
Executive Director

TO: Senator Bill Ray

FROM: Paula d. Scavera

DATE: April 17 1984

RE: SB 528

SECTION 1

Drops the marital defense for forcible rape and forcible sexual contact cases.

SECTION 2

Allows a person to assert the spousal defense so long as the sexual contact or penetration was with the consent of the spouse.

COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

POSITION PAPER


SB 528

"An Act relating to the spousal defense to sexual assault."

Marital rape, like stranger rape, is an act of power and hostility. Nicholas Groth, who has extensively studied men's motivations for rape, identifies five reasons why men rape their wives: "to assert power and strength; to punish and degrade; to prove their virility; to overcome feelings of being unloved; and to convince themselves that all is right with the world."

Victims that are raped by their spouses often suffer devastating effects. Among the most common reactions are self-blame, reduced self-esteem, humiliation, guilt, anger and depression. Diana Russell, a San Francisco sociologist, notes that these women's intense feelings of self-blame are heightened by the knowledge that society holds them more responsible for rape than it does victims of stranger rape. Further, many of the women she interviewed confessed to overwhelming feelings of betrayal. These feelings can destroy the victim's capacity for intimacy forever.

Yet most state laws and many people condone forced sex if the victim is married to the rapist. Only sixteen states have stricken the marital rape exemption from their criminal codes and permit prosecution of husbands who rape their wives under most circumstances. The Council on Domestic Violence and Sexual Assault supports this proposed legislation to make marital rape a crime in Alaska under all circumstances.


Jana Varrati, Vice-Chair
Council on Domestic Violence
and Sexual Assault

ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT

110 SEWARD #13 JUNEAU ALASKA 99801
(907)586-3650

POSITION PAPER

SB528: An Act relating to the spousal defense to sexual assault

The Alaska Network on Domestic Violence and Sexual Assault, a non-profit corporation composed of 20 programs statewide that provide services to victims of domestic violence and sexual assault, supports SB528, which would remove the marital exemption in cases of rape.

Under current Alaskan law, in order for a woman to prosecute her husband for rape, the couple must either be living apart or the perpetrator would have had to cause serious physical injury to the victim. In the opinion of the Network, this exemption provides no protection to the married woman who is the victim of forced, not concensual, sexual contact with her husband.

The Network is especially concerned about this issue because of the proven correlation between domestic violence and marital rape. A study conducted by Morton Hunt in 1979 and reported in Family Circle magazine indicated that one-fifth of the estimated 2 million battered wives in America were "forced to have sex as part of the beating or as a sequel to it." In a survey of 930 women conducted in 1981 and reported in the Family Law Quarterly, 14% of the women indicated that they were victims of marital rape.

By passing laws which recognize spouse abuse and child sexual assault as serious crimes, the Legislature has indicated that criminal behavior is not based on the relationship of the perpetrator and victims. The Network believes that the same recognition should be afforded the crime of rape within marriage, and urges your support of this bill.

I am here to speak in favor of SB 528.

The marital exemption to the violent crime of rape is invariably traced back to the 17th century when Mathew Hale, Chief Justice in England, pronounced,

"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

This ruling was based upon the notion that women were the property of their husbands and procreation was the sole purpose of matrimony.

Since most of us have had sexual intercourse and because our magazines, movies and now television have given so much time and attention to sexuality, it is impossible for us not to relate personally to this discussion of marital rape. When considering this legislation, I kindly request that you refrain from imagining in your mind a gallant Rhett Butler sweeping a petulant Scarlett O'Hara off her feet and up the stairs. Followed, in keeping with 1950 sense of proprieties, a fade out to the next morning -- a sun-filled room and a smiling Scarlett. I emphatically assure you that it not the situation out of which a marital rape charge could ever rise.

Until fairly recently, our law reflected the opinion of many lawmakers that rape was a charge easily made and difficult to defend against. However, as the recently highly publicized New Bedford rape trial reaffirmed, the woman victim is very much on trial as well. Her past sexual history and behaviors, her motivation, and even what she was wearing, and where she was at the time of the crime are given a thorough public scrutiny.

Through the increasing number of studies being done, we are learning that rape is a crime of violence. It rise out of a desire for conquest and domination greatly exacerbated by the media images that tell us sexual prowess is part of the definition of masculinity. As in the case of domestic

violence, sexual violence in the context of marriage exists on a continuum. The continuum extends from a non-violent marriage where sex is the result of mutual desire and consent, all the way to the opposite extreme of the rape/murder of a spouse.

As long as wife rape is condoned by our legal system many men will continue to feel that their wife has no right to refuse sex, and many women will continue to feel that they have no right to control their own bodies. By 1980, New Jersey, Oregon and Nebraska had completely abolished the marital rape exemption. It has been variously considered and debated in many other states since that time. State by state variance is so extreme that in West Virginia, a man may not be charged with first degree sexual assault if the woman has ever been a voluntary social companion of the man, even though they have never had mutually consensual sexual relations.

In arguing for SB 528 and against marital exemption, I first sight the moral and philosophical implications of the law as it presently exists. To allow marital exemption endorses the antiquated principle that women are property. Those who would argue that the charge will be made lightly and that the circumstances will be ambiguous, should take some time to familiarize themselves with the recent work of Irene Frieze, Nicholas Groth, Del Martin and Diane Russel. The case study descriptions make sobering and chilling reading.

The marital exemption has been shown to be in violation of the constitutional right to "equal protection" - both in the sense of married versus unmarried women and in the sense of wives versus husbands. Further, why in this one instance are we saying that identity and relationships of the perpetrator to the victim is relevant to our judgment of the crime. Isn't

murder always murder? Is murder less serious if you murder your wife or your child? It is a distortion of justice to rule that rape outside of marriage is a violent, heinous crime, while within the bonds of matrimony, it is allowable.

Nor does the evidence support the charge that rape is less traumatic to a woman when it is done by a man with whom there has been previous mutual consent. The violation of personal trust can be deeply disturbing, and we know from case studies that marital rape frequently occurs in conjunction with life threatening violence.

To tolerate wife rape in law is to minimize the seriousness of rape in other contexts. When we codified bigotry and racial prejudice, we tacitly perpetuate that prejudice. So to with violence. Violence condoned, made glamorous in our media and entertainment, violence used as a subject of humor, violence excused by its context promotes and perpetuates violence.

To quote Diane Russel from her book, "Rape in Marriage"

"To continue to see rape in marriage as husbands privilege is not only an insult, but a danger to all women. We must strive to stop wife rape, including working to eliminate the conditions that have given rise to it."

Patty Kastelic, Director
Women's Center
Board Member of Women in Crisis Counseling Assistance
4920 Anderson Road
Fairbanks, Alaska 99701
(907) 479-5744

Alaska State Legislature

Advisory Council Members
Senator Kerttula, Chairman
Senator Bennett
Senator Fahrenkamp
Senator Vic Fischer



1024 W. 6th Avenue, Suite 203
Anchorage, Alaska 99501
Phone: (907) 274-1426

SENATE ADVISORY COUNCIL

MEMORANDUM

TO: SENATOR JALMAR KERTTULA
FROM: ELIZABETH J. HICKERSON
RE: MARITAL RAPE
DATE: January 21, 1984

CURRENT LAW

Under Alaska law less protection is afforded individuals who are victims of sexual assault and abuse if the perpetrator is the victim's spouse.

For one prosecuted under AS 11.41.410 - 11.41.440 (sexual assault in the first and second degrees and sexual abuse of a minor in the first, second, third, and fourth degrees) it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless the spouses were living apart or the defendant caused physical injury to the victim.

While separate domiciles of the marriage partners at the time of the offense and physical injury to the victim trigger protection under our laws, the victim's consent to sexual assault or sexual contact is not at issue in cases of marital rape or sexual abuse. Lack of consent to sexually abusive acts is defined by the Alaska statutes at AS 11.41.470:

- "without consent" means that a person
- (A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or
 - (B) is incapacitated as a result of an act of the defendant.

These violent acts defined above are protected by law only if the victim and perpetrator have entered into a marriage contract.

We have no means of assessing the occurrences of rape in marriage since few are ever reported. It does exist however. According to the statistics compiled by Standing Together Against Rape, between

January 1, 1982, and December 31, 1982, one percent of the female victims seen by the staff in Anchorage were victims of marital rape. Domestic violence is on the increase in Alaska. The Abused Women's Aid in Crisis in Anchorage provided shelter for 596 battered women in 1982, a 55% increase over 1981. These victims are particularly susceptible to sexual assault and abuse in a marital relationship.

PROPOSED LEGISLATION

Attached is draft legislation that abolishes all defenses in cases of marital rape or sexual abuse. The sole issue to be considered is whether or not the victim consented to the sexual acts.

Last session the laws pertaining to sexual abuse of minor were extended to include "statutory rape" or sexual penetration and contact between consenting minors. Since marriages involving minors is sanctioned under certain conditions in this state and other jurisdictions, the draft legislation exempts these cases from prosecution under AS11.41.434 - 11.41.440 unless the victim did not consent.

TREND IN OTHER JURISDICTIONS

According to the National Center on Women and Family Law, as of November, 1983, eight states had abolished marital rape exemptions. Rape by a spouse is treated the same as rape by a stranger in the following states: Florida, Kansas, Massachusetts, North Dakota, New Jersey, Nebraska, Oregon and Wisconsin.

Eight states have partially stricken, or limited the marital rape exemption so that rape by a spouse is a crime under most circumstances: California, Connecticut, Delaware, Hawaii, Iowa, Minnesota, New Hampshire and Washington.

CONCLUSION

By retaining the affirmative defenses in marital sexual assault and abuse cases, the state of Alaska interprets the marriage license to be an absolute right of the husband to sexually assault and abuse his wife.

Marital Rape: What Happens When Women Fight Back? ①

by Teresa Priem

In marital rape, the wife is the victim. But occasionally, the victim strikes back, and sometimes she kills her husband.

The National Clearinghouse on Marital Rape, a new project of the Women's History Research Center in Berkeley, California (see letter in *NWT*, Mar., 1981, vol. VII, no.3), has on file eleven cases in which marital rape or sexual abuse was a known factor in causing a wife to kill her husband. Four of these women are still incarcerated under lengthy sentences.

Definition and History of Legal Marital Rape

Rape is defined in the statutes of 36 states as forced sexual relations with someone other than the "perpetrator's" wife. So, for a woman to get the State to charge her husband with raping her, marital rape has to be criminalized in her particular state. The only states that have criminalized marital rape are Nebraska, Iowa, Oregon, New Jersey, California, Minnesota, Massachusetts and Connecticut—and only within the past seven years.

A New Hampshire bill criminalizing marital rape was voted on in April (Ed. note: at the time we went to press, the outcome of the vote was not known.) Assemblywoman May Newberger is sponsoring a New York bill, and a bill will soon be introduced in Wisconsin—letters of support are crucial now. (Letters on the Wisconsin bill can be sent to Representative Barbara Ulichny of Milwaukee.)

In the six remaining states where husbands are not specifically exempted from rape charges by statute, the district attorneys could try to prosecute, but the judges could dismiss the charges if they think the English Common Law tradition applies. (See "The Common Law Does Not Support a Marital Exemption for Forcible Rape" by Dennis Drucker in *Women's Rights Law Reporter*, vol. 5, no. 2-3, Winter/Spring, 1979)

Thus it appears that a woman can use marital rape as a defense when she is being prosecuted for killing her husband only in the eight states where marital rape is criminalized. In fact, even in Oregon, after the exemption for husbands was removed, Greta Rideout's divorce attorney told her before the trial of her husband John for raping her, that marital rape was not a grounds for a divorce in Oregon. (From the Clearinghouse pamphlet on Greta Rideout before, during and after the trial, \$2.00. After his acquittal, John publically apologized, and they reconciled. However, she divorced him after he became violent.)

So even though marital rape is criminalized, it is often not taken seriously, and criminalizing it may not necessarily provide an adequate legal defense for a woman who defends herself against her husband's sexual attack.

The original comment exempting husbands from being charged with the rape of their wives was made by England's mid-17th century Chief Justice Sir Matthew Hale, who was also known for his overzealous hanging of witches. He wrote that:

"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."

200 years later, Justice Pollock in England still insisted that "a wife cannot resist her husband no matter how cruel or brutal" because she gave up her right to consent by marrying him.

300 years after Hale, his doctrine is still enforced in the 36 states which protect husbands married to their victims. Furthermore, in 13 states, it is legal for a man to rape the woman he is merely living with; and in four of these states, he can only be charged with a lesser degree of rape of a date ("voluntary social companion") with whom he



CLYTEMNESTRA

has had previous voluntary sexual intercourse. And in West Virginia, he can be charged with a lesser degree of rape even if he has not had previous voluntary sexual contact with his date. (The breakdown by states is available from the National Center of Women and Family Law, 779 Broadway, Suite 402, New York, New York 10003)

Marital Rape as a Part of the Lives of Battered Women

Marital rape is an often unreported form of violence towards battered women. According to Dr. Lenore Walker (in a call made to the Clearinghouse in the fall of 1980), she discovered in reviewing the sample for her 1979 book, *The Battered Woman*, that 80% of the women had been raped by their husbands.

Many women do not describe their rapes as "rape," but instead say "he forced me," "he used me," or "he took advantage of me." Saying the word rape makes the shame more acute and raises the intolerable question of how she is going to leave him.

