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Problems of Convicting a Husband for the Rape of his Wife

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Abstract

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KEYWORDS: rape, wife, husband

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I. Introduction

Society has recognized family violence as a pervasive and serious problem requiring intervention by the criminal justice system. One form of family violence is marital rape, which is both brutal and degrading. Suprisingly, marital rape has not received much public attention even though it occurs with alarming frequency. Reportedly, one out of seven women "who has ever been married, has been raped by a

husband at least once, and sometimes many times over many years."[1] Despite the frequency and seriousness[2] of marital rape, only seven states have totally abolished the marital rape exemption for husbands.[3]

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1. D. RUSSELL, RAPE IN MARRIAGE 2 (1982). This statement is based on a random sample of 930 women and generalized to the population at large.

2. Schwartz, *The Spousal Exemption for Criminal Rape Prosecutions*, 7 VERMONT L. REV. 33, 46 (1983). "Rape crisis center counselors have claimed that some of the most seriously injured women, particularly in injuries to vaginal walls, are raped spouses." *Id.*

3. The marital exemption has been completely abolished in Florida, Massachusetts, Nebraska, New Jersey, New York, Oregon and Wisconsin. *See* FLA. STAT. § 794.011 (1983 and Supp. 1984), (State v. Smith, 401 So. 2d 1126 (Fla. 5th Dist. Ct. App. 1981), State v. Rider, 449 So. 2d 903 (Fla. 3d Dist. Ct. App. 1984), *review denied*, 458 So. 2d 273 (1984) *appeal dismissed*, Rider v. Florida, 53 U.S.L.W. 3686 (U.S. March 26, 1985)(No.84-6164); MASS. GEN. LAWS. ANN. ch. 265, § 22 (West Supp. 1983), Commonwealth v. Chretien, 383 Mass. 123, 417 N.E.2d 1203 (1981); NEB. REV. STAT. § 28-319, 28-320 (1979); N.J. STAT. ANN. § 2c: 14-5(b)(1982); N.Y. PENAL LAW § 130.00 (McKinney Supp. 1983-1984), People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984); OR. REV. STAT. § 163.305 (1983); WIS. STAT. ANN. § 940.225(6)(West Supp. 1983-1984).

Thirty-five states have retained the exemption in some instances, depending on whether spouses have separated, are living apart, have filed a petition for annulment, divorce or separate maintenance or for third degree sexual abuse, etc.: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. *See* Alaska Stat. § 11.41.445(a) (1983); ARIZ. REV. STAT. ANN. § 13-1407.D (Supp. 1983-1984); ARK. STAT. ANN. §§ 41-1801, 41-1802, 41-1803, 41-1804 (1977); COLO. REV. STAT. § 18-3-409 (1978); CONN. GEN. STAT. ANN. §§ 53a-65, 53a-67 (West Supp. 1984); DEL. CODE ANN. tit. 11, §§ 763, 764 (1979 & Supp. 1984); HAWAII REV. STAT. §§ 707-730, 707-731, 707-732 (Supp. 1983); IDAHO CODE § 18-6107 (1979 & Supp. 1984); ILL. ANN. STAT. ch. 38, §§ 12-12, 12-13, 12-14, 12-15, 12-16, 12-17, 12-18(c) (Smith Hurd Supp. 1984-1985); IND. CODE ANN. § 35-42-4-1(b) (Burns Supp. 1984); IOWA CODE ANN. § 709.4 (West 1979 & Supp. 1984-1985); KAN. STAT. ANN. §§ 21-3502, 21-3517, 21-3518 (Supp. 1983); KY. REV. STAT. ANN. § 510.010(3)(B) (Bobbs-Merrill 1975 & Supp. 1984); LA. REV. STAT. ANN. § 14:41 (West Supp. 1984); ME. REV. STAT. ANN. tit. 17-A §§ 252.2, 253 (West 1983 & Supp. 1983-1984); MD. ANN. CODE art. 27, § 464D (1982); MICH. COMP. LAWS. ANN. § 750.520l (West Supp. 1984-1985); MINN. STAT. ANN. § 609.349 (West Supp. 1984); MISS. CODE ANN. § 97-3-99 (1983); MO. ANN. STAT. §§ 566.010, 566.030 (Vernon 1979 & Supp. 1984); MONT. CODE ANN. § 45-5-511(2) (1983); NEV. REV. STAT. § 200.373 (1983); N.H. REV. STAT. ANN. §§ 632-A:2, 632-A:3, 632-A:5 (Supp. 1983) (exemption retained in statutory rape and cases of mentally defective victim-wives); N.M. STAT. ANN. §§ 30-9-10E, 30-9-11 (1978 & Supp. 1983); N.C. GEN. STAT. § 14-27.8 (1981); N.D. CENT. CODE § 12.1-20-01 (1983); OHIO REV. CODE ANN §

In these seven states, however, even though a husband can be prosecuted if he rapes his wife, many obstacles to obtaining a conviction remain.

The purpose of this note is to give practitioners and judges insight into the problems of obtaining convictions for marital rape. The note begins with a discussion of the background of the marital rape exemption for husbands. The historical background aids in understanding the effect of Florida's Sexual Battery Statute[4] and corresponding case law on convictions. Finally, the note explores the attitudes of victims, police, prosecutors, judges and juries to determine their respective impact on convictions for marital rape.

II. History of the Marital Rape Exemption; Myths and Policies

Many states have embraced as part of their common law and eventually within their statutes the notion that a husband cannot be prosecuted for raping his wife. The exemption for husbands is credited to Sir Matthew Hale, who proposed the idea in a treatise he wrote in 1736.[5] Hale, however, did not base his proposition on case law or any

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2907.01L (Page 1982); PA. STAT. ANN. tit. 18 §§ 3103, 3121 (Purdon 1983); R.I. GEN. LAWS § 11-37-1 (1984); S.C. CODE ANN. § 16-3-658 (Law. Co-op. Supp. 1983); TENN. CODE ANN § 39-2-610 (1982); TEX. PENAL CODE ANN. § 22.011(c)(2) (Vernon Supp. 1984); UTAH CODE ANN. § 76-5-407 (Supp. 1983); VA. CODE § 18.2-61 (1982), Weishaupt v. Commonwealth, 277 Va. 389, 315 S.E.2d 847 (1984), Kiser v. Commonwealth, ___ Va. ___, 321 S.E.2d 291 (1984); WASH. REV. CODE ANN § 9A.44.010 (Supp. 1984-1985); WYO. STAT. ANN §§ 6-2-301, 6-2-302, 6-2-306, 6-2-307 (1983).

California and West Virginia have a separate statute for marital rape. *See* CAL. PENAL CODE § 262 (Deerings Supp. 1984) (requires 90 day reporting period); W.VA. CODE § 61-8B-6 (Supp. 1984) (cohabitors are exempt).

Alabama, Georgia, Oklahoma, South Dakota and Vermont completely adhere to the marital exemption. *See* ALA. CODE §§ 13A-6-60(4), 13A-6-61 (1975 & Supp. 1984); GA. CODE ANN. § 16-6-1 (1984)(retains common-law definition, requiring carnal knowledge); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1983-1984); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1984); VT. STAT. ANN tit. 13 § 3252 (Supp. 1984).

The District of Columbia statute is silent as to the exemption. *See* D.C. CODE ANN. § 22-2801 (1981 & Supp. 1984).

4. FLA. STAT. ch. 794 (1983 & Supp. 1984).

5. 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN § 629 (1736)("[T]he hu[s]band cannot be guilty of a rape committed by him[s]elf upon his lawful wife, for by their mutual matrimonial con[s]ent and contract the wife hath given up her[s]elf in this kind unto her hu[s]band, which [s]he cannot retract").

other cited authority.[6] Therefore, the doctrine is without significant legal underpinnings[7] and is not technically a part of the common law. Despite this shaky legal foundation, the exemption for husbands exists in some form in most jurisdictions today[8] and reflects many of the same myths, fears and policies which prompted Sir Matthew Hale to propose the exemption in his eighteenth century treatise.

Several myths concerning the relationship of husband and wife and the role of women have created obstacles in prosecuting a husband for the rape of his wife.[9] The marital exemption is partially based on the misguided belief that a wife consents to intercourse in marriage and this consent is irrevocable.[10] Another foundation for the marital exemption is the old legal fiction that a husband and wife are one person and the husband is that person.[11] This single-being theory makes it impossible for a husband to be legally sanctioned for the rape of his wife since he cannot be prosecuted for raping himself.[12] The exemption also stems from the antiquated notion that women are property,[13] and that a husband can, therefore, treat his wife any way he pleases. Another myth is the belief that a woman must actively resist the rape in order for the act to be considered non-consensual.[14] Still another prevalent fallacy is that if a woman has had prior sexual experience, she has probably consented to the present act of rape.[15] Finally, there is the suspicion that women often bring rape charges which are unfounded.[16] These myths have a sometimes subtle, sometimes clear impact on the decision to report marital rape, police inaction to the reports, discretion of the

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6. *Rider*, 449 So. 2d at 904.