Battered women are often raped, because they refuse to have sex or they refuse another of their husbands' orders. They are also beaten because

they refuse sex. When women are beaten because they refuse sex, they sometimes submit after the beatings to prevent further beatings.

Because of this, men often say women want to be beaten as foreplay! This was John Rideout's attorney's basis for defense in the December, 1978 Oregon trial, because Greta finally submitted (after her jaw was nearly broken).

Deadly Fear as a part of the Lives of Battered Women

Many battered women have recently been accused of killing their husbands. And it's not because women are frequent killers. In the United States, the homicide rate for women is only 15% and declining. "Most women in this culture are trained to inflict their disappointments on themselves, we are taught not to become angry, but to become depressed and self-destructive...programmed to commit suicide, not homicide." (from "The Lady is a Felon, the Harris Case is a New Morality Play for the Instruction of Uppity Women." by Anne Jones. In *These Times*, April 1-7, 1981)

According to a 1969 government report about as many wives kill their husbands as vice versa, but women are motivated by self-defense seven times as often as men (from "Battered Women—The Fight to End Wife-Beating" by Beverly Jacobson in *Civil Rights Digest*, Summer, 1977). "In many cases the homicide is an accident; the woman means merely to prevent or stop a beating, but a chance blow or hair-trigger brings death instead. But in all the battered women's cases from accident to justifiable homicide to premeditated murder, the women are impelled by deadly fear." (from "The Lady is a Felon")

According to Police Chief James Sannon, from 1971 through 1981, "all the men who were arrested in Detroit for killing their wives had previously beaten them." (from a phone call to Chief James Sannon in April, 1981 and *One Battered Woman Strikes Back, Murder or Self Defense?* by Jane Lindsay, September, 1979)

Wives who report beatings to the police find little help or protection. A study done by Claudia McCormick in the Chicago jail shows that all the women who were there for killing their husbands had called the police at least five times. And 27% of the women said that the beatings became even more severe after each arrest. (from *One Battered Woman Strikes Back, Murder or Self Defense?*)

Another obstacle that battered women face is that only 2% of the battering males are even prosecuted. (from "Battered Women, the Fight to End Wife-Beating." by Beverly Jacobson in *Civil Rights Digest*, Summer, 1977)

So what are the alternatives open to a battered woman? She can try to escape the situation knowing that he might eventually catch up with her, she can seek help—if it's available, she can be passive or she can fight back. According to Dr. Elaine Hilberman and Kic Munson in their study "50 Battered Wives":

"This passivity reveals an emotional state of helplessness and despair, plus feelings of incompetence, worthlessness, guilt, shame and being unlovable. The women felt they deserved the battering. The women were also trying to control their own aggressive impulses as a result of a violent encounter."

The women were also trying to control their own aggressive impulses as a result of violent encounter. "Passivity and denial of anger, then, did not imply that the battered women is adjusted or likes the situation. It is the last desperate defense against homicidal rage." (from *Victimology: An International Journal*, vol. 2 [1977-1978])

So there is a fine line between being passive and fighting back. Battered, sexually abused and raped wives who fight back are of all ages and races with the common link of having abusive husbands. The accounts of some of these women will follow.

Bernadine Howard

Bernadine Howard is a marital rape victim who was convicted of the murder of her husband on November 1, 1980. She is still institutionalized. She comes from Richmond, California, which is near the location of the Clearinghouse. Bernadine is young, black and poor. She was found guilty of second degree murder and sentenced to five to seven years in the California Youth Authority Correctional Institution in Camarillo, California, at the Venture School. When called, Barbara Nious, Bernadine's future parole officer when Bernadine is actually on parole, said that efforts to free Bernadine would be appreciated, especially since Bernadine won't be considered for parole for at least two years, and probably three.

Bernadine was only 18 when she killed her husband Lurria (Larry). The incident occurred in March, 1960, just three months after marital rape was criminalized in California. Therefore, Bernadine was able to plead self-defense since she was avoiding her husband's attempts to rape her.

According to the testimony of witnesses, Bernadine and Lurria had previously fought. Bernadine also told the police that Lurria was a karate trainee who practiced karate on her.

Her public defender, William Veale, said that the tape of her interrogation by the police was played at the trial and that she gave, "maybe five different statements to the police, totally contradicting herself." He said that her psychiatric state, as explained by psychiatric testimony showed that, "she could not tell the truth because she couldn't bear to look at what she did." Veale tried to show that Bernadine was mentally ill but not violently crazy. He believes that Bernadine is innocent and that the jury "was wrong and callous" because it judged so harshly on her mixed-up testimony to the police.

"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 herself up . . ."

On March 19, 1980, Lurria had come home around 3 a.m. after drinking at a neighbor's apartment. Bernadine said that she hit him with a wine bottle four times to fend off his rape attempts. She said that they fought and then he beat her. Afterwards, Bernadine told her mother, Bessie Gilbert, that she got dressed and called Bessie from a neighbor's apartment (the same neighbor who Lurria had visited). The neighbor testified at the preliminary hearing that he heard the couple arguing, then struggling, then Lurria telling Bernadine to put a knife down. He said that Bernadine came to his apartment, carrying a knife, to phone her mother. He said that Lurria staggered into the neighbor's and said, "Look, she hit me with a bottle" and then died. That was a curious thing for Lurria to say because medical testimony showed that Lurria died after being stabbed in the heart with an eight inch carving knife.

Bessie told the Clearinghouse that Bernadine called from the neighbor's apartment to say, "Larry's going to kill me!" Bernadine wanted her mother's help, but Bessie is crippled and has no car. Bessie said that she wanted to talk to Lurria, but he was yelling in the background, "It's our fight and stay out of it!"

Bessie emphasized that Bernadine, "hadn't cut him" before the phone call. When Lurria arrived at the neighbor's apartment, Lurria was in a rage and "there was no one to come to her rescue," sadly said Bessie. Bessie said her daughter told her afterwards that Bernadine shut her eyes and "stuck a knife in him in the neighbor's apartment. Bessie concluded, "She had to do it since he (Lurria) was going to kill her."

The neighbor committed suicide a month before Bernadine's trial, and Bessie is sure it is because he had guilt feelings pertaining to the incident.

"Saying the word rape makes the shame more acute and raises the incredible question of how is she going to leave him."

Veale said that the main issue was not where the killing took place, but whether Bernadine was innocent of murder. He said that there was blood all over the Howard bedroom, and only one bleeding wound, so it was impossible to fight the physical evidence that Bernadine had stabbed him before entering the neighbor's apartment. (Bessie said that Bernadine told her that the blood found was from wounds he received from the bottle).

Prosecutor John McFigue argued at the trial that if Lurria had intended to rape his wife, he would have been found in some stage of undress. Instead, all of Lurria's clothes were fastened when he was examined. The prosecutor said that Lurria's clothes did not show any signs of the struggle that Bernadine described, and that the scratches she had received were consistent with his defending himself from her hitting him with a wine bottle. The jury was swayed by the prosecutor's arguments and found Bernadine guilty.

An employee at the Ventura School told Bessie that if Bernadine "obeys, she'll only get two more years." So Bessie has resolved herself to helplessly accept Bernadine's conviction because Bernadine is getting the education she needs and couldn't get before. In fact, Bessie said that the schooling will keep her daughter "off the streets" and out of trouble. Bernadine recently phoned Bessie saying that the authorities are "so good to her that she's really satisfied."

But Bessie has mixed feelings. She would also like to have her daughter home. Bernadine's imprisonment is a hardship for Bessie because she is unable to visit her daughter since the school is far from any bus service. Bessie doesn't know where to turn for help, nor does she have the money to pay for assistance. The Clearinghouse is trying to connect her with interested organizations. (Our sources are Barbara Nious, Bernadine's future parole officer; Bessie Gilbert, Bernadine's mother; and William Veale, Bernadine's defender - all interviewed by phone in March and April, 1981; plus the Contra Costa Times of November 2, 1980, and the San Francisco Examiner of November 4, 1980).

Juanita Davenport

Juanita Davenport, a white 48-year-old mother from Cave Junction, Oregon, pleaded no contest to the manslaughter of her husband who had sexually abused her during their thirty year marriage. Her husband, Roland, 59, was described in court testimony by their 28-year-old daughter, who had also been sexually abused by Roland, as "somewhat of a cross between Charles Manson and Hitler."

According to a call to District Attorney Bob Burrows, Roland had been impotent so he "engaged in vicarious sex" by making her have sex with others while Roland looked on. Burrows also indicated that Roland even attempted to mate her with a dog once.

The press reported that Burrows, who prosecuted her, said she killed her husband under extreme stress and provocation because of Roland's sexual perversions and domination of her. She shot Roland in March, 1980. She then dismembered his body; boiled the hands, feet and head in a pressure cooker, and cremated his remains in their barbecue pit. She testified that her husband told her that when he died, he'd wanted to be cremated. Other witnesses said that she did anything to please him, including abnormal sex acts.

Burrows told the Clearing House that Juanita had been "very subservient to a dominate male; she makes Edith Bunker look like Susan B. Anthony."

Juanita's adult son found his father's remains in the barbecue pit and buried them in the garden. Five months later, the son showed the authorities where the grave was located.

"It (Juanita) is the last desperate defense against homicidal rage."

Juanita pleaded no contest to first degree manslaughter after a murder charge against her was dismissed. Judge Larry Cusick sentenced her on January 12, 1981, up to ten years at the Oregon Women's Correctional Center in Salem. He said that the psychiatric facilities there were excellent, and that her stay there would be "the best thing" for her. Juanita has not yet had a hearing before the parole board, but Burrows guessed she would be in prison for three years. (Our sources are District Attorney Bob Burrows, the court reporter and employees at the Women's Correctional Center who were phoned on March 23, 1981; and the Associated Press article as printed in the Berkeley Gazette on January 16, 1981.)

Frances Conyers

Frances Conyers was a 53-year-old mother of a married son when she shot her husband of 32 years, Byron, 52, in September, 1978. Frances, who is white and from Boone, Iowa, was often sexually, physically and verbally abused by her husband after his drinking bouts.

On the night of the killing, Byron repeatedly sexually abused Frances. She finally managed to escape, and she shot him before he could get out of bed to get her again.

Frances told the Clearinghouse that the county attorney was "vindictive," plus the chief of police knew Byron. She was charged with first degree murder, but she said, "To me it was self-defense. He carried his weapon, his fists, all the time." She said she refused to plea bargain for second degree murder because she "never did feel guilty. So I'm doing time."

Frances said that Byron was totally different when he was drinking, and his drinking grew worse as years went by. She kept thinking that "things will be better, and it won't happen again," and anyway it was a woman's place to accept the bad with the good and there were good times. But that night, she finally blew up and fought back. She said, "I've never been in a speck of trouble

before. "It's all a waste (the abuse that led up to the shooting, the shooting and her years in jail), and I miss the poor old guy too." Frances was sentenced to 10 years for voluntary manslaughter in July, 1979. She is now in the Iowa State Women's Reformatory at Rockwell City, and won't be eligible for parole until May 4, 1982. (Our sources are Frances Conyers, her attorney and Beth Bochnak, from the Center for Constitutional Rights, an organization which helps defend women who fight back. They were all phoned in March, 1981.)

Jennifer Patri

Jennifer Patri was a 32-year-old mother of two when she killed her husband, Robert. Jennifer, who is white and from Weyauvega, Wisconsin, is currently under a 10-year sentence for manslaughter. Her attorney, Al Eisenberg, said the killing was a result of "13 years of emotional, psychological and physical brutality." Eisenberg said that Jennifer was also a victim of sexual abuse, but she was too embarrassed to give the details in the courtroom. According to Eisenberg, Jennifer's husband also sexually abused their 12-year-old daughter and a niece, and maybe some boys.

"... men often say women want to be beaten as foreplay!"

In March, 1977, Robert threatened to assault Jennifer and kidnap their children. Eisenberg told the Clearinghouse that Robert brandished a knife and chased her to the basement. Then he pretended to leave but returned, so Jennifer shot him with a shotgun. The next day she buried his body and set fire to her house in an attempt to commit suicide.

Jennifer was charged with first degree murder and arson, but was only found guilty of manslaughter. In February, 1978, the judge (who Eisenberg said "was a sexist pig") gave Jennifer the maximum sentence for manslaughter, even though Jennifer had no previous record and had even been a Sunday school teacher and P.T.A. president.

Jennifer is attending a school during the day and spending her nights in jail, but may be on parole by the time this article is read. (Our sources are her attorney Al Eisenberg, who was phoned in March and April, 1981, and Time from November 28, 1977.)

Gloria Timmons

Gloria Timmons, a Black woman from Seattle, Washington, spent four years in prison for the manslaughter of her husband, Ronald, before she was released on parole. She was 21 in January, 1973, when she shot Ronald, who had raped and beaten her during the year they were married. Amazingly, he worked as a CSO officer (someone who brings witnesses to court) for the police department, but when details of his battering his wife became known, he resigned.

Occasionally, his treatment of her sent her to the hospital - once for burns after he threw scalding water in her face, and once for injuries after he threw her down a flight of stairs.

Gloria reported him, and Ronald retaliated by striking her in front of witnesses while she was in the hospital emergency waiting room for injuries he had inflicted.