7. State v. Smith, 85 N.J. 193, 200, 426 A.2d 38, 41 (1981).

8. See *supra* note 3 for a review of the states which cling to the proposition in various instances.

9. Note, *Marital Rape in California: For Better or for Worse*, 8 SAN. FERN. V.L. REV. 239, 242-250 (1980).

10. Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 GOLDEN GATE L. REV. 717, 721 (1981).

11. Note, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 J. FAM. L. 565, 569 (1980).

12. Note, *The Marital Rape Exemption*, 27 LOY. L. REV. 597, 599 (1981).

13. *Smith*, 401 So. 2d at 1128.

14. Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A.L. REV. 567, 568-70 (1983).

15. *See generally* Note, *If She Consented Once, She Consented Again— A Legal Fallacy in Rape Cases*, 10 VAL. U.L. REV. 127 (1976).

16. Note, *The Victim of a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 336 (1973).

prosecutor to prosecute, judges' rulings, and jury decisions.

Many states have introduced rape shield statutes[17] in an attempt to protect all rape victims from the myths which tend to make them the victims of the criminal justice system as well as the victims of rape. Unfortunately, rape shield statutes do not always accomplish this goal. Some states have rape shield statutes which may require victim resistance or corroboration of the rape, or authorize jury instructions which insinuate the victim may not be telling the truth[18] or permit the admission of the victim's prior sexual conduct into evidence to prove consent. These three statutory requirements provide a thin shield. The resistance requirement is based on the myth that a truly chaste woman would "resist to the utmost"[19] to protect her honor. However, because resistance can be fatal and because the victim's common and automatic

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17. The following rape shield statutes deal with the admissibility of evidence of prior sexual conduct: ALA. CODE § 12-21-203 (Supp. 1984); ALASKA STAT. § 12.45.045 (1980); ARK. STAT. ANN § 41-1810.1, .2, .4 (1977 & Supp. 1983); CAL. EVID. CODE § 1103 (Deering 1967 & Supp. 1984); COLO. REV. STAT. § 18-3-407 (1978 & Supp. 1983); CONN. GEN. STAT. ANN. § 54-86F (West 1983); DEL. CODE ANN. tit. 11, § 3509 (1979); FLA. STAT. § 794.022 (1983); GA. CODE ANN § 24-2-3 (1982 & Supp. 1984); HAWAII REV. STAT. § 626 R.412 (Supp. 1983); IDAHO CODE § 18-6105 (1979 & Supp. 1984); ILL. ANN. STAT. ch. 38, § 115-7 (Smith-Hurd Supp. 1983); IND. CODE Ann. § 35-37-4-4 (Burns Supp. 1984); IOWA CODE ANN. R.412 (West Supp. 1984); KAN. STAT. ANN. § 21-3525 (Supp. 1983); KY. REV. STAT. ANN § 510.145 (Bobbs-Merrill Supp. 1984); LA. REV. STAT. ANN. § 15:498 (West 1981 & Supp. 1984); MD. ANN. CODE. art. 27, § 461A (1982 & Supp. 1983); MASS. GEN. LAWS ANN. ch.233, § 21B (West Supp. 1984); MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1984); MINN. STAT. ANN. § 609.347 (West Supp. 1984); MISS. CODE ANN. § 97-3-70 (Supp. 1983); MO. ANN. STAT. § 491.015 (Vernon Supp. 1984); MONT. CODE ANN. § 45-5-503(5) (1984); NEB. REV. STAT. §§ 28-321 to 323 (1979); NEV. REV. STAT. § 50.090 (1981); N.H. REV. STAT. ANN § 632-A:6 (Supp. 1983); N.J. STAT. ANN § 2A: 84A-32.1 to .2 (West Supp. 1984); N.M. STAT. ANN. § 30-9-16 (1978 & Supp. 1983); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981); N.C. GEN. STAT. § 8-58.6 (1981); N.D. CENT. CODE § 12.1-20-14 (1976); OHIO REV. CODE ANN. §§ 2907.02(D)-.02(F) (PAGE 1983); OKLA. STAT. ANN. tit. 22, § 750 (West Supp. 1983); PA. CONS. STAT. ANN. ch 18, § 3104 (Purdon 1983); R.I. GEN. LAWS § 11-37-13 (1981); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-22-15 (1979); TENN. CODE ANN. § 40-17-119 (1982); TEX. PENAL CODE ANN. § 22.065 (Vernon Supp. 1984); VT. STAT. ANN. tit. 13, § 3255 (Supp. 1984); VA. CODE § 18.2-67.7 (1982); WASH. REV. CODE ANN. § 9A.44.020 (West Supp. 1984);W.VA. CODE [[61-6B-11 (Supp. 1984); WIS. STAT. § 972.11(2)(b) (Supp. 1983); WYO. STAT. § 6-2-312 (1983).

18. *See generally* Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 AM. CRIM. L. REV. 309 (1973).

19. Schwartz, *supra* note 14, at 568-70.

reaction is to freeze rather than fight back,[20] states with the resistance requirement may be promoting more harm than good. The basis for the corroboration requirement is Sir Matthew Hale's proposition that a charge of rape is easily made and hard to defend.[21] The judge's cautionary instructions to the jury to consider the "weight and quality"[22] of the evidence presented by the victim is based on the same rationale. These instructions tend to plant in the juror's mind the notion that the victim's credibility should be examined more carefully in a rape case than in other types of cases.[23] Finally, evidence of prior sexual conduct is sometimes admitted to imply that if "she consented once, she consented again."[24] Admission of this evidence in marital rape cases makes prosecution especially difficult since there will almost always have been prior consensual sexual relations. The element of consent is perhaps the most critical issue in a case of rape. Prior sexual conduct and evidence of general reputation, if admitted, may also impact on the credibility of the victim.[25]

In addition to the many myths, the marital exemption rests on the fear that women will falsely charge their husbands with rape in retaliation for a perceived wrong.[26] This fear creates an apprehension that removing the exemption will open the floodgates of litigation, and courts will be unable to handle the onslaught.[27] An additional justification for the exemption is the belief that the fear and humiliation experienced by a victim of spousal rape is not as great as the fear and humiliation experienced by a victim who is raped by a stranger.[28]

Finally, there are two underlying policy rationales that impact on the marital exemption and the problems of proof. First is the belief that states should not interfere with the "sanctity of marriage".[29] The argument is that the state should foster family unity and not aid in divorce,

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20. *Id.* at 576-82.

21. Hale, *supra* note 5, § 635. *See also* Note, *Rape Reform Legislation and Evidentiary Concerns: The Law in Pennsylvania*, 44 U. PITT. L. REV. 955, 973 (1983).

22. FLA. STAT. § 794.022(1)(1975)(amended in 1983 to delete the cautionary instruction).

23. Note, *supra* note 21, at 973.

24. *See generally* Note, *supra* note 15, at 127.

25. *Id.* at 132.

26. Note, *supra* note 12, at 600. *See also* Pracher, *supra* note 10, at 732-37.

27. Schwartz, *supra* note 2, at 52.

28. *Id.* at 45-46. *See also* Harmon, *Consent, Harm and Marital Rape*, 22 J. FAM. L. 423, 432 (1983-1984).

29. *See* Note, *supra* note 12, at 603.

since if a wife charges her husband with rape, the marriage will be likely over with little chance for reconciliation.[30] The second policy behind the exemption is the idea that proving a case of marital rape is next to impossible,[31] and that, the exemption for husbands is realistic and should, therefore, continue.

III. Florida's Sexual Battery Statute and Florida Cases: Obtaining Convictions for Marital Rape

Florida's present Sexual Battery Statute, section 794 of the Florida statutes[32] was enacted in 1974 and makes no mention of spousal immunity. Prior to 1974, Florida's rape statute[33] reflected the common-law myths and notions about rape. The earlier statute provided that a person was guilty of rape if he "unlawfully ravished and carnally"[34] knew another. Since carnal knowledge of one's wife was considered lawful under the old statute, husbands were exempt from prosecution for raping their wives.[35] One early interpretation of the present statute, Florida Statute section 794, was that because the marital exemption was not mentioned, there was still a common law exception for husbands.[36] Between 1974 and 1980, there were no reported cases involving marital rape which tested the present Florida Statutes section 794 to determine if it included a spousal exemption. However, since 1981 two cases have held that there is no interspousal exemption excluding a husband from prosecution for the sexual battery of his wife.[37] Although the Florida Third and Fifth District Courts of Appeal have recognized

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30. *Id.* at 602. *See also* Note, *supra* note 9, at 246; *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984)(the court rejected this argument as lacking a rational basis in an equal protection challenge).

31. Schwartz, *supra* note 2, at 48-51; *See also* People v. Brown, ___ Colo. ___, 632 P.2d 1025 (1981)(asserting problems of proof in marital rape which justify statutory exclusion of husbands from prosecution).

32. FLA. STAT. §§ 794.011-.05 (1974).

33. FLA. STAT. § 794.01 (1973).

34. *Id.*

35. *See* Note, *Florida's Sexual Battery Statute: Significant Reform but Bias Against the Victim Still Prevails*, 30 U. FLA. L. REV. 419, 429 (1978).

36. *Id.*

37. *Smith*, 401 So. 2d at 1127 (there is no common-law exemption in a factual situation where the couple were separated, had filed for a divorce and a restraining order was issued); *Rider*, 449 So. 2d. at 904 (holds that there is no interspousal exemption in a factual situation where the couple was living together and no separation had occurred.)

that husbands can be prosecuted for spousal rape,[38] Florida Statutes section 794, nonetheless, inherently retains some of the myths about rape which may limit convictions. The statute recognizes four levels of severity, and the punishment reflects the age of the victim and the degree of force used.[39] Subsections (3), (4) and (5) of section 794.011[40] are particularly relevant to marital rape.[41]

A. Florida Statutes Section 794.011(3)—Life Felony

A husband who is convicted of sexual battery upon his wife under Florida Statutes section 794.011(3) is guilty of a life felony.[42] Section 794.011(3) requires lack of consent and the use of a deadly weapon, or the use of actual physical force likely to cause serious personal injury.[43] Serious personal injury is defined as "great bodily harm or pain, permanent disability, or permanent disfigurement."[44] Because of the history of prior consensual sexual relations in a marriage, the prosecutor may not be induced to bring charges against a husband unless the severity of violence required by Florida Statutes section 794.011(3) exists.[45] Police will more likely make an arrest in marital disputes where there are serious injuries;[46] however, since the punishment involved may be life imprisonment, the jury will examine both the victim and

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38. *Smith*, 401 So. 2d at 1127; *Rider*, 449 So. 2d at 904.

39. Note, *supra* note 35, at 422.

40. FLA. STAT. § 794.011(3), (4), (5) (1983 & Supp. 1984).

41. FLA. STAT. § 794.011(2) (Supp. 1984) will not be discussed since it addresses sexual battery of a person twelve years old or younger, and is therefore not applicable to marital rape.

42. FLA. STAT. § 775.082(3)(a) (1983) states:

> For a life felony committed prior to Oct 1, 1983, by a term of imprisonment for life, or a term of years, not less than 30; and for a life felony committed on or after Oct 1, 1983, by a term of imprisonment for life, or a term of imprisonment not exceeding 40 years.

See also FLA. STAT. 775.083(1)(a) (1983)(indicating there may also be a fine of fifteen thousand dollars) and FLA. STAT. § 775.084 (1983)(providing for imposition of an extended term based on the accused's prior record).

43. FLA. STAT. § 794.011(3) (1983 & Supp. 1984).

44. FLA. STAT. § 794.011(1)(g) (Supp. 1984).

45. L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE (1981). *See also* News/Sun Sentinel, Sept. 1, 1984, at A1, col. 1 (William Rider was found guilty of raping his wife after he beat her, bound her to the bed with duct tape, and raped her. She required hospital treatment.).

46. L. LERMAN, *supra* note 45, at 26.

her testimony very closely.[47] Even in a violent situation, the jury will usually acquit the accused when he and the victim have had a prior sexual relationship.[48] Therefore, while the existence of physical violence evidenced by severe physical injury to the victim is likely to result in police action on the reported incident, and prosecution by prosecutors,[49] the jury may still fail to convict the husband either because of the prior sexual relationship,[50] or the severity of the punishment, or both.[51]

Convictions are also unlikely under the portion of Florida Statute section 794.011(3) which provides for a life felony for the threatened use of a deadly weapon without serious personal injury. The jury may decide that the lack of severe personal injury does not warrant a conviction when the penalty is so severe,[52] and, therefore, may acquit the defendant.[53] As a compromise, even though the attack may meet the requirements of section 794.011(3), the jury may be inclined to convict a husband on a lesser included offense or on an alternate charge because the punishment will be less severe.[54] In order to be assured of convicting on a lesser included offense or alternate charge, the prosecutor must object to jury instructions which do not instruct on appropriate lesser included offenses.[55] Also, the prosecutor must plead on alternative grounds in some instances because some sections of the statute which provide lesser penalties are not necessarily lesser included offenses, unless they contain all the elements of the more serious offense.[56] An offense that is not a lesser included offense must be "spelled out in the accusatory pleading."[57]

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47. Schwartz & Clear, *Towards a New Law on Rape*, 26 CRIME & DELINQ. 129, 134 (1980).

48. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 251 (1966).

49. L. LERMAN, *supra* note 45, at 39.

50. H KALVEN & H. ZEISEL, *supra* note 48.

51. Schwartz & Clear, *supra* note 47.

52. *Id.*

53. H. KALVEN & H. ZEISEL, *supra* note 48.

54. Findlay, *The Cultural Context of Rape*, 60 WOMAN L.J. 199, 205 (1974).

55. *See* Davenport v. State, 429 So. 2d, 1352 (Fla. 2d Dist. Ct. App. 1983), where the court found that failure "to instruct the jury as requested on battery as an appropriate lesser included offense of sexual battery, was per se reversible error". *Id.* at 1353-54.

56. *See, e.g.*, Bragg v. State, 433 So. 2d 1375, 1377 (Fla. 2d Dist. Ct. App. 1983)("[s]exual battery using slight force is not a necessarily included offense of sexual battery under subsection (3), when the defendant is charged with the use or threatened use of a deadly weapon").

57. *Id.*

B. Florida Statutes Section 794.011(4)(a), (b), (c)—Felony of the First Degree

A felony of the first degree[58] will result if the husband is convicted of any of the listed offenses in section 794.011(4). Three subsections of 794.011(4) are relevant to marital sexual battery.[59] Section 794.011(4)(a) permits a conviction for sexual battery "[w]hen the victim is physically helpless to resist."[60] The phrase "physically helpless to resist" is defined as sexual battery against a person who is "unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act."[61]

According to one theory, however, a husband's intercourse with his wife who is physically helpless to resist is not the type of violence that truly represents marital rape.[62] This permissive-license theory is based on the idea that in marriage there exists permissive consent to intercourse, having characteristics of a license.[63] The license is not revoked until an objection is made.[64] In the case of a wife who is sleeping, unconscious or physically unable to communicate unwillingness to intercourse, the permissive-license of consent to sexual relations has not been revoked.[65] Without revocation there is no sexual battery because the wife has in effect consented, and sexual battery, of course, requires a lack of consent by the victim.[66] Permissive-license theorists believe that reforms such as the "physically helpless to resist"[67] subsection of the Florida statute do not apply in marital rape cases and detract from the seriousness of what they perceive as *real* marital rape, which is a violent crime.[68] However, under the permissive-license theory, Florida Statutes section 794.011(4)(a) is applicable in non-marital situations,

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58. *See* FLA. STAT. § 775.082(3)(b) (1983) which provides for a penalty of imprisonment not to exceed thirty years. *See also* FLA. STAT. § 775.083 (1)(b) (1983) indicating that a fine of not more than ten thousand dollars may also be required. FLA. STAT. § 775.084(4)(a)(1) (1983) provides a life sentence for a "habitual offender".

59. FLA. STAT. § 794.011(4)(a), (b), (c) (1983 & Supp. 1984)

60. FLA. STAT. § 794.011(4)(a) (1983 & Supp. 1984)

61. FLA. STAT. § 794.011(1)(e) (Supp. 1984).

62. Harmon, *supra* note 28, at 429.

63. *Id.* at 434.

64. *Id.* at 435.

65. *Id.* at 437.

66. *See* FLA. STAT. § 794.011(4) (1983 & Supp. 1984).

67. FLA. STAT. § 794.011(4)(a) (1983 & Supp. 1984).

68. Harmon, *supra* note 28, at 429.

since there is not a permissive license of consent to intercourse.[69]

Despite the existence of the permissive-license theory, one may argue that section 794.011(4)(a) does apply in marital rape cases. The defense of consent in any rape case requires that the consent be "intelligent, knowing, and voluntary."[70] One cannot give intelligent, knowing, and voluntary consent when asleep. Common sense, however, indicates that intercourse while a wife is sleeping, without more, will not in all likelihood motivate a jury to convict for this first degree felony. As indicated, juries are reluctant to convict when there is a prior relationship, even with evidence of violence.[71] For these reasons, the hyperbolic conclusion is that unless the wife is in a coma and the husband repeatedly rapes his wife in the presence of witnesses, a violation of section 794.011(4)(a) will not likely result in a conviction.