The district attorney charged Ronald with misdemeanor assault for this inci-

"To me it was self defense. He carried his weapon, his fists, all the time."

dent.

Ronald was released prior to the trial and asked her for a reconciliation. According to public records, she said that when she met him, he tried to strangle her, but two friends freed her. One accompanied Gloria to a bar to calm down. Gloria's friend left but gave Gloria a gun for protection. Ronald showed up at the bar and threatened Gloria. Gloria told him she had a weapon and would use it if he tried to hit her. He was about to hit her when she shot him.

Gloria pleaded guilty to manslaughter on April 11, 1973, to avoid being tried for murder. Since she used a firearm, she faced mandatory imprisonment and was sentenced to a 20 years maximum sentence on May 9, 1973.

Gloria escaped twice from prison and was released on parole on August 31, 1979, after four years of incarceration. (Our sources are the Feminista Alliance Against Rape News, as printed in the Center Against Sexual Assault Newsletter of December, 1977; and the public defender's records, and the district attorney's office - both called in March, 1980)

Cynthia Denny

Cynthia Denny pleaded guilty to voluntary manslaughter of her husband, Gary Denny, 36, a softball pitcher who was well-known in their hometown of Prescott, Arizona. Cynthia, who was 28 when she shot her husband, was abused about three times a month. Her attorney, Tony Shaw, told the Clearinghouse that the abuse included beatings and sodomy.

Shaw said that on September 28, 1974, Gary and Cynthia were returning from an argument at a bar. Gary had that look in his eye that warned Cynthia that a beating would soon follow. He left for a little while, so she got a shotgun and tried to commit suicide with it, but he returned before she was successful. She intended to scare him off with a shot, but the bullet hit Gary in the chest. She took off, and he grabbed at her as she left. She returned when she realized he wasn't following her and found that he was hurt worse than she had supposed. Cynthia became hysterical, called the police and was rocking Gary's head when the police arrived.

A change of venue was granted because of pretrial publicity. She was tried for murder and found guilty of voluntary manslaughter. The conviction was reversed because she had confessed to the shooting after she had been reassured that Gary would survive. She was



tried in another city and convicted of involuntary manslaughter because the jury could not understand why she hadn't left her husband long ago. This conviction was also reversed because of a technicality.

Shaw thought the next retrial would be a "sure winner" because he planned to show through expert testimony exactly why she had remained with her husband. Instead, Cynthia opted to plea bargain so that she would not have to spend any more time in jail. She pleaded guilty to voluntary manslaughter on October 6, 1978, and she now works at a shelter for battered wives. (Our sources are Cynthia's attorney, Tony Shaw; and Beth Bochnak. Both were called in March, 1981.)

"I've never been in a speck of trouble before. It's all a waste (the abuse that led up to the shooting, the shooting, and her years in jail)."

Hartwell

Judy Hartwell, 28-year-old mother of two boys when she killed her husband, Fred, Judy, who is white and from Detroit, Michigan, was found innocent in the stabbing of her husband who had frequently assaulted her before. She had called the police on numerous occasions, but the authorities did nothing to help her.

On November 9, 1975, Fred came home drunk and gave her a choice - either to have sex with him or to be tied to the bed and whipped. Judy grabbed a paring knife and tried to escape, but he blocked her way. She stabbed him.

In March, 1976, the jury acquitted her on grounds of self-defense following Judge Victor Baum's instruction that a woman has a legal right to forcibly resist unwanted sexual advances by her husband. These instructions were surprising since marital rape is not a crime in Michigan. Judge Baum also disregarded judges' opinions in previous cases where the wife was expected to submit to her husband's demands. (Our sources are MS., of August, 1976; and Beth Bochnak, from a call made in March, 1981.)

Deborah Davis

Deborah Davis, a 22-year-old white woman from Lyndon, Kansas, was found innocent in the shooting death of her husband, James Curnutt, 38. They had been married six months, but he had already sexually abused her for five years by torturing her with rubber balls, pins, and an electric cattle prod. He had also imprisoned her in an underground tank.

"Thirteen years of emotional, psychological, and physical brutality." --

James owned books on torture, brain-washing and hypnotism. According to Diane Wiley, (who worked on the case for the National Jury Project, which is a nationwide organization of legal workers and social scientists specializing in helping attorneys pick juries). James made Deborah's suffering bearable by giving her "reasons" for it. For instance, he'd say, "I'm going to stick pins in your breast because you don't cry enough, and crying is good for you." Of course, she would cry, and would bring some relief.

But her torture became unendurable when James announced his plans to keep her wrapped in tape, like a mummy, in a coffin beneath the bed. Deborah discovered he was serious when she found a catheter and air pump for keeping her alive. She testified that she was afraid for her life, so she shot James in the back of the head while he was sleeping on Christmas, 1979. The jury in her June, 1980, trial sympathized with her ordeal and cleared her of murder.

Diane said that Deborah acted out of self-defense, which is the use of necessary force. With his prior history of cruelty and power, the gun she used was the equalizer in her hopeless situation. The precedent for this was the reversal of Yvonne Wanrow's 1973 conviction for murder. Yvonne was 5-foot-4, had a cast on one leg and was using a crutch; and the man she killed was a 6-foot-2 drunken man with a prior history of child molestation. He was breaking into her friend's house, and she thought he had already gotten to her children when she shot him in self-defense. Because of the Wanrow precedent the jury is more likely to look at the incident from the woman's point of view, so Deborah was not seen as shooting a helpless man.

"She was tried in another city and convicted of involuntary manslaughter because the jury could not understand why she had not left her husband long ago."

According to Diane, Deborah was a great witness because she was "not angry." Diane said that after a battered woman kills her husband, women's groups tell her that she should be angry about the way he treated her (when she was battered, she couldn't afford to be angry because he would batter her more). So by the time the trial comes about, she is usually justifiably angry, and the jury gets the impression

Deborah had not arrived at this stage prior to the trial. (Our sources are Diane Wiley of the National Jury Project, who was called in March, 1981; and *The Longest Revolution* from August/September, 1980.)

Idalia Mejia

Idalia Mejia, a 30-year-old Mexican woman from Lindsay, California, was found innocent of murder on October 3, 1978, in the shooting death of her husband, Ralph, 30. They had been married for 14 years, but he became abusive when he started drinking. Her public defender, Joe Altschule, said that Ralph once attempted to force Idalia to mate with a dog, another time he "fondled" their 12-year-old daughter to "antagonize" Idalia. Altschule also said that there was sexual abuse because Idalia submitted when, where and how Ralph wanted it, but at the time she just considered it her wifely duty.

Ralph often beat Idalia - with his hand, belt strap or buckle. On one occasion, he grabbed her hair and banged her head against the dashboard and steering wheel of their car. By the time they reached their destination, K-Mart, her head hurt and she had big lumps on the back of her neck. He also repeatedly threatened Idalia and their four children with death. She called the police four times to tell of Ralph's abuse, but he charmed the police and then beat her even more for her audacity.

On December 18, 1977, he was drunk again. They were in bed after yet another quarrel, and he had again threatened to kill her and the children. He alternated between telling her how much he loved her and smashing her face against the wall. She got out of bed, found his .22 caliber revolver and shot him four times, once through the heart, before he could get out of bed.

She was tried for murder in three separate trials; but the first two times, she had hung juries. In September, 1978, the third jury found Idalia innocent. (Our sources are New West, from March 12, 1979; and a March, 1981, phone call to Idalia's public defender, Joe Altschule.)

Francine Hughes

Francine Hughes, from Lansing, Michigan, and the mother of four, was found innocent of the death of her ex-husband, James (Mickey), 31. Francine, who was 29 when she burned the house with Mickey in it, pleaded innocent, not because of self-defense, but because of temporary insanity.

Francine had undergone beatings, plus sexual and verbal abuse from Mickey since her marriage at 16. She eventually divorced him, but after he was injured in an automobile accident, he moved in again. She tried to escape him through seeking help from the police, the courts, and friends and relatives, but no one was willing to help her. In fact, the police often arrived just after a beating and when Mickey was still threatening her, but as long as Mickey didn't touch her in front of them, they couldn't arrest

him. Mickey's threats to kill her were not unfounded—on a few occasions, he choked her or chased her with a knife. He also told her that if she left him, no matter where she went he would find her.

On March 9, 1977, he beat her yet again and forced her to have sex with him. He also forbade her from going to school—her one escape from the house. He even made her burn her books and term paper. After Mickey had gone to sleep, she poured gasoline on the floor around the bed and lit it.

The prosecutor charged her with first degree murder. But the jury accepted Francine's plea of temporary insanity in November, 1977, and she was freed from prison. (Our sources are *The Burning Bed, The True Story of Francine Hughes—A Beaten Wife Who Rebelled* by Faith McNulty, Harcourt Brace Jovanich, New York, 1980; and the *Feminist Alliance Against Rape News*, as printed in the *Center Against Sexual Assault Newsletter* of December, 1977.)

"She called the police four times to tell of Ralph's abuse, but he charmed the police and then beat her even more for her audacity."

Eva Mae Heygood:

Eva Mae Heygood, a 27-year-old Black mother of five from Milwaukee, Wisconsin, was charged in the shooting death of her husband, but the judge dismissed the charges at her preliminary hearing.

In the summer of 1976, Eva's husband beat her and tried to force her to perform a "variety of acts of sexual perversion," said her attorney, Al Eisenberg. Eva refused, so he got a loaded .38 and pressed it to her forehead. She grabbed the barrel and twisted it toward him and the gun went off. Eva then draped his body from the rafters of the garage, and tried to throw suspicion off herself by writing a letter from a fictitious jealous lover. But when the police arrived, Eva admitted that she had killed her husband in self-defense, and the judge accepted her testimony. (Our source is Eva's attorney, Al Eisenberg who was phoned in March, 1981)

CONCLUSION

Convictions and acquittals are sporadic, but Black women are more readily convicted. According to Diane Willey, this is often the case. Since the wife is usually the only witness, she has to look credible to the jury, but when she is not white, the jury looks at her case differently and less sympathetically.

The inconsistent acquittals and convictions show that a woman's legal rights to defend herself against her husband's rape attempts are rather shaky. But "case law allows the use of deadly force to prevent forcible sodomy between males." (From pamphlet, "Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault" by Elizabeth Schneider and Susan Jordan, 1978.)

A CONVERSATION WITH AL EISENBERG:

"I have defended more major women's cases than anybody in this state (Wisconsin) and won them all. I have also represented more accused rapists than anybody in this state."

Eisenberg considers Jennifer Patri's case a win because she bought and readied the gun, plus shot her husband from the back but instead of getting murder-one, she received a sentence of manslaughter and a school release program.

Eisenberg indicated that he had defended a man accused of raping his wife, but it really wasn't "rape" since the man had "only threatened to commit suicide." (Wisconsin is one of the states where women "in effect" have to ask the court for the right to say "no". One spouse has to file a petition for an annulment, divorce, separation, or separate maintenance before the husband can be charged.)

He also defended two accused rapists by suggesting the victim had invited a gang-rape (from OOB, June, 1980 and a phone call to the court reporter)

Eisenberg said that he's a feminist and a member of N.O.W., "But that doesn't mean I'm going to back off my case because someone has a different political feeling. Those men (the two accused gang rapists) are innocent as far as I'm concerned. They got rail-roaded by the judge." The two men were convicted but an appeal is now pending.

In the courtroom during the gang-rape trial, he said that the courtroom was filled with "radical feminist, lesbian separatist banshees." Eisenberg said that he used that phrase because the women that were disrupting the courtroom were a particular group that he recognized from previous encounters as being "lesbian separatists."

He said that this same group said he was "defending a murderer" when he took on Jennifer Patri's case. These "lesbian separatists" have also "tried unsuccessfully" to have him removed from N.O.W.

The findings of Dr. Elaine Hilberman and Kit Munson in their study "60 Battered Wives" sum up why these wives tried to solve their problems through violence. They found that:

"the few women who resorted to counterviolence did so as an act of desperation associated with failure of other options. Their use of violence was related to a direct threat to life and usually came as a surprise to the women who were themselves unaware of the extent of their rage. This is in contrast to the minimal provocation which precipitated violence by the husbands."

(From *Victimology—An International Journal*, vol. 2 (3-4) 1977-1978)

As Elizabeth Schneider says about the number of battered women whose self-defense cases she worked on through the now defunct Women's Self-Defense Law Project.

"Many of these women are literally killing to avoid being killed. Some of them have left home many times before, but their husbands have followed them everywhere they went. Often, they've called the police and gotten no help. Killing may have seemed like the only way they could defend themselves."

(From "When Victims Kill" by Tamar Lewin in the *National Law Journal*, Oct. 29, 1979)

We've got to find alternatives for these women. For further information about these women, and about the Clearinghouse membership, publications and resources, send a self-addressed stamped envelope to the National Clearinghouse on Marital Rape, 2325 Oak St., Berkeley, CA 94708.

For information, legislation, and litigation on behalf of battered women, contact The National Center of Women and Family Law, 799 Broadway, Suite 402, NY, NY, 10003.

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Laura X will be doing a workshop at the National Coalition Against Sexual Assault Conference in Syracuse, NY, and in Storrs, CT., at the National Women's Studies Association Conference, from May 31 through June 4. If anyone wants to meet with her or have her speak, she needs paid speaking engagements in the area around these states (or donation) to afford the trip. Write to her at the National Clearinghouse on Marital Rape.