Two other subsections of section 794.011(4) deal with threats of violence. These subsections proscribe perhaps the most common sexual batteries between husbands and wives. Subsection 794.011(4)(b) provides a first degree felony penalty when an "offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim and the victim reasonably believes that the offender has the present ability to execute the threats."[72] Subsection (c) provides the same first degree penalty if the offender threatens "to retaliate against the victim or any other person, and the victim reasonably believes that the offender has the ability to execute the threats in the future."[73] Retaliation "includes, but is not limited to, threats of future physical punishment. . . ."[74] Studies have shown that more than one-third of battered women have been raped by their husbands.[75] "Women may accede to sexual intercourse with their husbands to avoid being battered. . . . [s]ome husbands regard a wife's refusal of sexual intercourse as grounds for beating or intimidation."[76] Therefore, battery or the threat of battery against wives by their husbands often in-

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69. *Id.* at 438.

70. FLA. STAT. § 794.011(1)(a) (Supp. 1984).

71. H. KALVEN & H. ZEISEL, *supra* note 48, at 251.

72. FLA. STAT. § 794.011(4)(b) (1983 & Supp. 1984).

73. FLA. STAT. § 794.011(4)(c) (1983 & Supp. 1984).

74. FLA. STAT. § 794.011 (1)(f) (Supp. 1984).

75. Findelhor & Yllo, *Forced Sex in Marriage: A Preliminary Research Report*, 28 CRIME & DELINQ. 459, 460 (1982)(citing studies made by Spektor, Giles-Sims, and Pagelow).

76. Freeman, *"But If You Can't Rape Your Wife; Who[m] Can You Rape?": The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 5 (1981).

cludes sexual battery.[77]

Evidence presented by a wife at trial that she suffered from battered wife syndrome[78] would be useful to support her claim of sexual battery under Florida Statutes section 794.011(4), subsections (b) and (c).[79] A spouse who remains in a situation where she has been physically abused more than once is referred to as a battered wife.[80] The battering episodes usually run in cycles, with three distinct stages.[81] The episodes begin with minor battering incidents which then intensify into more serious violence, and finally into a stage of contrition and reconciliation, until the cycle begins again.[82] However, evidence of battered wife syndrome would be inadmissible if its admission was solely for the purpose of showing bad character or propensity of the husband to commit the crime.[83] Nonetheless, such evidence has been admitted in homicides where the defense was self-defense, to show that the party had a reasonable and honest belief she was in danger of serious bodily harm.[84] Because subsections (b) and (c) of Florida Statutes section 794.011(4) require that the "victim reasonably believe that the offender has the ability to execute these threats,"[85] evidence of battered wife syndrome would aid the jury in determining the reasonableness and honesty of her belief. In homicides, self-defense is usually an overt,

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77. *Id.* at 5, 6.

78. Finesmith, *Police Response to Battered Women: A Critique and Proposals for Reform*, 14 SETON HALL L. REV. 74, 82 (1983). Battered wife syndrome is the term used to describe typical reactions of physically abused women. A battered wife often does not leave her husband or seek other relief because of a feeling of helplessness, lack of other emotional and economic resources and a fear of retaliation by her husband.

79. FLA. STAT. § 794.011(b)(c) (1983 & Supp. 1984).

80. State v. Kelly, 97 N.J. 178, 193, 478 A.2d 364, 371 (1984)(citing L. WALKER, THE BATTERED WOMAN (1979)).

81. *Id.*

82. *Id.*

83. FLA. STAT. § 90.404(2)(a) (1983).

84. In *Kelly*, 97 N.J. at 204, 478 A.2d. at 377, the court stated that the expert's testimony on the battered woman syndrome is admissible, in a homicide, as relevant to the honesty and reasonableness of defendant's belief that deadly force was necessary to protect her against death or serious bodily harm. *See* Borders v. State, 433 So. 2d 1325, 1327 (Fla. 3d Dist. Ct. App. 1983), where the court noted that in a homicide, testimony of a clinical psychologist relating to battered wife syndrome should be allowed if the trial court feels it is sufficiently developed and the expert is qualified. *See also* Hawthorne v. State, 408 So. 2d 801 (Fla. 1st Dist. Ct. App. 1982), *cert. denied mem.*, 415 So. 2d 1361 (Fla. 1982).

85. FLA. STAT. § 794.011(4)(b), (c) (1983 & Supp. 1984).

aggressive act, undertaken to protect one's self from serious bodily harm or death.[86] In sexual battery, on the other hand, self-defense is often a passive act of submission, also undertaken to protect one's self from serious bodily harm. Although the act of self-defense in sexual battery is often passive, the similarity to the concept of self-protection indicates that the admission of battered wife syndrome evidence is justified under Florida's Sexual Battery Statute in marital rape cases.[87] Because many of these wives will use the passive method of self-defense, evidence that she has been battered in the past will show that she reasonably believed her husband had the ability to carry out his threats. With the admission of battered wife syndrome evidence, a wife with a history of being abused may be viewed by the jury as a more credible witness than a rape victim who did not previously know her assailant. Evidence of past abuse will reinforce her credibility by proving to the jury the reasonableness of her fear of future or present retaliation, and provide an explanation for her submission to the sexual battery. Of course, the danger of admitting the evidence is that jurors may decide the battered wife consented to the violence because she stayed in the relationship with her husband. Actually, there is an array of sociological reasons the battered wife remains with her husband, but true consent to the abuse is not one of them.[88] In *Hawthorne v. State*,[89] for example, the court ruled that expert testimony regarding battered wife syndrome was admissible in a first degree homicide where the defense was self defense. This court reasoned that the testimony was necessary to inform the jury that staying in the home was reasonable because it is a common symptom of the syndrome.[90] In *Borders v. State*,[91] the court reversed and remanded a first degree homicide conviction, ruling that expert testimony on battered wife syndrome is admissible as long as the trial court finds the expert is qualified and "the subject matter is sufficiently developed so that it can support an expert opinion."[92] In *Borders*, the husband and wife often drank alcohol, which led to violent fights. The husband beat his wife with his fists and sometimes used weapons such as a frying pan. The fights were often so severe that

86. *Hawthorne*, 408 So. 2d at 806.

87. There have not been any Florida cases applying this rationale to sexual battery as yet.

88. *Kelley*, 97 N.J. at 194-97, 478 A.2d at 372-73.

89. *Hawthorne*, 408 So. 2d at 801.

90. *Id.* at 807.

91. 433 So. 2d at 1325.

92. *Id.* at 1327.

friends and the couple's children would intervene because they feared that the wife would be killed. On the day of the homicide, the couple had been drinking and began arguing. The husband punched his wife in the breast. The wife ordered her husband out of the house, he left for a short while and then returned. When he returned, a shoving match occurred. The wife, armed with a kitchen knife, stabbed her husband, who was dead when authorities arrived.[93] The court asserted that in a homicide prosecution the defendant should be allowed to introduce a wide array of testimony to support a self-defense theory.[94] Arguably, the court should afford the victim of sexual battery the same latitude. Evidence of battered wife syndrome should be admitted to show the reasonableness of the wife's beliefs that her husband will carry out his threats. If evidence of previous wife battering is inadmissible, a wife may be at a greater disadvantage than the victim of a rape by a stranger. The jury may find that a wife would not reasonably believe that her own husband would actually carry out such threats, and therefore the jury may not convict him.

C. Florida Statutes Section 794.011(5)—Felony of the Second Degree

Florida Statutes section 794.011(5) provides for a penalty of felony in the second degree[95] for sexual battery involving a lower level of force than required for the first degree felony sections of the statute. Section 794.011(5) provides a sanction when the offender uses "physical force and violence not likely to cause serious personal injury."[96] With married couples, the use of this level of force[97] may not be viewed as sexual battery by the jury. The jury, as a cross-section of the community, will reflect common attitudes about rape. Some women do not consider a coercive act of intercourse as rape even when there is a lack of mutual consent to the intercourse.[98]

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93. *Id.* at 1326.

94. *Id.*

95. FLA. STAT. § 775.082(3)(c) (1983) provides for a term of imprisonment not to exceed fifteen years. FLA. STAT. § 775.083(1)(b) (1983) indicates the penalty may include a fine of up to ten thousand dollars. FLA. STAT. § 775.084(4)(a)(2) (1983) notes that habitual offenders may be sentenced to a term of imprisonment not to exceed thirty years.

96. FLA. STAT. § 794.011(5) (1983 & Supp. 1984).

97. Freeman, *supra* note 76, at 5.

98. Russell, *supra* note 1, at 2.

It is likely that some jurors have themselves experienced this type of forced intercourse in marriage. If a female juror admits that this level of force constitutes a sexual battery, she would in many cases be admitting that she herself has been sexually battered by her own husband. If a male juror admits this level of force constitutes sexual battery, he would in many cases be admitting that he himself is a rapist. It is doubtful that either a male or female juror would want to admit this. Also, jurors who have not experienced this form of sexual battery in marriage may tend to disbelieve that such conduct occurs in marriage. Therefore, convictions for sexual battery with this level of force will be difficult to obtain. Without evidence of great physical force, or admission of prior wife abuse, the jury may feel the wife consented to the intercourse.[99] There is generally an abhorrent disbelief that any man would commit rape, especially against his wife, and therefore the jury may distrust the wife's complaint.[100]

D. Florida Statutes Section 794.022—Rape Shield

Rape shield laws deal with important rules of evidence, which are intended to protect the victim of rape from becoming a victim of the criminal justice system. The rape shield portion of the statute was substantially rewritten and amended in 1983.[101]

Section 794.022(1)[102] was amended to delete the following cautionary instruction to the jury: "The court may instruct the jury with respect to the weight and quality of the evidence."[103] The removal of the cautionary instruction is an important step in removing judicial sanction of the notion that many rape claims are unfounded.[104] The present subsection states, "[t]he testimony of the victim need not be corroborated."[105] Although corroboration is not required under the statute, courts admit various forms of corroborating evidence, including

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99. Note, *Towards a Consent Standard in the Law of Rape,* 43 U. CHI. L. REV. 613, 618 (1976).

100. *Id.* at 616.

101. FLA. STAT. § 794.022(1), (2), (3) (1983)(amending Fla. Stat. § 794.022(1), (2) (1975)).

102. FLA. STAT. § 794.022(1) (1983).

103. FLA. STAT. § 794.022(1) (1975) included the instruction in the text of the statute.

104. J. WIGMORE, ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924(a) at 459 (1940)(many were falsely charged of rape and convicted).

105. FLA. STAT. § 794.022(1) (1983).

evidence of physical injury, presence of semen, and testimony of witnesses if available: "[T]he fact remains that proof of rape in most cases is sufficient only when the evidence is corroborated."[106]

In marital sexual battery there may be little, if any, evidence of physical injury unless the level of violence is quite severe. The presence of semen will not be indicative of non-consensual intercourse in the same degree as in non-marital sexual battery, and it is unlikely that there will be any corroborating witnesses. The absence of the need for corroboration, directed by the statute, is therefore helpful. Realistically, despite the progressiveness of the amended statute, cases of marital sexual battery will need corroborating evidence to prove that non-consensual sexual battery occurred.

The greatest barrier to a marital rape conviction is the language of section 794.022(2), which deals with the admissibility of evidence concerning "specific instances of prior sexual activity between the victim and any other than the offender. . . ."[107] This barrier stems from the retention of a disputable myth, that prior specific acts of sexual conduct are relevant to the issue of consent.[108] This myth is based on the premise that an unchaste woman will lie,[109] and a belief that once a person has had prior voluntary sexual intercourse, she most likely has consented in the subsequent instance of rape.[110] The statute forbids the introduction of evidence of prior sexual activity, unless it establishes a pattern of conduct which is relevant to consent,[111] or tends "to prove the defendant was not the origin of the semen, pregnancy, injury, or disease."[112] The court must first have a hearing in camera to determine

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106. Hibey, *supra* note 18, at 314.

107. FLA. STAT. § 794.022(2) (1983).

108. *See, e.g.*, MICH. COMP. LAWS. ANN. § 750.520j(1)(b) (1975)(declares all evidence of prior sexual conduct with persons other than the accused is inadmissible, unless it shows the source of semen was not the defendant's, or where there is pregnancy, or disease). *See also* J. MARSH, A. GEIST & N. CAPLAN, *Rape and the Limits of Law Reform*, 23 (1982)(the elimination of such evidence in Michigan was due to its "irrelevance and highly prejudicial and inflammatory nature").

109. Note, *supra* note 99, at 626.

110. *Id.* at 624.

111. *See* McElveen v. State, 415 So. 2d 746, 747 (Fla. 1st Dist. Ct. App. 1982)(three specific incidents of prior sexual activity do not show a pattern of conduct relevant to the issue of consent). *See also* Winters v. State, 425 So. 2d 203, 204 (Fla. 5th Dist. Ct. App. 1983); Hodges v. State, 386 So. 2d 888, 889 (Fla. 1st Dist. Ct. App. 1980).

112. FLA. STAT. § 794.022(2) (1983).

if there is a pattern of conduct relevant to the issue of consent.[113] Prior to the 1983 amendment, the relevance of the pattern of conduct was supposed to be decided outside the presence of the jury, but in practice this was rarely done.[114] The requirement of an in camera hearing is an effort to guard the victim's privacy. The need for an in camera hearing gives credence to the view that such evidence is usually highly prejudicial.[115]

In a marital situation, evidence of prior sexual activity which establishes a pattern of conduct is admissible in two ways. First, the prior sexual relationship between the husband and wife is admissible. It is possible that prior unusual sexual conduct between a husband and wife will be exposed and used to prove that the act of violence before the court was a normal part of the couple's relationship, indicating consent to the present sexual battery. Second, if a married woman established a pattern of extramarital sexual conduct, this also is admissible. Deviant extramarital conduct, if it establishes a pattern of conduct indicative of consent, will be admitted to demonstrate consent to the sexual battery. However, neither of these types of behaviors necessarily establish consent to the particular act before the court, especially when the act was performed with violence and force.[116] The fact that a person has had prior consensual sexual relations with another person has no bearing on whether there was consent to the present act. It is outrageous to even consider that a person consents to violence.

However, in the minds of jurors, extramarital sex, if admitted, is likely to cause the jurors to develop unconscious hostility toward the victim.[117] Also, prior consensual activity with the offender may imply, in the minds of jurors, consent to the present sexual battery.[118] This emphasis on the victim's behavior, rather than on the offender's, behavior should be eliminated from the statute because it has been shown to be of little probative value.[119] The admission of prior sexual relations

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113. *Id.*

114. FLA. STAT. § 794.022(2) (1979). *See* also Note, *supra* note 35, at 439 n.154.

115. Note, *supra* note 15, at 159.

116. Schwartz & Clear, *supra* note 47, at 137 "One does not think to ask the victim of assault for proof he or she is not a masochist, or provide a life history of all previous assaults, to establish a pattern that might mitigate the assailant's culpability". *Id.*

117. *See* Note, *supra* note 15, at 155.

118. *Id.* at 146.

119. *See* Note, *supra* note 35, at 440-41. Note, *supra* note 16, at 345. *See also*

with the defendant, as well as sexual relations with others, if a pattern of conduct is shown to be relevant to the issue of consent, creates a difficult evidentiary obstacle for a married woman to overcome.

The two redeeming features of the 1983 amendment to Florida Statutes section 794.022[120] are the requirement of an in camera hearing and the elimination of the cautionary instruction to the jury. Without the safeguard of an in camera hearing it is doubtful that a married woman would ever seek to prosecute her husband for sexual battery because she knows every detail of their marital history would be overheard by courtroom spectators, and possibly even the jury.[121] Also, the cautionary instruction to the jury, to consider the victim's testimony with extra care, would discourage victims from bringing charges against their spouse, because it may promote the feeling that the victim is also on trial.

The last subsection is a new addition to the statute.[122] Florida Statutes subsection 794.022(3), delineates a *per se* rule against the admission of "reputation evidence relating to a victim's prior sexual conduct,"[123] despite any other provision of law.[124] This addition helps to ensure that a victim's credibility will not be undermined by inferences of immorality by general reputation evidence. The exclusion of such evidence is an attempt to abrogate the common-law myth that unchaste women are liars.[125] In the marital context, the inadmissibility of reputation evidence will be as important as it will be in non-marital sexual battery.

It appears that the statute permits the admissibility of specific acts of prior sexual conduct under the conditions delineated under Florida

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supra note 17 for rape shield statutes of other states, in relation to prior sexual conduct.

120. FLA. STAT. § 794.022(2) (1983).

121. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 88 (1977).

122. FLA. STAT. § 794.022(3) (1983). The prior statute did not mention reputation evidence. It was thought that since such evidence was admissible at common law, it was admissible under the statute. *See* Note, *supra* note 35, at 437. *See also McElveen*, 415 So. 2d at 746.

123. FLA. STAT. § 794.022(3) (1983)("Notwithstanding any other provisions of law" establishes the per se rule).

124. Previously, the controlling statute was FLA. STAT. § 90.404(1)(b)(1) (1983). This statute provided for the admission of "evidence of pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait, . . ." under the sexual battery statute. *Id.*

125. *See* Schwartz, *supra* note 14; Note, *supra* note 15.