Teresa, a journalism volunteer, investigated each of these cases just for this article, starting with newspaper clippings, then by library research and telephoning all over the country. Contributions for the several dozen phone calls and for her time and transportation costs are tax-deductible. The National Clearinghouse on Marital Rape is a project of the Women's History Research Center, which has no funding except donations.

Laura X, Director
National Clearinghouse
on Marital Rape

\$ 2.00

New Women's Times
May 81

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Item 39

MARITAL RAPE EXEMPTION PACKET

1. Marital Rape Exemption Chart -- State-by-state summary of the Exemption in Criminal Statutes (8 pages). 1.50
2. Marital Rape Litigation -- Summary and Citations of Case Law (3 pages). \$.75
3. Resources on Marital Rape -- Bibliography of articles, legal articles and studies (3 pages). \$.75
4. Schulman, J., "The Marital Rape Exemption in the Criminal Law," 14 Clearinhouse Review 538 (Oct. 1980) (4 pages). \$1.00
5. Marital Rape Fact Sheet (4 pages). \$1.00

Total Packet: \$5.00

* * * * *

If you wish to receive any of these materials, please check off and enclose appropriate payment. Prices cover costs of xeroxing and postage only.

Thank you.

South Dakota - Compiled Laws Ann. §22-22-1 (1979)
(Note: South Dakota amended its statute to strike the marital rape exemption, but the following year repealed that amendment)

- *Texas - Pen. Code Ann. §21-02(a) (1979)
- Vermont - Stat. Ann.; Title 13 §3252 (effective 7/1/77)
- *West Virginia - W. Va. Code §61-8B-1 (1977)
- Washington - Rev. Code Ann. Ch. 9A.44.010, 9A.44.040, 9A.44.050, 9A.44.060 (effective September 1, 1979)
(Note: in 1979, the city of Seattle passed a city ordinance striking the marital rape exemption).

-- 11 states: marital rape exemption ends when parties are separated under a court order:

- *Kentucky - Rev. Stat. §510.010(3) (1975)
- Louisiana - Rev. Stat. Ann. §14.41 (1978)
- Maryland - Ann. Code §27-464D (1979)
- Missouri - Ann. Stat. §566.010:2 (1979)
- New York - N.Y. Pen. Law §130.00
(Note: exemption also ends if parties entered into separation agreement which includes an express provision that husband will be criminally liable for raping woman. 1980 legislation to strike "express provision" requirement failed).
- North Carolina - Gen. Stat. §14-27.8 (1979)
(or living apart pursuant to a written separation agreement).
- *North Dakota - Code Ann. §12.1-20-01, 12.1-20-02 (1977)
- Rhode Island - Gen. Laws §11-37-1 (1979 Supp.)
- South Carolina - Code §16-3-658 (1977)
- Utah - Crim. Code Ann. §76-5-402, §76-5-407 (1979)
- Wyoming - Stat. Ann. §6-4-307 (Laws 1977)

-- 6 states: marital exemption ends where parties are living apart and one spouse has filed a petition for annulment, divorce, separation or separate maintenance:

- Indiana - Stat. Ann §35-42-4-1(b) (amended 1977)
- Michigan - Mich. Second Pev. Crim. Code Ch. 23 §2340 (1980)
- Nevada - Rev. Stat. §200.373 (1977)

*See "Expansion" Section, infra.

Ohio - ORC §§ 2907.01(L), 2907.02 (or if parties have entered into a written settlement agreement).

Tennessee - Code Ann. §39-3709 (1979)

Wisconsin - Stat. Ann. §940.225 (6) (1978)

- 2 states: no marital exemption when parties are living apart, OR one spouse has initiated legal proceedings:

Idaho - Code §18-6107 (1977) (parties must be living apart at least 180 days).

New Mexico - Stat. §30-9-10 (1978)

- 10 states: no marital exemption where parties are living apart (do not need court order or separation agreement):

Alaska - Stat. §11.41.445(a) (effective 1-1-80) (marriage is an affirmative defense, except where parties are living apart, or defendant caused serious physical injury).

Arizona - Rev. Stat. §§13-1401.4, 13-1404 to 13-1406 (1978)

Colorado - Rev. Stat. §18-3-409 (1975)

Idaho - Code §18-6107 (1977) (parties must have been living apart for at least 180 days).

Iowa - Code Ann. §§709.2, 709.3, 709.4 (1978) (exemption in third degree only).

*Maine - Rev. Stat. Ann. Title 17A §§11-251, 252 (1979)

Mississippi - M.C.A. 97-3-95 (Supp. 1981) [Sexual battery].

*Montana - Rev. Code §45-5-506 (1979)

New Mexico - Stat. Ann. §§30-9-10E, 30-9-11 (1978)

*Pennsylvania - Stat. Ann. Title 18 §3103 (1977)

(Note: no exemption if parties have entered into a written separation agreement even though they are still living together).

- 5 states: have no express marital rape exemption in their statutes. Whether the alleged "common law" exemption (barring prosecution) is applied is a matter of judicial decision and/or legislative intent.

Arkansas - Stat. §§41-1801, 41-1803 (1976) (Note: express exemption for statutory rape, §§1804-1806).

*See "Expansion" Section, infra.

Georgia - Code Ann. 26.2001 (amended 1978)
(Note: express exemption for
statutory rape, §26-2018).

Mississippi - MCA 97-3-65(2) (1979) [rape statute]
Virginia - Va. Code 18.2-61 (1981 Amendments)
Washington, D.C. - R.S.D.C. §22-2801 (1967)

STATES WHICH HAVE STATUTORILY LIMITED OR
STRICKEN THE MARITAL RAPE EXEMPTION

-- 5 states: have abolished the marital rape exemption altogether. Rape by a spouse is the same as rape by a stranger.

Florida - Stat. Ann. §794-011 (1979). No exemption; spouses can be charged the same as strangers, State v. Larry Smith, Court of Appeal, Fifth District, Case No. 80-878, decided July 1, 1981. (See LITIGATION Section.)

Massachusetts - Ann. Laws. Ch. 265 §22, Ch. 277 §39 (1979). No exemption; spouses can be charged the same as strangers. Commonwealth v. Chretien — Mass. —, Docket No. E-2276, decided March 9, 1981. (See LITIGATION Section.)

New Jersey - S.A. §2C:14-5(b), effective 9/1/79. This is the only state which has affirmatively abrogated the alleged "common law" exemption:

"No actor shall be presumed to be incapable of committing a crime under this Chapter [Sexual Offenses] because of age or impotency or marriage to the victim." N.J.S.A. §2C:14-5(b).

Nebraska - Rev. Stat. §§28-319, 28-320, effective 1/1/76, repealing and replacing §29-403.03 and .04 which included exemption.

Oregon - Rev. Stat. §163.305, amended by 1977 c. 844, deleting marital rape exemption.

-- 7 states: have partially stricken, or limited, the marital rape exemption so that rape by a spouse is a crime under most circumstances:

California - Pen. Code §262, effective 1/1/80, establishing a separate crime of spousal rape. However, the marital rape exemption is still applicable where (1) the rape is not reported to the police or district attorney within 30 days after the day of the violation; or (2) the victim is "incapable" of giving legal consent (e.g., mentally or physically handicapped; intoxicated or drugged, even when victim's state is due to acts of the defendant; unconscious of the nature of the act).

Connecticut - Pen. Code 53a-67(b), effective October 1, 1981 (HB 5247). Marital and cohabitant exemption deleted from first degree, forcible rape. Exemptions remain, as affirmative defense, to lesser degrees of rape and sexual assault.

*Delaware - exemption deleted from first and second degree rape (D.C.A. §§763, 764). However, D.C.A. §764 (first degree rape) includes a "voluntary social companion" exemption which may operate to exempt spouses and cohabitators.

Exemption still applies to Sexual Assault (D.C.A. §761, Class A Misdemeanor) and Sexual Misconduct (D.C.A. §762, Class E Felony). Additionally, exemption, where applicable, is extended to unmarried cohabitators. D.C.A. §772

Hawaii - Rev. Stat. §§707-730, 707-731, 707-732, effective 6/21/79. By amending statutes to gender neutral terms, marital rape exemptions were deleted. However, "voluntary social companion" exemption in §707-730 (first degree rape) may operate to exempt spouses and cohabitators.

Minnesota - Stat. Ann. §609.349, amended 1980, expressly deletes marital rape exemption in most cases: "Nothing in this section shall be construed to prohibit or restrain the prosecution for any other offense committed by any person against his legal spouse."

However, exemption (which includes cohabitators) still applies in statutory rape, and cases where victim is mentally or physically disabled.

New Hampshire - RSA §632-A:5 (amended by HB 516; effective September 1981). Exemption deleted, except for statutory rape cases, or cases involving "mentally defective" victim-wives. (PSA 632-A:2, :3)

Iowa - Code Ann. §§709.2-709.4. No exemption in first and second degree Sexual Abuse; exemption for third degree Sexual Abuse.

* See "Expansion" Section, infra.

EXPANSION OF THE MARITAL RAPE EXEMPTION

-- 13 states have now expanded this marital "privilege" or "right" of rape to unmarried cohabitants (hereinafter referred to as "cohabitators") e.g., "the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship." (Montana, RCM §45-5-506(2)).

Additionally, 5 states* have also provided a partial exemption to "voluntary social companions", thereby, to an extent, legalizing "date rape":

Alabama, Crim. Code §13A-6-60(4) (exemption extends to cohabitators).

Connecticut, Pen. Code §53a-67(b) (cohabitation is an affirmative defense, except to first degree rap

*Delaware, Code Ann. §772(b) (exemption for cohabitators to sexual assault and sexual misconduct); and Code Ann. §764(2) (first degree rape exemption where defendant was victim's "voluntary social companion" on the occasion of the crime and victim had previously permitted him sexual contact).

*Hawaii, Rev. Stat. §707-730(1)(a)(i) exemption to first degree rape where victim was defendant's "voluntary social companion who had within the previous thirty days permitted him sexual intercourse". If defendant inflicts "serious bodily injury", the "voluntary social companion" exemption does not apply. There is no exemption for second or third degree rape.

Iowa, Code Ann. §709.4 (exemption to third degree Sexual Abuse for cohabitators. No exemption to first and second degree Sexual Abuse).

Kentucky, Rev. Stat. Ann. §510.010(3) (exemption extended to cohabitators; marriage defined as "persons living together as man and wife regardless of the legal status of their relationship". Decree of judicial separation required to end exemption for legally married spouses).

*Maine, Rev. Stat. Ann. Title 17-A §252.2 (cohabitation as an affirmative defense) and §252.3 ("voluntary social companion" defense

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MARITAL RAPE LITIGATION

The following pleadings and materials are available from NCOMFL unless asterisked. If asterisked, they are available from Clearinghouse for Legal Services, 500 North Michigan Avenue, Suite 1940, Chicago, Illinois 60611.

1. State of New Jersey v. Albert Smith, 426 A.2d 38 (1981), appeal of defendant-husband's motion to dismiss charges of rape of his wife on the grounds that the criminal rape statute codifies the alleged common law marital rape exemption. Defendant's trial motion was granted, 148 N.J. Super 219 (Law Div. 1977). The Appellate Division affirms the dismissal, 169 N.J. Super 98 (App. Div. 1979). The Supreme Court of New Jersey unanimously reversed the dismissal and reinstated the indictment for rape.
 - * (a) New Jersey Supreme Court 27 page opinion, and concurring opinion (J. Sullivan), 426 A.2d 38 (1981), holding that New Jersey's former rape statute, having no express exemption, did not incorporate or codify a "common law" marital exemption to rape. The Court discusses at length the doubtful origins and authority of the alleged "common law" rule (Hale's doctrine), concluding that "[n]either was the law of this State under the former rape statute as blind to personal liberty and privacy as defendant would have this Court believe. A man separated from his wife - and perhaps one not separated - could not invoke an outdated and doubtful rule to avoid prosecution for rape simply because he was still legally married to his victim." (p. 27) Clearinghouse No. 30,489.
 - * (b) Amicus Brief of the National Center on Women and Family Law, Inc., arguing that the exclusion of married women from the protection of the criminal law when they are raped by their husbands is a denial of equal protection. Clearinghouse No. 30,489.
2. State of New Jersey v. Daniel Morrison, defendant-husband pretrial motion to dismiss rape charges was denied; defendant subsequently stood trial and was convicted and sentenced for raping his estranged wife. The Appellate

Division, by per curiam decision, summarily reversed defendant's conviction for rape (Docket No. A-271-78, decided Jan. 18, 1980; unpublished). Supreme Court of New Jersey reversed Appellate decision, reinstating the rape conviction based on their decision in State v. Albert Smith, supra.