Statutes section 794.022(2), holding on to the myth that such conduct is indicative of consent. The husband will invariably raise the issue of consent, as an affirmative defense, in virtually all cases of marital sexual battery.[126] The retention of the myth that previous sexual relations indicates consent to the present act is a formidable barrier to conviction. Counteracting the jury's inclination to disbelieve the existence of rape in marriage, however, is perhaps the most difficult obstacle of all.[127]

E. Resistance

The Florida Sexual Battery Statute does not require resistance.[128] However, case law indicates resistance may be an important factor in the minds of the judges and juries. In *State v. Hudson*,[129] the offender grabbed the victim, pulled off her clothes, yanked her out of the car and threatened to seriously injure her.[130] The victim testified that she submitted out of fear for her physical safety.[131] The court hinted that this was effective resistance. The Florida Second District Court of Appeal held that "questions of consent, force, resistance, and fear, are particularly within the province of the jury to determine."[132] Apparently, in Florida resistance by the victim is sometimes important to demonstrate a lack of consent, but the need for resistance to show lack of consent is unrealistic and dangerous to the life of the victim.[133] To infer that lack of resistance implies consent is a throwback to the myth that a virtuous woman would "resist to the utmost"[134] to defend her honor. "There are many situations in which resistance is not a valid measure of lack of consent by rape victims."[135]

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126. Note, *Criminal Law—Sexual Battery—No Interspousal Exception Under Florida's Sexual Battery Statute—State v. Smith, 401 So. 2d. 1126 (Fla. 5th Dist. Ct. App. 1981)*, 10 FLA. ST. U.L. REV. 326, 336 (1982).

127. Pracher, *supra* note 10, at 732. The same point was made in a telephone interview with Jayne Weintraub, prosecutor in the case of State v. Rider (Aug. 14, 1984). Weintraub expressed the view that getting the jury to believe a husband can rape his wife is the most difficult barrier in the prosecution.

128. Note, *supra* note 35, at 426-29.

129. 397 So. 2d 426, 428 (Fla. 2d Dist. Ct. App. 1981).

130. *Id.* at 427.

131. *Id.*

132. *Id.*

133. *See generally* Schwartz, *supra* note 14, at 577-82.

134. *Id.* at 569.

135. *Id.* at 582.

Florida recognizes sexual battery as an act of violence, not a sexual act.[136] Since assault and battery do not require resistance by the victim,[137] the need for resistance in sexual battery must be solely related to old common-law myths about rape, and should be abolished. In *State v. Rider*,[138] for example, the court concluded that "the legislature by repealing the rape statute and enacting the sexual battery statute, intended to abrogate any common-law assumptions concerning the crime of rape."[139] It is apparent, however, that the common-law myths regarding prior sexual conduct and resistance continue to exist in Florida law. Florida courts should consider issuing jury instructions which advise the jury that lack of resistance is not indicative of consent to sexual battery. To expect resistance from a wife, when there is, at the very least, fear of possible violence, which may or may not cause serious personal injury, is to put a burden on the victim of sexual battery that is not placed on most other victims of crime.[140] "[T]o impute consent on the part of the victim exceeds the bounds of the law of consent."[141]

IV. Attitudes of Victims, Police, Prosecutors, Judges and Jurors: Impact on Marital Rape Convictions

Although Florida Statutes section 794, with its gradations of punishments reflecting levels of force, provides an adequate framework for marital rape convictions, a serious impediment within the statute to successful prosecutions lies with the admissibility of evidence of specific prior sexual activity. Also, case law, which permits the jury to consider resistance of the victim, results in inconsistencies that could effectively bar convictions. However, the major barriers to convictions do not lie within the statute, or within case law. Non-reporting by victims, police inaction, prosecutorial discretion, and the attitudes of judges and juries are the primary obstacles to successful prosecutions and convictions for marital rape. Even when a statute or case law permits the prosecution of husbands for marital rape, the problems in obtaining convictions for marital rape are exacerbated by the attitudes of the participants in the

136. *Smith*, 401 So. 2d at 1127.
137. Schwartz & Clear, *supra* note 46, at 146.
138. 449 So. 2d at 903.
139. *Id.* at 906.
140. Schwartz, *supra* note 14, at 583-88.
141. Pracher, *supra* note 10, at 730.

judicial process.[142]

A. Victim Awareness and Cooperation

"One of the simplest and most effective ways that a victim can prevent a wrongdoer from being arrested and prosecuted is to fail to report the crime. . . ."[143] It is generally thought that the crime of rape is the most unreported type of crime in the United States.[144] There are no precise figures to indicate the number of spouses who do not report marital rape. One reason marital rape is seldom reported is that most states do not recognize rape in marriage in all situations,[145] as a crime.[146] In those states where the marital rape exemption has not been totally abolished, a husband has, in essence, a license to commit the debilitating and degrading crime of rape against his wife.[147]

There have been few prosecutions[148] in states whose laws permit husbands to be prosecuted for marital rape, which may indicate that although the exemption for husbands is removed by statute or case law, the attitudes of victims, as well as those in the criminal justice system, are predominate factors in perpetuating the existence of the marital exemption. "In the case of marital rape, all the reasons that deter women from bringing rape charges [in non-marital rape] are exacerbated."[149] Marital rape is often only reported when it is accompanied by other violence.[150] Studies have shown that despite the level of violence used, some married women do not realize or admit they have been raped by their husbands.[151] The attitude of the victim is one of denial, and inability or refusal to conceive of the violent sexual attack as rape.

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142. Beinen, *Rape Reform Legislation in the United States: A Look at Some Practical Effects*, 8 VICTIMOLOGY 139, 140 (1983).

143. Hall, The Role of the Victim in the Prosecution and Disposition of a Criminal Case, 28 VAND. L. REV. 931, 934-35 (1975).

144. Freeman, *supra* note 76, at 6.

145. *See supra* note 3.

146. Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A.J. 1088, 1090 (1980).

147. *See generally* Griffin, *In 44 States It's Legal to Rape Your Wife*, STUDENT LAWYER 21, 57 (1980). *See also* Schwartz, *supra* note 2, at 51.

148. *See* Beinen *supra* note 142, at 144 (indicating there were "less than [five] prosecutions in three years . . . in the entire state [of New Jersey], which has a population of nine million"). *See also* Schwartz, supra note 2, at 48.

149. Griffin, *supra* note 147, at 57. *See also* Note, *supra* note 9, at 260.

150. Freeman, *supra* note 76, at 6.

151. *See generally* Freeman, *supra* note 76, at 6-8.

The Law Enforcement Assistance Administration (LEAA), in its study of forcible rape, conducted interviews with twenty-nine non-marital rape victims who did not report the crime,[152] and listed the reasons for their failure to report.[153] The reasons spouses do not report rape are even more complex. Some wives internalize the reason for the rape and see themselves at fault.[154] Some are too "ashamed to talk about it,"[155] and "prefer to keep this humiliating experience private."[156] Victims of marital rape may fail to report because of fears of "loneliness, loss of . . . psychological security and admission of failure. . . ."[157] Additionally, wives may not report the rape because of financial inability to live without the economic assistance of their husbands.[158] In essence, then, there are three significant barriers to conviction arising from the attitudes of victims of marital rape. First, the victim has the attitude that if her husband is the offender, it is not rape. Second, even when the wife perceives the act as rape, other fears result in her not reporting the crime. Finally, these attitudes and fears, when coupled with the fact that in some Florida districts eighty percent of victims of domestic vio-

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152. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, FORCIBLE RAPE, FINAL PROJECT REPORT, 15 (1978) [hereinafter cited as FORCIBLE RAPE].

153. The table shows an ordered rank of the reasons victims did not report to police.

Reasons for Not Reporting the Rape to Police.
(N = 29) (Multiple Answers Possible)

RANK	REASONS	% RESPONSE
1.	Fear of Treatment by Police or Procedures	52%
2.	Fear of Trial Procedures	34%
3.	Fear of Publicity or Embarrassment	34%
4.	Didn't Want Family or Friends to Know	34%
5.	Lack of Interest by Police	31%
6.	Fear of Revenge by Offender	28%
7.	Procedures Too Time-Consuming	17%
8.	Didn't Want Him Arrested/Punished	14%
9.	Probably Couldn't Identify Him	10%
10.	Didn't Think Police Would Believe You	3%
11.	Lack of Evidence/No Proof	0%

Id. at 15.

154. Freeman, *supra* note 76, at 7.

155. *Id.*

156. Griffin, *supra* note 147, at 57.

157. Finkelhor & Yllo, *supra* note 75, at 462.

158. Note, *supra* note 9, at 260.

lence drop the reported charges,[159] indicate that victim non-cooperation is a major hurdle to successful prosecutions for marital rape.

California has had some success in implementing marital rape laws.[160] The reason for this success has more to do with the educational campaign that occurred when the statute was drafted, than with the statute itself.[161] Women's groups, people in the criminal justice sytem, and citizens in general, were educated as to the existence of marital rape and its prevalence in society.[162] Following California's example, a state seeking to eliminate the marital rape exemption must not only enact a statute which permits the prosecution of husbands, but must make an effort to educate its citizens. If this occurs, victims will more frequently recognize the act as a rape and report it to the police, and citizens who will become prospective jurors will realize that husbands can and should be convicted for raping their wives.

Some California cities, as well as cities in other west coast states, have implemented no drop policies which effectively reduce victim non-cooperation after they report a crime.[163] No drop policies have been used to secure victim cooperation in many kinds of domestic violence cases. Prosecutors implementing this policy encourage victim cooperation by reassuring the victim that the state is responsible for the prosecution and warning the victim that once the charge is filed it will not be dropped.[164] In Anchorage, Alaska, a spouse abuse victim was jailed for contempt for non-cooperation.[165] However, most prosecutors have not taken such drastic measures in the implementation of existing no drop policies and have substantially reduced victim non-cooperation.[166] Greater victim cooperation will cause police and prosecutors to take domestic violence seriously and give it the priority it deserves.[167] With

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159. *See* L. LERMAN, *supra* note 45, at 35. In response to a questionnaire, the district attorney's office in Jacksonville, Florida estimates 80% of victims of spouse abuse drop the charges. *Id.*

160. CAL. PENAL CODE § 262 (West Supp. 1981). *See also* Schwartz, *supra* note 2, at 49.

161. This view was expressed in a telephone interview with Laura X, of The National Clearinghouse on Marital Rape, 2325 Oak St., Berkley, Ca. 94208. (Aug. 5, 1984).

162. *Id.*

163. L. LERMAN, *supra* note 45, at 34-36.

164. *Id.* at 45.

165. The National Law Journal, Aug. 22, 1983, at 4.

166. L. LERMAN, *supra* note 45, at 34.

167. *Id.* at 33.

the knowledge that prosecutors will pursue their complaints aggressively and with sensitivity, victims who would not report the rape due to fear of the treatment they would have received from police and prosecutors, will be encouraged to report the crime, further enhancing the likelihood of convictions.[168] These three approaches, legislation, education, and a no-drop policy, would enhance victim cooperation and lead to a greater number of convictions.

B. Police Assistance

Police are hesitant to respond to calls relating to marital violence.[169] Their reluctance to respond results from infrequency of prosecution and a fear for their own safety due to the extreme violence in marital disputes.[170] When there has been a prior relationship between the victim and the attacker, police are more likely to deem the charge of rape as unfounded and fail to act on the complaint.[171] Police have wide latitude as to whether action should be taken and are usually "highly suspicious of rape complaints."[172]

Married women are less likely to seek police intervention than women who are divorced.[173] Also, it has been determined that if a police officer holds subsequent police investigatory interviews at the police station, instead of at the victim's current residence, there is a higher rate of victim attrition.[174] Therefore, even when married women report the sexual battery, "[r]egardless of the truth of the charge, most marital rape complaints will not survive police investigation."[175] "[M]ost rape cases are never presented for prosecution; . . . [they] simply die a bureaucratic death. . . ."[176] In cases where the victim knows the offender, for example, the possibility of a victim's consent halts further development of the case beyond the investigatory stage.[177] Attitudes of police reflect attitudes of society. In marital rape, the police officer will

168. *Id.* at 34.
169. Note, *supra* note 9, at 246.
170. *Id.*
171. Hall, *supra* note 143, at 940. *See also* Pracher, *supra* note 10, at 738.
172. *See* FORCIBLE RAPE, *supra* note 152, at 31.
173. McLeod, *Victim Noncooperation in the Prosecution of Domestic Assault*, 21 CRIMINOLOGY 395, 405 (1983).
174. FORCIBLE RAPE, *supra* note 152, at 34.
175. Pracher, *supra* note 10, at 739.
176. FORCIBLE RAPE, *supra* note 152, at 46.
177. *Id.*

often find the complaint unfounded because of the existence of the previous consensual sexual relationship, and the fact that the relationship creates a nearly insurmountable problem of proof. Married women may report marital rape in cases where violence and physical injury exist.[178] The police will investigate and bring the case to the prosecutor when there is evidence of extreme violence.[179] Cases of marital rape not rising to this level of violence and physical injury may not get beyond the investigatory phase,[180] cutting off the chance of prosecuting the case. Although attitudes biased against rape victims may in general be changing,[181] in cases of marital rape, a woman may still need to be "bruised, bloody, and damned near dead[182] . . . for the activity to be considered not consensual."[183] Therefore, even when a victim is willing to report the sexual battery to the police, she may find police reluctant to act.

C. Prosecutor Discretion

The prosecutor has great discretion in filing charges.[184] Prosecutors may be reluctant to file rape charges because of the many difficulties in obtaining convictions.[185] Also, not every prosecutor agrees on what constitutes rape.[186] In a marital rape, unless there is the use of force likely to cause serious injury, a prosecutor may feel the jury would not convict[187] and, therefore, not prosecute.[188] Frequently in rape

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178. Freeman, *supra* note 76, at 6.

179. Hall, *supra* note 143, at 941.

180. L. LERMAN, *supra* note 45, at 14.

181. News/Sun Sentinel, Aug. 12, 1984 § A, at 15, col. 1 (Palm Beach Edition)(citing Lunt, *Juvenile Crime in Florida: Myths and Facts*, indicating that arrests for forcible rape in 1983, have increased by 70.9% since 1975).

182. Note, *supra* note 16, at 347 (*quoting* a past victim of rape).

183. *Id.*

184. FORCIBLE RAPE, *supra* note 152, at 48.

185. *Id.*

186. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPT. OF JUSTICE, FORCIBLE RAPE: A MANUAL FOR FILING AND TRIAL PROSECUTORS, PROSECUTOR'S VOLUME III 10 (1978).

187. Telephone interview with Jayne Weintraub, prosecutor in the case of State v. Rider (Aug. 14, 1984). Weintraub indicated a jury is unlikely to convict without severe force likely to cause serious personal injury.

188. In State v. Rideout, No. 108, 866 (Marion County Or. Cir. Ct. 1978), prosecutor Garry Gortmaker stated in a pretrial remark that "if it had happened in the bedroom and he didn't beat her up, I'd agree with the other side." Barry, *supra* note

cases, a prosecutor will dismiss the case if the victim is reluctant to fully cooperate at trial.[189] Also, if a victim of rape does not endorse a negotiated plea, it influences the prosecutor to reject it.[190] Therefore, it is evident that victim cooperation and serious victim injury are the most important factors in influencing the decision of prosecutors to bring the case to trial.

Unfortunately, it has been found that often prosecutors "unintentionally discourage victims from following through with prosecution."[191] The victim is made to feel that she is "responsible for the prosecution of the case and for whatever penalty is ultimately imposed,"[192] despite the fact that rape is a felonious crime against the state. The prosecutor can promote victim cooperation if the prosecutor explains that the state is responsible for filing the charge and prosecuting the case, and that the victim will not be allowed to effect a dismissal of the charge, once filed.[193] Cities that have implemented this policy in wife battering cases have experienced a greater number of convictions, due to victim cooperation.[194] Therefore, there is a great need for prosecutors to become more sensitized to the victim's needs in order to avoid unintentional discouragement. At the present time, prosecutors may only choose to prosecute a marital rape case where there is extreme force likely to cause serious injury.[195] However, as more cases are prosecuted and jurors recognize that marital rape occurs frequently without extreme violence and severe injury, prosecutors will likely begin to prosecute those cases. Prosecutors can promote victim cooperation with appropriate policies, and as a result enhance conviction rates.

D. Attitude of the Bench

The judge's attitude toward marital rape can impact on the jury's decision in at least two ways. First, the general demeanor of the judge may sway the jury, which tends to look upon the judge as the ultimate authority figure in the courtroom.[196] The judge may feel that it is im-

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146, at 1091.

189. Hall, *supra* note 143, at 951.

190. *Id.* at 952.

191. L. LERMAN, *supra* note 45, at 33.

192. *Id.*

193. *Id.* at 45.

194. *Id.* at 34.

195. *See supra* note 187.