- (a) Petition for Certification and Appendix on behalf of the State of New Jersey (dated February 19, 1980), which includes a copy of Appellate Division's per curiam decision reversing rape conviction. The State argues that the alleged "common law" marital rape exemption does not extend to estranged marriages.
 - (b) Brief and Appendix for the State of New Jersey on appeal to Appellate Division of Superior Court.
3. State of Florida v. Larry Smith, appeal of defendant-husband's pretrial motion to dismiss the charge of sexual battery on the grounds that the criminal statute codifies a pre-existing "common law" marital exemption. Defendant's trial motion was granted (order dated July 30, 1980). The State appealed the lower court's dismissal of the sexual battery charge. The Florida District Court of Appeal, Fifth District, Case No. 20-878, opinion filed July 1, 1981, held that no exemption existed in Florida, and reversed the trial court's order; Husband must stand trial for rape of his wife.
- * (a) Florida Court of Appeal, Fifth District Decision, holding that Florida's sexual battery statute does not incorporate a marital exemption. The court reviewed at length the New Jersey Supreme Court's decision in State v. Smith, 426 A.2d 38 (1981), and relied heavily on the New Jersey court's reasoning. The Florida court noted that sexual battery is a crime of violence, not sex. Additionally, the court pointed out the absurdity of defendant-husband's claim under the current sexual battery statute, which prohibits nonconsensual sexual conduct between persons of the same or different sex. "In Hale's time a man could not be the victim of rape, but under section 794.011, Florida Statutes, he can be. It is inconceivable that a husband would accept the argument that by marriage he consented to the conduct defined in the statute if inflicted upon him by force or violence." (p. 5). Clearinhouse No. 31,552.
 - (b) Amicus Brief of the National Center on Women and Family Law, inc., and Central Florida Legal Services, Inc., arguing that the exclusion of married women from the protection of the criminal law when they are raped or sexually battered by their husbands is a denial of equal protection.

(c) Initial Brief of Appellant, State of Florida, arguing that Florida's sexual battery statute, which codifies the crime of rape, makes no mention of and does not include a marital exemption. The Legislature in enacting the sexual battery statute did not preclude charging a husband for the forcible sexual battery of his wife.

4. Commonwealth v. James K. Chretien, appeal of defendant-husband's conviction of rape of his wife. At trial, defendant's motion to dismiss the rape indictment based on the "common law" spousal exemption was denied. On September 21, 1979, defendant was convicted by a jury of rape and breaking and entering, and was sentenced to 3-5 years in prison and three years probation after release. On March 9, 1981, the Massachusetts Supreme Judicial Court, in a unanimous opinion, affirmed the conviction, holding that a person may be prosecuted for and convicted of rape even if the rape victim is defendant's spouse. (— Mass. —, Docket No. E-2276)

* (a) Massachusetts Supreme Court unanimous opinion (20 pages, written by Chief Justice Hennessey), holding that the legislature's revision of the rape statutes in 1974 eliminated any "common law" spousal exemption. The court analyzes the history and bases for the alleged common law doctrine. The court finds that the legislative intent to criminalize marital rape is evidenced in the state's "Domestic Violence Act" (G.L. ch.209A) which expressly defines "abuse" to cover and include sexual abuse. The court does not limit its holding to separated or estranged spouses; the terms of Massachusetts's revised rape statute clearly applies to married couples even while living together. Clearinghouse No. 31,712.

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The Marital Rape Exemption In the Criminal Law

The battered women's movement has brought to public light the abuse and violence women suffer from their husbands, ex-husbands, male mates and ex-mates. Researchers and advocates on behalf of battered women have realized that this violence includes severe physical abuse as well as non-physical violence such as threats of severe harm or degradation. Until recently, however, rape of women by their husbands and male mates has remained a silent and hidden crime. Men's right to rape their wives is in fact not a crime in most states. The legal right of marital rape is known as the "marital rape exemption" and is embodied in state criminal statutes as well as the Model Penal Code (sections 213 et seq.). There has been limited progress towards the erosion of the marital rape exemption, but this has been more than offset by the significant extension of the exemption to additional classes of defendants.

The legal system has been and continues to be a not-so-silent partner to this "marital right" of violence. Historically, battering and rape of wives has been recognized as a husband's legal right. The legal system's condonation of wife-beating was expressed in 1824 by the Mississippi Supreme Court which held that a "husband should be permitted to chastise his wife moderately in cases of great emergency without subjecting himself to vexatious prosecution for assault and battery, resulting in the discredit and shame of all parties concerned." *Bradley v. State*, 2 Miss. (Walker), 151, 155. Other states limited the husband's common law right to beat his wife by the "Rule of Thumb": He was allowed to beat her as long as the stick was "no thicker than his thumb." Prosser, *Handbook of the Law of Torts*, 136 (4th ed. 1971). Since the mid 1800's, wife beating has been a crime in every state, yet these laws have not been enforced against battering husbands or boyfriends. Today, this "marital right" is upheld in the policies of noninvolvement by the courts, nonarrest by police, and nonprosecution by district attorneys.

The principle that a husband cannot, as a matter of law, rape his wife first appeared in written English Law in the 14th century and was stated in the following manner:

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 herself in this kind unto her husband which she cannot retract. 1 Hale, *History of the Pleas of the Common Crown* 629 (1726 ed.).

Lord Matthew Hale authored this alleged common-law rule with absolutely no supporting authority. Lord Hale's misogyny was not, unfortunately, restricted to the area of marriage. His infamous statement that rape is a charge "easily to be made and hard to be proved, and harder to be

defended" (1 Hale, *The History of the Pleas of the Crown*, 635 (1978)) is preserved in state jury instructions (see 61 Cal. L.R. 919, 931-932 (1973)). Additionally, Hale played a significant role in the persecution of witches in England. For a thorough analysis and discussion of the lack of support for this alleged common-law rule see Drucker, *The Common Law Does Not Support A Marital Exception for Forcible Rape*, 5 Women's Rights L. Rep. 181 (1979).

Present Status of the Marital Rape Exemption

Today, a husband's "marital right" to rape his wife is expressly recognized in at least 37 states. Husbands are afforded this right through an express statutory exemption provided in state criminal statutes.

(a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape. (Emphasis added). Ill. Ann. Stat., ch. 38, §11-1 (1977).

In 10 states (Alabama, Connecticut, Illinois, Kansas, Oklahoma, South Dakota, Texas, Vermont, West Virginia and Washington) the statutory marital rape exemption is absolute. It applies regardless of whether the parties are living apart voluntarily or by court order; only a final decree of divorce terminates the exemption.

In 27 states certain limitations are placed upon the statutory marital rape exemption. These limitations reflect the varying degrees in which states recognize a wife's intent to extricate herself from the marriage as a basis for limiting the exemption. In 11 states (Kentucky, Louisiana, Maryland, Missouri, New York, North Carolina, North Dakota, Rhode Island, South Carolina, Utah and Wyoming) the statutory exemption is denied to a spouse once a judicial decree or order of separation is entered. The exemption still applies, however, when the spouses are living apart, and/or legal action to terminate the marriage is pending. In six states (Indiana, Michigan, Nevada, Ohio, Tennessee and Wisconsin) the marital exemption ends when the spouses are living apart and a petition for annulment, divorce or separation has been filed. In 10 states (Alaska, Arizona, Colorado, Idaho, Iowa, Maine, Montana, New Hampshire, New Mexico and Pennsylvania) the marital rape exemption ends once the parties are living apart; no court order is required.

Rape statutes in seven jurisdictions (Arkansas, Florida, Georgia, Massachusetts, Mississippi, Virginia and the District of Columbia) contain no express marital exemption. Whether the alleged common-law exemption applies in these states, thereby barring prosecution of husbands for marital rape, remains a matter of judicial decision and legislative intent. Arkansas and Georgia provide express marital exemptions for statutory rape (Ark. Stat. §§41-1804-1806, Ga. Code Ann. §26-2018) but not forcible rape (Ark. Stat. §§41-1801, 1803; Ga. Code Ann. §26-2001). It is therefore arguable that the legislatures of these states did not intend a common-law exemption to apply when the statute is silent. In Florida and

1. Citations to state statutes are available upon request from the National Center on Women and Family Law.

Massachusetts husbands have been convicted of rape of their estranged wives.² There are no reported cases regarding marital rape in Mississippi, Virginia and the District of Columbia.

Lobbying efforts to end this archaic and sexist "marital right" or protection afforded husbands have been hard fought and, to a large extent, unsuccessful. Opposition to legislative efforts is being met with the following typical arguments:

...the state of Florida has absolutely no business intervening into the sexual relationship between a husband and a wife.... We don't need Florida invading the sanctity and the intimacy of a husband and wife's sexual relationship. [Rep. Tom Bush, Ft. Lauderdale, Fla., Transcript of Floor Debate on House Bill 650, at 3-4, May 29, 1952].

...the Bible doesn't give the state permission anywhere in that Book for the state to be in your bedroom, and that is just exactly what this bill has gone to, its meddling in your bedroom, the State of Florida, as an entity, deciding what you can do and what you can't do. [Rep. John Mica, Winter Park, Fla., Transcript of Floor Debate on House Bill 650, at 6, May 29, 1950].

... But if you can't rape your wife, who can you rape? [California State Senator Bob Wilson, addressing a group of women lobbyists regarding California's Marital Rape Bill AB 546, Spring 1979].

To date, only three states have totally abolished the marital rape exemption. The express exemptions in Oregon and Nebraska statutes were stricken (Neb. Rev. Stat. §§25-319, 25-320, effective 1976, repealing and replacing §§25-403.03 and §25-403.04; Or. Rev. Stat. §163.305, amended by 1977 c. 544). New Jersey legislators went one step further in abrogating the marital rape exemption by including an express statutory provision that "no actor shall be presumed to be incapable of committing [sexual offense] because of . . . marriage to the victim." (N.J. Stat. Ann. §2C:14-5(b), effective Sept. 1, 1979). Additionally, the exemption has been deleted in most, but not all, cases in California (Cal. Penal §262, effective Jan. 1, 1960, establishing a separate crime of spousal rape), Minnesota (Minn. Stat. Ann. §609.349, amended in 1980, deletes the exemption in most cases), and Iowa (Iowa Code Ann. §709.2-709.4, exemption deleted from first and second degree sexual abuse; exemption retained in third degree).

Delaware and Hawaii have amended their rape statutes by deleting the marital rape exemption on one hand, but then granting an exemption to a previously unprotected class of defendants. In Delaware the marital exemption was deleted from first and second degree rape (Del. Code Ann. §§763, 764). However, in first degree rape the marital exemption was replaced with an exemption for "voluntary social companions" (*see infra*). The Hawaii legislature amended its rape

statutes to provide for gender neutral terms, and in so doing deleted the marital rape exemption. However, like Delaware, a "voluntary social companion" exemption was included in first degree rape (Hawaii Rev. Stat. §707-730).

Expansion of the Marital Rape Exemption

The marital rape exemption has traditionally only applied to, and protected, husbands in legally valid marriages. Various theories, in addition to Hale's "matrimonial consent," have been subsequently offered as the basis for this marital right or privilege of rape: the "unity of person" common-law doctrine, whereby the legal identity of a woman merged upon marriage into that of her husband and made rape by her husband legally impossible since he could not rape himself; or the position of women as property or chattel of their husbands meant that a husband's rape of his wife was merely making use of his own property. All of these "rationales" underlying the marital rape exemption depended upon and required a valid marriage contract.

Exemption for Unmarried Cohabitants

While efforts to abolish the marital rape exemption are meeting strong resistance, legislators in 13 states (Alabama, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Montana, North Dakota, Pennsylvania, Texas, West Virginia) have extended this "privilege of marriage" to unmarried persons. Eleven of these states extend the marital rape exemption to persons living together who are not married to each other (*i.e.*, cohabitation relationships). For example, Montana provides that "...the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship." Mont. Rev. Codes Ann. §45-5-50(2). *See also* Alabama (Crim. Code §13A-6-60(4)); Delaware (Code Ann. §772(b)); Iowa (Code Ann. §709.4, exemption only for third-degree sexual abuse); Minnesota (Stat. Ann. §609.342, exemption only for statutory rape and specified cases involving handicapped couples); Pennsylvania (Stat. Ann. Title 18 §3103); Texas (Penal Code §21.12). In West Virginia (Code §61-8B-1(2)) and Kentucky (R.S.A. §510.010(3)) "marriage" is defined in the criminal statute to include unmarried cohabiting persons. Connecticut (Penal Code §§3a-67(6)) and Maine (R.S.A. Title 17-A §252.2) expressly provide that cohabitation shall be an affirmative defense to rape.

The expansion of the marital rape exemption to cover unmarried cohabitants is "justified" in the Practice Commentary following Texas Penal Code §21.12:

Adults cohabiting may terminate their relationship if one dislikes the other's sexual conduct, and there is no justification for the criminal law's intrusion into the relationship. This section restates and expands the prior law's recognition of this commonsense notion, which was reflected in [Texas] Penal Code art. 1153's definition of rape to exclude sexual intercourse between husband and wife.

While men in these unmarried cohabiting relationships are increasingly being granted the "marital privilege" of rape, women in these relationships have fared far worse in their attempts to obtain privileges of marriage such as spousal sup-

2. Commonwealth v. Chretien, No. 9983-84, 85 (Essex County Superior Court, Mass., Sept. 1979); People v. Finley, No. CRC 86-877 (Criminal Division, Pinellas County Circuit Court, Florida, Apr. 1980).

part ("palimony"), division of the couple's property, or civil orders of protection. In those few states where unmarried women are accorded these rights, courts have first required an express or implied agreement between the parties. No such requirement is made with respect to the expansion of the marital rape exemption.