196. L. HOLMSTROM & A. BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL RE-

possible to rape one's wife and unconsciously reinforce similarly held beliefs of jurors.[197] Second, the judge's discretion in deciding when certain evidence is admissible, especially evidence of prior sexual conduct, influences the outcome of the case.[198] The judge's role should be to weigh the evidence according to the rules of evidence, and to admit the evidence when the probative value outweighs its prejudicial value.[199] There is a belief that in many states, including Florida, judges apply discretion to the admissibility of evidence that does not conform to statutory provisions.[200] In cases where the judge abuses his discretion, and the jury acquits the defendant, the state is unable to appeal due to the constitutional ban of placing the defendant in double jeopardy.[201]

The judge's admission of evidence of rape trauma syndrome[202] in cases of marital rape could be enormously helpful in the prosecution of husbands, especially where there is no evidence of severe physical injury. The acute symptoms of rape trauma syndrome include feelings of "shock, numbness, bewilderment, fear, terror, disgust, humiliation, vulnerability, powerlessness, anxiety, and shame."[203] It has been documented that most rape victims continue to suffer from rape trauma syndrome at least one year after the rape.[204] The Kansas Supreme Court and the Montana Supreme Court recently permitted evidence of

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ACTIONS 158-62 (1978). *See also* J. MARSH, A. GEIST, & N. CAPLAN, *supra* note 108, at 58-62.

197. Chappel, *Forcible Rape and the Criminal Justice System*, 22 CRIME & DELINQ 125, 136 (1976).

198. Note, *supra* note 15, at 156 (juries are likely to acquit when inflammatory evidence of prior sexual conduct of the victim is admitted).

199. Hibey, *supra* note 18, at 326.

200. Nicholl, *Idaho Code § 18-6105: A Limitation on the Use of Evidence Relating to the Prior Sexual Conduct of the Prosecution in Idaho Rape Trials*, 15 IDAHO L. REV. 323, 342-43 (1979). *See also* Beinen, *supra* note 142, at 147-48.

201. Note, *supra* note 15, at 158.

202. In State v. Marks, 231 Kan. 645, 653, 647 P.2d 1292, 1299 (1982) the psychiatrist, Dr. Modlin, testified that "[s]ymptoms of rape trauma syndrome include fear of offender retaliation, fear of being raped again, fear of being home alone, fear of men in general, fear of being out alone, sleep disturbance, change in eating habits, and sense of shame." *Id. See also* Note, *Scientific Evidence in Rape Prosecution*, 48 UMKC L. REV. 216, 221-22 (1980), where the author indicates his opinion that "most trial courts . . . would allow the jury to consider the evidence [of rape trauma syndrome]."

203. Becker, Skinner, Abel, Howell & Bruce, *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 94, 95 (1983).

204. *Id.* at 99.

rape trauma syndrome to be introduced at trial.[205] The Kansas Supreme Court held that rape trauma syndrome was a sufficiently developed phenomena which "is generally accepted to be a common reaction to sexual assault."[206]

In *Anderson v. State*,[207] the Florida Fourth District Court of Appeal held that "[t]he trial court should have excluded the testimony related to the changes in the victim's behavior pattern following the [sexual] assault."[208] However, the court concluded that the admission "constituted harmless error"[209] and had "no real prejudicial effect;"[210] the court therefore denied a new trial.[211] The court ignored the existence of rape trauma syndrome. In ruling that the testimony should have been excluded, the court relied on a 1919 case[212] which stated that "[w]hat happened after the criminal act in no wise affected either the guilt or innocence of the accused. Her giving birth to a dead child, her sufferings, the impairment of her health, were not material to the issues involved."[213] However, in *Division of Corrections v. Wynn*,[214] the Florida First District Court of Appeal indicated that the admission of rape trauma syndrome was an appropriate use of judicial discretion.[215]

Florida courts should acknowledge the significant development of rape trauma syndrome and battered wife syndrome. Florida judges could enhance convictions for marital rape if they follow the example of the Kansas and Montana Supreme Courts and admit evidence of rape trauma syndrome when the defense is consent. In addition, Flor-

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205. *Compare Marks*, 231 Kan. at 653, 647 P.2d at 1299 and State v. Liddell, ___ Mont. ___, 685 P.2d 918, 923 (1984), *with* State v. Saldana, 324 N.W.2d 227 (Minn. 1982); State v. Taylor, 663 S.W.2d 235 (Mo. 1984); and People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984)(reject evidence of rape trauma syndrome). *See also* Dobson, *Survey of Kansas Law: Evidence*, 625 U. KAN. L. REV. 662, 663-64 (1984), which raises interesting problems concerning introduction of collateral issues and possible adverse outcomes if a victim does not suffer from rape trauma syndrome.

206. *Marks*, 231 Kan. at 653, 647 P.2d at 1299.

207. 439 So. 2d 961 (Fla. 4th Dist. Ct. App. 1983).

208. *Id.* at 962.

209. *Id.*

210. *Id.*

211. *Id.*

212. Bynum v. State, 76 Fla. 618, 622, 80 So. 572, 573 (1919), *rev'd on other grounds*, Hunter v. State, 95 So. 115, 116, 118 (Fla. 1923).

213. *Id.*

214. 438 So. 2d 446 (Fla. 1st Dist. Ct. App. 1983).

215. *Id.* at 448.

ida courts should admit evidence of battered wife syndrome to show that the wife had a reasonable belief that her husband's threats of violence would be carried out. Problems of proving marital rape would further diminish if Florida judges use their discretionary powers to exclude prior sexual conduct admitting it only when the pattern of sexual conduct could have no other possible meaning but consent. Finally, if judges exhibit a courtroom demeanor that is cordial to the anxious victim, and refrain from any actions or tone which show their own bias to the jury, convictions for marital rape should increase.[216]

E. The Jury

The most difficult task for a prosecutor in a case of marital rape is to convince the jury that a husband can actually rape his own wife.[217] A 1966 study[218] indicates that jurors will most likely not convict a defendant for rape when the defendant and the victim have had prior sexual relations, even when there is evidence of violence.[219] The same study demonstrates that when a victim's character is shown to be tarnished, the jury is also apt to acquit the defendant.[220] Recently, questionnaires were sent to judges in Michigan to assess changes in jury attitudes under Michigan's Criminal Sexual Conduct Law.[221] A majority of the judges thought jurors were less conservative than in the past, and would more often render guilty verdicts in rape cases.[222] The judges indicated that the change in jury behavior was due to "(1) changes in public attitudes regarding sexual behavior, (2) public awareness about rape, and (3) the impact of the women's movement, . . ." rather than the statute itself.[223] However, many jurors still come to court with numerous stereotypical notions about rape.[224] One of

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216. Miami Herald, Sept. 18, 1984, at B1, B2, col.1. The judge also has a duty to impose proper sentences which reflect the seriousness of the crime. In *Rider*, the jury convicted the husband because "[h]is story didn't hang together." The judge however, mitigated Rider's possible life sentence to fourteen years, despite the fact Rider was on parole for second degree murder at the time of the incident. The judge reasoned that the Riders were "not by any means your typical surburban couple." Id.

217. *See supra* note 127.

218. H. KALVEN & H. ZEISEL, *supra* note 48, at 252-57.

219. *Id.* at 251.

220. *Id.* at 249-51.

221. J. MARSH, A. GEIST & N. CAPLAN, *supra* note 108, at 56.

222. *Id.*

223. *Id.*

224. L. HOLMSTROM & A. BURGESS *supra* note 196, at 168.

these notions is that a husband cannot rape his wife.[225]

Therefore, citizens as prospective jurors will need to be educated that marital rape occurs frequently and that it is a crime.[226] Jurors should be aware that victims of marital rape experience, at the very least, the same trauma and humiliation as other non-marital rape victims.[227] When this educational process is complete it will be easier to convince the jury that it is a crime to rape one's wife.

V. Conclusion

Florida is one of very few states which holds a husband criminally liable for the rape of his wife, whether they are separated or living together. The problems of proving marital rape, however, may bar the successful prosecution of most husbands. The problem in obtaining convictions for marital rape is not an acceptable reason for states to retain the exemption for husbands. "Many types of prosecutions are rare and difficult—treason, for example—and yet we strongly uphold the need to keep such laws on the books."[228]

One obvious remedy for the problem of obtaining convictions for marital rape lies in legislative reform which would permit the prosecution of husbands for marital rape. The reform should include rape shield laws which eliminate the admissibility of prior sexual activity as indicative of credibility or consent. Evidence of rape trauma syndrome should be admitted in cases of marital rape to demonstrate lack of consent to the sexual battery. Evidence of battered wife syndrome should be admitted to show the victim had reason to fear her husband would carry out his threats of inflicting bodily harm. However, the most effective way to enhance prosecutions for marital rape lies in the education of victims, police, prosecutors, judges, and juries. Without changes in the attitudes of these participants in the criminal justice system, reforms in the law, although important statements of public policy, will not provide relief to the one out of seven wives who are raped by their husbands.[229]

Susan Ruby

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225. Pracher, *supra* note 10, at 731-32. *See also* Griffin, *supra* note 147, at 57.

226. D. RUSSELL, *supra* note 1, at 2. *See also* Finkelhor & Yllo, *supra* note 75, at 461.

227. *See* D. RUSSELL, *supra* note 1, at 190.

228. Schwartz, *supra* note 2, at 48.

229. D. RUSSELL, *supra* note 1, at 2.