"Voluntary Social Companion" Exemption

The extension of the marital rape exemption has gone even further in five states. Delaware, Hawaii, Maine, North Dakota and West Virginia do not require cohabitation and they provide partial exemption or immunity for those "date rapes" in which the victim was defendant's "voluntary social companion" who had previously permitted him sexual contact. See Del. Code Ann. §70-4(2) (first degree rape); Hawaii Rev. Stat. §707-730 (first degree rape; exemption requires sexual intercourse within previous 12 months); Maine Rev. Stat. Ann. Title 17-A §252.3 (affirmative defense which

reduces offense to Class B crime); N.D. Code Ann. §12.1-20-03:3 (reduces crime to Class B felony; exemption applies if victim has at any previous time permitted defendant "sexual liberties"). West Virginia presents the extreme example of legalizing "date rape." The "voluntary social companion" exemption to first degree sexual assault requires no previous voluntary sexual act between the defendant and victim (W. Va. Code §61-8B-3(aXiii)).

Conclusion

These new exemptions, like the original marital rape exemption, are without any basis in the common law. The effect of these extensions is that if a woman cohabits with a man, or agrees to intercourse once, or, in some states, if she dates a man, she has lost the protection of the criminal laws that she at least in theory formerly had.

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Divorced Spouses Are Left Out in the Co'd for Distribution of Former Spouses' Pension Benefits

With all of its inadequacies, one aspect of the Social Security Act which borders on real progress is its provision of a separate benefit to the divorced spouse of an insured wage-earner when the couple was married for at least 10 years.¹ Neither of the two large federal public pension programs, Civil Service Retirement and Railroad Retirement, make provision for divorced spouses. Indeed, the Railroad Retirement Act has taken pains to ensure that divorced spouses are explicitly excluded from ever obtaining an annuity based on the work record of the former spouse.² Moreover, the private pension area affords no more

progressive an outlook. The Employee Retirement Income Security Act of 1974 (ERISA),³ which was intended as a comprehensive effort to provide the most basic guarantees to individuals dependent on private pensions, does mandate that plans provide employees with the option to select a "joint and survivor annuity,"⁴ but the requirement is not applicable to former spouses.

It is not news that the divorce rate doubled during the seventies, and many couples who were married for a significant period of time—20 or more years—are dissolving their marriages. One obvious result is that the number of divorced spouses without work records of their own—the great majority of whom, for the time being, are women—has also grown dramatically. And without covered employment, they are deprived of retirement benefits, except for the relatively low benefits available to those whose divorced spouses were covered by Social Security.

Some litigative approaches have been considered to remedy the situation. Divorced spouses of former railroaders, for instance, have suggested that it is unconstitutional to provide divorced spouses' benefits under the Social Security Act but not under the Railroad Retirement Act. It is true that the two Acts are comparable to a limited degree, that they were intended to provide similar coverage to workers in non-railroad and railroad industries, and that they are integrated in some aspects. However, at the same time, they were designed for somewhat different reasons and are different in many significant respects.⁵ The likelihood of forcing the

1. 42 U.S.C. §402(b)(1). Although the statute has not been rewritten, a class-wide decision ensured that the benefit was equally available to men and women. *Oliver v. California, Unempl. Ins. Rep. (C11) §15,244 (N.D. Cal. 1977)*. The former 20-year requirement was reduced to 10 years on January 1, 1979. Pub. L. No. 95-216, §337(e) (Dec. 14, 1977).
2. See 45 U.S.C. §2311(c)(3). One bizarre and apparently unintended result of providing benefits for surviving divorced spouses in the Social Security Act, but having no comparable provisions in the Railroad Retirement Act, is that surviving divorced spouses of individuals who were insured under both Acts are denied the social security benefits which they would receive if their deceased former spouse had been insured under only the Social Security Act, 42 U.S.C. §402(b). Because of the bewildering irrationality of this result, a challenge is being prepared.

3. 29 U.S.C. §§1001 et seq.
4. 29 U.S.C. §1055.
5. For instance, railroad retirement benefits are greater than social security benefits because the former include a private pension "component" while the latter have always been theoretically intended to complement private pension payments—however unrealistic that purpose has proved in practice. See *Hisquierdo v. Hisquierdo*, 94 S.Ct. 812, 84-215 (1974).

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MARITAL RAPE FACT SHEET*

1. Fact or Fiction? "MARITAL RAPE ISN'T AS SERIOUS AS RAPE BY A STRANGER--IT'S JUST A WOMAN NOT BEING IN THE MOOD AND HER HUSBAND INSISTING."

As a matter of fact, marital rape is often just as violent, just as degrading, and oftentimes more traumatic than rape by a stranger. It is perpetrated with knives, at gunpoint, repeatedly, brutally, in front of others, and most often is the final violent act culminating a series of physical abuses. One woman has reported being beaten and raped by her husband virtually every day for six months, anally raped 9 or 10 times. He told her that, if she ever tried to leave, he would kill her. In terror she fled to another state, changed her name, and lived there for a year in cognito.

2. Fact or Fiction? "MARITAL RAPE ISN'T OFFENSIVE--AFTER ALL, A WIFE HAS HAD SEX WITH HER HUSBAND BEFORE, WHAT'S ONE MORE TIME?"

As a matter of fact, a woman raped by a stranger has to live with the memory of that experience. A woman raped by her husband has to live with her rapist. Many wife victims, trapped in a reign of terror, experience repeated sexual assaults over a number of years. What happens to a capacity for intimacy when the person who has promised to love and protect, and on whom one may be economically dependent, commits such a brutal and violent violation?

* Prepared and distributed by the Pennsylvania Commission on the Status of Women.

3. Fact or Fiction? "MARITAL RAPE IS A BIZARRE AND UNUSUAL ACT AND DOESN'T NEED LEGISLATIVE ACTION."

As a matter of fact, most experts consider rape to be the most underreported of all crimes and marital rape even more so. Over a third of women who appear at battered women's shelters report being sexually assaulted by their husbands. It is seldom discussed. Humiliated and ashamed, marital rape victims don't talk about it. They don't report it because the law does not help them.

4. Fact or Fiction? "WHEN A WOMAN MARRIES, SHE CONSENTS TO SEXUAL INTERCOURSE WITH HER HUSBAND."

As a matter of fact, sexual expression in love is one thing. Forced, brutalized sex is another. No one consents to violence by marrying. Under current law prosecution is impossible for even the most brutal rapes in marriage.

5. Fact or Fiction? "IF PROSECUTIONS ARE ALLOWED FOR MARITAL RAPE, A LOT OF INNOCENT HUSBANDS WILL HAVE RAPE CHARGES FILED AGAINST THEM BY ANGRY, VENGEFUL WIVES WHO HOPE TO BARGAIN FOR A BETTER PROPERTY SETTLEMENT IN A DIVORCE ACTION."

As a matter of fact, this myth is built on the ill-founded belief that women are innately vengeful and willing to go through the tortures of a courtroom trial in order to "get back" at a man, and that somehow women should be treated as less credible victims of crime than others. Actually, there are many other types of complaints which a woman could file for retaliation that would require less public self-exposure and trauma. Further, our legal system has built in mechanisms to determine the merits of a complaint. Police investigations, prosecutor discretion, and jury deliberations are employed to determine the truth or falsity of other allegations. Why should marital rape be treated any differently? Finally, no such misuse has been documented by the states that have eliminated immunity of spouses from prosecution for rape. Only the most extremely brutal and horrifying incidents of marital rape have been reported.

6. Fact or Fiction? "MARITAL RAPE IS SIMPLY ONE SPOUSE'S WORD AGAINST THE OTHER, HENCE IT WILL BE DIFFICULT TO PROSECUTE."

As a matter of fact, when has difficulty to prosecute determined what a crime is? Treason, conspiracy, child abuse, and incest are difficult to prove, but there is no outcry to decriminalize them.

7. Fact or Fiction? "THERE ALREADY EXIST REMEDIES FOR MARITAL RAPE--A WOMAN CAN FILE ASSAULT CHARGES OR GET A DIVORCE."

As a matter of fact, all rapists assault their victims. Rape is a crime different from assault. That is why special rape laws exist. Rape involves a special humiliation and special violation. Assault is a less serious crime, its penalty less a deterrent. Even though a woman might escape as a victim by filing for divorce, should the committer of the criminal acts escape punishment for them? An appropriate deterrent to this type of violent behavior is not now available.

8. Fact or Fiction? "MARITAL RAPE LAWS WOULD HAVE THE STATE MEDDLING IN PEOPLE'S BEDROOM AFFAIRS."

As a matter of fact, the state is meddling in the bedroom whether there is a marital rape law or not. In one case the state allows husbands to rape their wives. In the other, the state protects wives from this type of violence. Should murder and assault between spouses be decriminalized just because it's a family affair? A husband should no more fear criminalization of marital rape than a parent fears laws on incest or child abuse. The law should condemn a brutal, hostile, revengeful, hateful, and anti-social act whether it happens within a marriage or without.

9. Fact or Fiction? "MARITAL RAPE LAWS WILL DESTROY MARRIAGES BY PREVENTING ANY POSSIBLE RECONCILIATION."

As a matter of fact, isn't a marriage in which a husband rapes his wife and she presses charges already destroyed? Withholding justice and equal protection to try to hold together such a marriage is an unrealistic and improper goal for the criminal law. The law now protects a raping husband rather than a victim wife, and women can be coerced into staying in violent marriages. Should the law encourage such forced cohabitation?

10. Fact or Fiction? "SINCE SO FEW CASES ARE BROUGHT TO TRIAL, WHY BOTHER WITH A MARITAL RAPE LAW?"

As a matter of fact, the law protects either the victim or the rapist. Husbands who commit acts of violence against wives now receive special protection from the law in Pennsylvania. Should such special protection more rightly belong with the victim? Passage of H.B. 1122 would call attention to the problem, let the victims know there can be help, and, by removing society's sanction for such behavior, work to deter it.

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Listing of over 600 files (bibliography/contacts) available,
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return stamped envelope, plus tax deductible membership fee
(\$10 students and activists; \$15 faculty, researchers; \$25
attorneys; \$30 libraries and organizations).

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12/80

California Socio-legal Chart
of Marital Rape Cases Since
January 1980

NATIONAL CLEARINGHOUSE ON MARITAL RAPE
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2325 OAK STREET
BERKELEY, CA 94708

\$5.00

April 1983

	Name	Arrested	Charges	Arrested Bail	Plea	Retrial	Final Verdict	Verdict	Sentence	Other disposition
pr 1	Kevin Green -C14170	9-30-79	262 - spousal rape 661 - attempted murder 245A - assault with a deadly weapon 259 - murder	18 EO \$20,000	not guilty	4-7 EO trial 6-18-80	not guilty	guilty - 2nd degree murder 2nd degree attempted murder, assault with a deadly weapon	11-7-83 15 years to life in state prison	spousal rape 262 dropped because crime occurred before law went into effect
pr 2	David William Washburn #74060	11-5-79	207 - kidnapping 288 - enticement 644 & 286 - attempt to seduce via force	1-3-80 \$10,000	no contest	to 734 - false imprisonment indiction of traumatic injury on wife			5-2-80 1 year in county jail, 3 years probation, psychiatric counseling own probation period, work for 1 year if recommended	
pr 3	Lupe Garcia Regalado #76586	12-19-79	207 - kidnapping 211 - robbery 245A - assault with a deadly weapon	1-31-80 \$7,250	guilty to kidnapping and rape	1-4-80 hearing 1-21-80 trial guilty of insanity 4-31-80 5-19-80	no trial because of plea		5-19-80 7 years in state prison (153 days credited for time in jail, psychiatric counseling) The defendant is serving time for kidnap because it is a worse crime than my trial. The mayhem crime will go into effect if kidnap charge ever dropped because 654 - court cannot double punish.	defendant could not be charged or arrested on spousal rape because the crime happened before the law was passed.

code pr - pre-trial
C - court order
P - plea bargain
I - initial trial charges

D - case dropped
H - in arrest
M - with indictment
N - no trial

A - ALTERNATE ROL

Age	Wife's Name	Marital Status	Crime	Race	Children	Race/Ethnicity	Occupations	Residence	How Incident Ended
21	Diana - 20	together	Victim 2 weeks overdue with first child. When she resisted his advances he hit her head with large metal key container, raped her.	thirapl.	none	♂ white ♀ white	♂ marine ♀ housewife	Tipton; Orange Co.	Green called ambulance when victim became comatose. Infant delivered dead by Caesarean due to victim's injuries. She remained in coma 4 months, memory regained 3 months later at which time Green re-arrested. Victim now aphasic and suffers permanent brain damage.
28	Victoria - 31	separated 2 months	He came to discuss separation, kidnapped her in van, drove to secluded area in Santa Cruz mts. Repeatedly threatened to kill her with gun he claimed in glove compartment. Beat her with belt, raped her - overcame her when she tried escaping, raped her two more times.	van in Santa Cruz mountains	1	♂ white ♀ white	♂ courier ♀ unavail- able	San Jose, Santa Clara Co.	Weddingham eventually dropped her at her home; she called the police.
28	Maria 27	separated 8 months	He picked her up to go to the cinema, drove instead to a cornfield. Forced her to walk four miles through the field nude, raped her, shaved her head, carved swastika on her cheek & cross on hip, covered her with shoe polish & red paint, pulled four teeth and burned her hands.	cornfield	not known	♂ Mexican-am. ♀ American-am.	both farm workers	Yuba City, Sutter Co.	A rancher discovered her in the field the next morning.

Age	Wife's Name	Marital Status	Crime	Place	Children	Race/Ethnicity	Occupations	Residence	How Incident Ended
31	53	separated	argument, rape					Bellflower, Los Angeles	
31	Karen	26 separated 1 month married 5 years	Bray came to victim's home to pick up photographs - argued - 280 lbs Bray threw her (120) onto chair and raped her	her apt.	none	♂ white ♀ white	♂ studying to be a mechanic ♀ unavailable	Chico, Butte Co.	Police in area heard her screaming for help from window and saw her jump through it to ground.
21	Rosa	18 separated 4 months married 6 wks prior to living together 5 years.	(wife) stolen Martinez lured victim into van claiming he had a gift for her. Drove around area stopping at intervals to rape wife (4 times). Van had been stolen the day before of the woman sales agent abducted for 10 hrs. and raped 4 times by Martinez.	Stevan van	none	♂ Mexican am ♀ Mexican am.	♂ unemployed laborer ♀ Factory worker	Armona, Los Angeles Co.	Victim managed to slip message to another woman in gas station saying she'd been kidnapped and raped. The woman called police who caught him in van.
25	Edith	20 together married 4 years many separations he beats her several times all kinds of counseling, pills, and drugs prescribed for husband to "calm him down"	He was watching television, wanted sex, when she resisted he beat her head against floor, tore her clothes with a knife, raped her.	their apt.	none	♂ Black ♀ Black	♂ unemployed Lake Elsinore ♀ unemployed Riverside Co.		VICTIM'S SISTER, WHO LIVES IN THE SAME APT. BUILDING, HEARD VICTIM'S SCREAMS FROM HER APARTMENT, HELPED VICTIM ESCAPE, AND PHONED THE POLICE.
25	Carmen	24 separated 3 months married 1-20-74 to 1-7-80	Beltman kidnapped her at knife-point from shopping center, drove to rural spot, threatened to kill her, raped her.	country-side in car	none	♂ white ♀ mex am.	♂ member of Garment Workers Union ♀ sales clerk	Hayward, Alameda Co	Beltman drove her back to shopping center, victim went home and called the police

Name	Arrested	Charges	Assigned Bail	Plea	Retim. Hearing	Verdict	Sentence	Other disposition
pc 9 Heather Watkins #66933	3-17-80	262 - Spousal rape 286c - Sodomy 289A - Rape with a foreign object	4-7-80 \$1,500 exonerated	not guilty 6-17-80 hearing 7-18-80 defendant entered plea of guilty to 262 (incompetence)			9-2-80 guilty to 262, other counts dismissed. 8 months in jail, 3 years formal probation counseling at discretion of probation officer, must submit to warrant less search of person, vehicle, or residence during parole period. Must submit to chemical testing during parole must refrain wholly from drugs except when prescribed and refrain from alcohol as well as establishments predominantly selling alcohol.	plea bargained
d 10 David Jesse Carter # 2555	4-23-80	262 - Spousal rape 236 - False imprisonment	5-19-80 \$15,000 reduced to 5,000	not guilty 5-5-80				case was dropped because DA didn't think victims testimony was believable she was a heavy drug user to criminal record - she tried to take child by impersonating an authority, then by threatening with gun a witness at apt. also claimed to rape occurred.
c 11 John A. Chiampollini # 20920	4-27-80	207 - Kidnapping 262 - Spousal rape	4/28/80 \$20,000 reduced to \$5,000	not guilty 5-8-80 hearing	no contest to misdemeanor 262 spousal rape		6-10-80 1 year suspended sentence, 3 years probation, psychiatric counseling, 25 day comm. volunteer work.	trial had been set for July then Chiampollini had no contest before the judge.

CALIFORNIA LEGAL COURT
page 5

Age	Wife's Name	Marital Status	Crime	Place	Children	Race	Ethnicity	Occupations	Residence	How Incident Ended
24	Catherine	23 together married 3 1/2 years	He raped victim in bedroom of their home with mouth wash bottle twice, then sodomized her	their apt	3	♂ white ♀ white		♂ unemployed ♀ unemployed unemployed	Rocking, Santa Co.	Victim called police the next day, filed for divorce, then went to a women's shelter
28	Sanka	22 separated 1 month married 5 years	Victim came to his apartment to see children, he pulled her into bathroom where she screamed out of fear. Husband was on Probation on a 242 Battery misdemeanor.	his apt	2	♂ white ♀ white		♀ - Home maker (believed to be)	Hayward, Alameda Co.	VICTIM WENT TO SHERIFF OFF. EARLY - Victim later received phone call from Carter telling her he would send the Hell's Angels after her if she didn't drop charges. Call made 1/22 From Santa Rita Jail. CHARGE OF THREATENING WIFE WERE DROPPED, BECAUSE THEY WEREN'T THREATS AGAINST HER. BUT AGAINST CHILDREN (ACCORDING TO NEWSPAPER REPORT). CARTER REPRIMANDED IN COURT FOR HIS BEHAVIOR - HE WAS LAUGHING AND "SMIRKING" AT WIFE DURING HER TESTIMONY.
23	Lisa	22 separated 2 weeks	KIDNAP & RAPE. HUSBAND WANTED TO MEET WITH WIFE. PICKED HER UP AND TOOK HER TO A SECLUDED SPOT WHERE HE Raped HER.	Yuba in " secluded spot	none	♂ white ♀ white		♂ grocery store Employee	Livermore, Alameda Co.	

	Name	Arrested	Charges	Arraigned Bail	Plea	Trial or Prelim. Hearing	Conv. Dis.	Verdict	Sentence	Other Disposition
d 12	Michael Eugene Maggard	5-15-80	220 - assault with intent to commit rape 273.5 - felony wife-beating 242 - assault & battery 602 - trespassing				charges dropped by D.A. over wife's objections			WIFE SAID THAT D.A. CANTERTON'S DECISION ALLOWED HE DID NOT TAKE THE CASE SERIOUSLY.
SM 13	Roger Edelbacher	5-28-80 1-8-82 (murder)	262 - spousal rape 259 - murder	mini 1-25-82 (murder) Superior arraignment (murder) 3-24-82 - moved to 6-1-82 held who bail	not guilty (empt) not guilty (murder)	jury hearing 2-25-81 (murder) pre-trial 2/1/82 and 2/16/82 - (same dates rescheduled) trial: 9-7-82 - reset to 9-16-82		not guilty 2-26-81 not guilty	WIFE WAS MURDERED. HUSBAND DRUNK CHARGED WITH MURDER	
d 14	Philip Ramirez	6-10-80	261 (-21.3) - rape	6-11-80	not guilty	D.A. dropped case 11-26-80 when wife stated she did not wish charges pursued - 571 cont. 11/2/80			PERSON UNKNOWN, WIFE BATTERY CHARGES, BUT NEVER SIGNED NEW COMPLAINT. JUDGE STATED "TRADITIONALLY WOMEN HAVE RAISED THIS ISSUE BY HAVING A HEADACHE" (During THE-11M HEARING)	
PL 15	Joseph R. Magno	7-15-80	262 - spousal rape 273.5 - inflicting corporal injury on spouse	7-18-80 \$15,000	guilty to battery				8-1-80 3 years probation, psychiatric counseling, protection order issued, 1 year in county jail if breaks parole.	ALLOVED plea bargain because he conveyed before being granted Miranda rights and police entered home without a warrant.

Age	Wife's Name	Marital Status	Crime	Place	Children	Race/Ethnicity	Occupations	Residence	How Incident Evoked
32	Linda Jean	30 separated	tore off victim's nightclothes, hit her boyfriend	her apt.		♂ white ♀ white		Westminster, Orange Co.	
24	Lela	25 Separated 1 year married 4 1/2 years	Victim raped on two consecutive nights. On second night he broke down door - he claimed he'd forgotten his keys inside and victim refused to let him back in so he broke door	her apt.	1	♂ white ♀ white	♂ works for printing company tractor ♀ interior decorator	Fresno, Fresno Co.	Victim called police on second night. - 1 month later victim was murdered, shot gun found under husband's bed, Edthacker being sought for questioning
		18 - Separated wife filed for divorce on day BEFORE THE MARR.	VICTIM WAS SLEEPING IN BED WHEN SHE AWAKENED TO HEAR BANGING COMING FROM DOWN STAIRS. SHE CALLED POLICE. POLICE ARRIVED AND FOUND VICTIM IN BED WITH BLOOD ON HER DRESS. SHE HAD BEEN RAPIED.	her apt.		♂ Mexican-Am.	♂ unemployed	Santa Rosa, Sonoma Co.	Ramirez left the apt.
27	Jolene	22 Separated 1 year	Romagna asked victim to his apartment to discuss financial matters, once there she was hit then raped	his apt.	2	♂ Italian-Am. ♀ Italian-Am.	♂ truck driver ♀ housewife	Bobersfield Kern Co.	Victim called police on her CB radio in her car - At time of attack Romagna was free on \$1500 bail after he had kicked in the door to her apartment, ripped up her furniture and sprayed obscenities on the walls.

	Name	Arrested	Charges	Arraigned	Bail	Plea	Trial or Prelim. Hearing	Court	Held	Ventil	Sentence	Other disposition	
N 16	Gerald Frank Stanley #1323	- never arrested while wife was alive - incident (rape) in July 1980.	7-19-80 261 - Spousal rape - rape by threat 288 - oral copulation - felony wife - 273.5 - beating 109 - murder while trying to commit - murder to prevent testimony. 157 - burglary 461 - arson.				CHARGES DROPPED BECAUSE OF WIFE'S MURDER - AFTER WIFE WAS RAPED, THERE WAS A MARRIAGE FOR THE HUSBAND FOR 3 WEEKS. WIFE WAS THEN MURDERED IN PRESENCE OF HER FAMILY, SHOT THROUGH THE HEART - STANLEY IS NOW ON TRIAL FOR MURDER - THE RAPE CHARGE WILL BE BROUGHT IN A: EVIDENCE, THOUGH THIS CHARGE DROPPED SINCE PRINCIPAL (WIFE'S WIFE) DEAD. TIME OBLIVIOUS AS OF FEB '82.						Stanley arrested 8-27-80 charged with wife's murder and suspect in another murder (of STRANGER). STANLEY CONDUCTED OF KILLING 2nd wife. Third wife disappeared and has not been found. Buried Down House (4th wife).
AQ17	John Berlin #C-45596	9-12-80	262 - spousal rape	\$2,500	not guilty	jury trial 2-17-81 not guilty	deadlock					not guilty	
F 10	Timothy Herbert Aug. #261707-1	2.9.1980	262 - spousal rape 289 - rape with a foreign object	10 22 80 \$1000	1-7-81 guilty to spousal rape dropped 201	11-10-80					3 years in prison	BEGLIN FLED SUIT AGAINST COUNTY FOR fabricating evidence (dis-missed) plea-bargained.	
19 PC	Emil Gabriel #10573-C	10-29-80	262A - spousal rape 1667 - assault with a deadly weapon 245 - assault 273.5 - assault	12-9-80	OK	not guilty	wived hearing 5-26-81	no contest to 262 (misdemeanor)			5-5-81 5 years suspended sentence, 3 years probation, psychiatric counseling.	Plea bargained out in all out with deadly weapon, corporal punishment & criminal contempt of court order (on wife) insistence that it was not the same person that was charged with the same crime.	
A 30	Maximilian Ethel Vargas #A M 20242	11-23-80	262 - spousal rape 242 misdemeanor battery	12-9-80	\$2,000	not guilty	1-2-81	Case dismissed, DA needed wife's desire that prosecution proceed for COURT ORDER (REASON UNKNOWN FOR HER DECISION)					

Name	Arrested	Charges	Arranged Bail	Mea	Trial/ Plea/ Hearing/ Convicted	Verdict	Sentence	Other disposition
21 Thor Lawless Asgardson #6-59782	12-15-80	262 - spousal rape	12-17-80 none out on his own rec.	guilty	There was never a hearing because the 1st date was cancelled for some unknown reason as with the second date for a hearing. He pleaded guilty between 2nd & 3rd hearing. The plea-bargaining brought his felony down to a misdemeanor.		3-26-81 2 years with summary probation, 60 days minimum in jail.	Plea-bargain from felony to misdemeanor.
22 Sam Norman Munby #7-3113	11-24-80	282A - oral copulation 262 - spousal rape 207 - kidnapping	11-26-80 no bail	not guilty	2-19-81 hearing no contest 3-5-81 to 1993 misdemeanor battery	Guilty	6 months suspended to court probation and counseling	Plea bargained of pleading charges changed to 288A from 262 and 262 dropped to 242. At hearing plead no contest to 242 if other charge dropped. (misdemeanor) Victim is now back with defendant.
D 23 William Shactell C-8157895	12-30-80	289 - rape with a foreign object 245A - assault with deadly weapon	1-19-81 \$13,000	not guilty	2-11-81 case dismissed; wife did not want prosecution to continue. When the case got to court, she refused to testify. It was not in her best interest. hearing. wife described by D.A. as arrogant, uncooperative, which she felt was not handled with intelligence.		DO NOT PROCEED WITH CASE AS WIFE DID NOT WANT PROSECUTION TO CONTINUE. When the case got to court, she refused to testify. It was not in her best interest. hearing. wife described by D.A. as arrogant, uncooperative, which she felt was not handled with intelligence.	
D 24 Emanuel Genzales	no arrest	no wife would not press charges despite D.A.'s urging,			reason unknown.			
D 25 Anonymous	no arrest	Woman reported estranged husband beat and raped her,			charges dropped for unknown reason			

Age	Wife's Name	Marital Status	Crime	Place	Children	Sex/Ethnicity	Occupations	Residence	How Incident Ended
29	Julie	25 separated	rape, no weapons	his home	none	♂ white ♀ white	♂ graphic work ♀ nurse (Student/AM)	Eureka, Humboldt Co.	Victim waited a week before reporting rape.
21	Elrenda	20 separated	D.A. office said she was kidnapped from alpha beta cinnery store then taken to house where raped.	Bus Station (near 4th) Victim's house		♂ white ♀ white	♂ unemployed (husband) ♀ housewife	Livermore, Nameda Co.	Victim ran from house where rape occurred to her own home. Monday followed, broke window and kicked in door then left when crowd gathered as a result of the commotion. WIFE CALLED POLICE.
31	Kathy	28 together married 5 years	He came to bed after drinking and watching pornographic tapes; said he had some "new ideas." First voluntary sex then became angry, raped her with crowbar and tire iron, slashed her breasts with crowbar and poured brandy on her wounds, struck her with belt.	their home (bedroom, garage) floor	1	♂ white ♀ white	♂ concert promoter ♀ housewife	San Jose, Santa Clara Co.	Victim escaped to neighbors and phoned police when he tried her to feed the baby. Was hospitalized several days for gashes and internal bleeding.
35		33 together	Victim claimed a history of Gonzales forcing her to have 5 way sex with strangers and beating her	their home	3	♂ mexican-2m ♀ mexican-2m		East Los Angeles, Los Angeles, Co.	wife left house & went to police.
		36 separated married 7 years	Victim beat and raped by estranged husband	her apt				Fresno, Fresno Co.	

	Name	Arrested	Charges	Arrangpt Bail	Plea	Delim ^{Trial or} Hearing	Court Pnd	Verdict	Sentence	Other disposition	
J 28	Anonymous	(no arrest)	Woman reported kidnapping, beating, and rape - husband denied all three, charges never made								
I 29	Arturo Arroyo #5196	1-29-81	262A - spousal rape	3-3-81 \$3,000	not guilty		case dropped due to wife's wishes.		She said "I don't want to go to court, I don't want to take off any more time from my job and he (the defendant) said he would leave me alone."		
28 C	Victor Burnham #10549	12-17-81	4x 262 - spousal rape 249a - assault with threatening with firearm 259 - assault with foreign object (dog) 12020 - possession of machine gun <i>(also charged w/ nearly 100 rounds and magazine 40s, 200 rounds)</i>	3-13-81 \$50,000 reduced to \$25,000 then to \$30,000 <i>judge refused to release because of previous conviction</i>	not guilty	5-12-81 ^{July} trial	5-26-81	not guilty (pled no contest to gun possession charge during trial)	guilty 6-4-81: 4 counts spousal rape, bestiality, assault with intent to commit great bodily harm (gun charge moved to separate trial pending trial)	Suspended sentence. Sent to California Board of Correction for 90 days observation. 1-22-81. <i>(see hospital records) 6-13-81.</i>	Burnham has 3 prior convictions: 1977 - misdemeanor hit/abuse 1965 - assault and battery 1977 - illegal transportation of liquor. 24 months w/parole for 1st of 2nd. He spent 6 months in prison.
pt 29	Marvin Nille #21005	3-20-81	491 - entering residence with intent to commit felony 17010 - possession of a weapon 3x 236 - false imprisonment 261 - spousal rape 4118 - exhibiting firearm in a threatening manner	3-26-81 \$5,000	not guilty	4-13-81 5-8-81	guilty - <i>(had been sent to Napa during incarceration pending trial)</i>	guilty on weapons and false imprisonment charges	4 years in Alameda	1972 - battered - 202 dropped. Maximum sentence on charges 5 yrs. STANDARD RATE CHANGE LAW ADOPTED 1975 BECAUSE OF ANTI-TRUST ACTS AGAINST LIFE OF THE WORLD. BUT THIS LAW BANNED AND BANNED WITH THE PROHIBITION OF THE BLACK.	

Age	Wife's Name	Marital Status	Crime	Max.	Children	Race/Ethnicity	Occupations	Residence	How Incident Ended
20		separated 1 month	kidnapped wife from bar, drove to his apt., beat and raped her	his apt.				Fresno, Fresno Co.	
24	Rose Mary	28 separated 10 months	Victim returned to home with daughter following father's funeral. Accoly forced himself into car and drove to a house where they were forced to remain - at 11:00 AM mother and daughter went to sleep - mother awakened to his advances. When she resisted, he beat, hit, and raped her. *(Rose Mary's mother's funeral)	home 401 S. 8th	2	♂ mexican-am ♀ mexican-am	♂ unemployed (alcoholic) ♀ secretary (Head Start program)	Madera, Madera Co.	Victim was finally able to make a phone call for help to a friend at 5:00 AM.
35	Rebecca	20 together married 2 1/2 yrs	Victim repeatedly subjected to forced sex with Burnham, other men, and dogs. She reported last incident when he raped, choked her and forced her to have sex with stranger and a dog. All 3 wives testified to having been hit, choked, pinned, whipped, etc. (incidents of death in courtroom, and generally means to humiliate, cause pain, and distress. Victim always at home, forced sexual intercourse at home).	their home	1	♂ white ♀ white	♂ unemployed construction worker ♀ housewife	Marced, Marced Co.	Victim fled to battered women's shelter, then went to Sheriff's department. AFTER BEING BEATEN BY BURNHAM, WIFE TESTIFIED THAT THERE WERE CONSTANT THREATS AGAINST HER & HER CHILD, CREATING A "P.O.L.I.C. SITUATION" (SHERIFF D.A.). CHILD HAD HYPERTENSIVE CRISIS DURING FORCED SEX EPISODES. IN ALL 3 MARRIAGES, 9 WIVES LEFT COMPLETELY ISOLATED. BURNHAM STATED INTENTIONALLY TARGETED WIVES MARRIAGE / SEPARATION / DIVORCE / DEATH OF WIFE WAS RATHERING A
27	Sophia Moline	24 separated	broke into wife's home with sword of shotgun then raped wife. When she escaped he held son as hostage.	her home	2	♂ black ♀ white	♂ railroad worker ♀ housewife	Ukiah, Mendocino Co.	MARRIAGE / SEPARATION / DIVORCE / DEATH OF WIFE WAS RATHERING A OUT OF HOUSE, RAN INTO LIVE-IN LOVER, WHO WAS PREVENTING FROM WORK. LOVER CALLED POLICE ON HIS C.O. RADIO

	NAME	ARRESTED	CHARGES	ARREST	BAIL	PLEA	DATE OF TRIAL HEARING	CHARGE YEAR	VERDICT	SENTENCE	OTHER DISPOSITION	
D 30	Kirk Layton #5510	7-1-81	262. Sexual Rape		40,000				- CASE DISMISSED BECAUSE WIFE DIDN'T SHOW UP AT TRIAL (LACK OF CORPUS DELICTI) - DEFENDANT IS TO SURRENDER INTO CUSTODY IF WIFE RETURNS AND REFILES.			
D 31	Arson (D.A. Lisa Vandia)	7-18-81	262. Sexual Rape EMBAZLE COP. 184a Summary		40,000	NOT GUILTY	8/16/81		- WIFE STATED ON WITNESS STAND THAT SHE DID NOT WANT TO PRESS CHARGES - CHARGES DROPPED FOR LACK OF COMPLAINT BY WIFE			
D 32	Joe Carrera (MA. COP. WIFE)	7-1-81	262. Sexual Rape						- CHARGES DISMISSED - BELIEVED WIFE ASKED THAT DA DROP CHARGES BECAUSE UNDERWIFE.			
C 33	IMMIGR. HERMAN #CR017100		262. Sexual Rape		O.R.	NOT GUILTY	8/16/81	9/4/81	GUILTY	CONFINED APPROXIMATELY 222	6-14-81 (YES) Probation and \$2,500.00 FINE	CASE SET FOR JURY! Wife's Name GUILTY (CRIME JURY) BEFORE JURY DELIBERATION
P 34	FERRIS RUSSELL PENNSYLVANIA #855 AND CIVILIAN	9-15-81 (MURKIN 7-1-81)	262. Sexual Rape INFL. ASSAULT WITH A LEADEN WEAPON	9-16-81	\$20,000 (Equivalent to \$40,000 D.A. Bail) if witness charges to any of 800 At Lamp House				PLEA BARGAINING TO 2 1/2 YEARS		10-20-81 - - LIVE IN PSYCHIATRIC COUNSELING - 4 YEARS PROBATION - 116 Days County County Jail (112 Days completed during trial).	CASE DISMISSED (ADMONISH WIFE'S REPUTATION ALREADY DROPPED) - DURING WIFE'S SUBSTITUTION BY COUNSELLING RETRIBUTION JURY.
N 35	Arson (D.A. Lisa Vandia)	INTERVIEW ON 8-11-81 (NO ARREST)	UNDER INVESTIGATION FOR SEXUAL RAPE. WIFE BELIEVED TO PRESS CHARGE FOR CHARGES						- VICTIM DECLINED TO PRESS CRIMINAL COMPLAINT			

AGE	WIFE'S NAME	MARRIAGE STATUS	CRIME	PLACE	CHILDREN	RACE / ETHNICITY	OCCUPATIONS	RESIDENCE	HOW INCIDENT ENDED
22	TERRY - 22	SEPARATED	HUSBAND ASKED COURT ORDER TO STAY AWAY FROM WIFE ENTERED THROUGH WINDOW HIT WIFE IN FACE WITH FIST AND SHOULDER TOOK WIFE AND SOLE \$20.00	WIFE'S HOME	NONE	SPAN WHITE	UNAVAILABLE	FRESNO	HUSBAND LEFT - WIFE CALLED POLICE
28	-25	SEPARATED	HUSBAND WANTED TO RETURN TO WORK TO STAY AWAY FROM WIFE EXCEPT ONE TIME/WEEK TO VISIT MOTHER. GRANTED PERMISSION TO VISIT MOTHER. STRUCK WIFE REPEATEDLY WITH HIS FIST. DROPPED HER UPSTAIRS AND THREATENED TO STRANGLE HER WITH TWENTY NINE. DORIS CHARLES RADING FROM MAY 12, 1951	WIFE'S HOME	1 DAUGHTER			Union City & Alameda - 17 (Both Alameda County)	WIFE CALLED POLICE
37	-25	SEPARATED	SPONSORAL BARRAGE	WIFE'S HOME				FRESNO (BORN)	HUSBAND FLED
37	SUZANNE - 37	SEPARATED FILED THE DIVORCE	SAW WIFE OFF HIM OF FEAR WIFE HAD BORN TO HIM HUSBAND CALLED THE (WINE) (SILVER) POLICE, THEY BATTED HIM.	HUSBAND'S HOME	ONE	SPAN WHITE	♀ - HAWK DRESSING (BORN)	WISIN, SAN DIEGO (BORN)	HUSBAND ABANDONED. WIFE CALLED THE POLICE AND DROVE TO GAS STATION. CALLED FRIENDS FOR HELP.
31	MARIA - 46	MARRIED 6 mos. (WAGING ON SEPARATION)	HE BEHAVED WITH WIFE FILED UP LADS WIFE WOULD HUSBAND TO DISCUSS (WAGING) BARRAGE IN CAR IN FRONT OF HOME.	CAR (ON STREET IN FRONT OF HOME).	1 BY WIFE'S FACIUMS IMMEDIATE	SPAN WHITE	♂ - MILITARY (MARRIED) ♀ - HOUSEWIFE	SPAN OCEANSIDE, SANTA BARBARA COUNTY	WIFE CALLED POLICE HUSBAND HAD BEEN JAILED ON ASSAULT BEFORE.
20		SEPARATED	HUSBAND FORCED WIFE INTO WIFE'S BATHROOM FORCED WIFE'S FRIEND WITH SUBMISSION BARRAGE WIFE IN HAND AND SHOULD BE BARRAGE. THREATENED TO BARRAGE WIFE IF SHE DIDN'T HAVE SEX WITH HIM. RATED WIFE IN FRONT OF HOD. CALLED	WIFE'S HOME STREET				9 WEST PLYMOUTH, CONTRA COSTA COUNTY	HUSBAND LEFT AND RETURNED SEVERAL HOURS LATER. TOOK WIFE TO ANOTHER APARTMENT AND TOLD HER NOT TO LEAVE HIM. VICTIM AND BARRAGE TO EVIDENTIALLY ME - POLICE IN THE APARTMENT AND LEAVING THE AREA. BARRAGE AND NEIGHBORS WERE TOO FRIGHTENED TO CALL THE POLICE - DEFENDANT IS 6'2", 155 lbs. HA. TRYING TO REMOVE DEFENDANT'S IDENTIFICATION.

CALIFORNIA SOCIOLOGICAL CHART

