The Gradual Fall of the Marital Rape Exemption: *The Curious Case of South Dakota*

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INTRODUCTION

On February 19, 1975, the front page of the *Daily Republic*, a Mitchell, South Dakota newspaper, included a small heading: "Senate Committee Approves Revising S.D. Rape Laws." Though short and understated, the article hints at a monumental shift in American rape law—about a month later, the state legislature would pass S.B. 165, thereby making South Dakota the first U.S. state to criminalize marital rape. The bill amended the state's rape statute by removing the codified marital rape exemption, in this case the language "not the wife of the perpetrator,"[1] thereby extending state protection to married women:

> An act of sexual penetration accomplished with *any person* under the following circumstances: (1) Through the use of force, coercion or threats of immediate and great bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution; or (2) Where the victim is incapable, because of physical or mental incapacity, of giving consent to such act; a person sixteen years of age or less shall be presumed incapable of consenting to such acts; or (3) Where the victim is incapable of giving consent because of any intoxicating, narcotic or anesthetic agent, or because of hypnosis, administered by or with the privity of the accused.[2]

This change was immensely significant because it used the phrase "any person" without a qualifying clause, broadening the scope of potential rapists to include husbands. In this period, state statutes with a codified marital rape exemption generally included a phrase similar to "other than a man's wife" in order to make it clear that married women were not protected by the statute with regard to their husbands. S.B. 165 marked the first time that a state guided by the English common-law tradition went against the traditionally accepted notion that rape could not exist within the conjugal bond, that marriage *implied* sexual consent. Thus, one of the least populous states and most traditionally conservative states in America took the first legislative swing at the

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[1] S.D. Codified Laws § 22-22-1 (Supp. 1974).
[2] An Act Revising Rape Laws, ch. 169, section 1, 50 S. Dak. laws 341 (1975) (emphasis added).

centuries-old concept of "implied consent," making South Dakota an important player in common-law history.

By 1977, however, the progressivism of early 1970s South Dakota proved to be only temporary. In a staunch Democratic defeat in 1976, the Republicans regained control of both the House and Senate, gaining two-thirds majorities in both houses.[3] The newly Republican-dominated House undertook a massive criminal-code revision, during which they inserted a change to 22-22-1, the rape statute. The revised statute added the phrase "other than the actor's spouse" after the phrase "any person,"[4] so revitalizing the marital rape exemption in South Dakota for many years to come. Marital rape would not be recriminalized in the state until 1990, late compared to most states. South Dakota hence went from being an innovative leader to a lagging follower, from a state where a man could not legally rape his wife to a state where he could.

This essay discusses marital rape legislation in South Dakota within the broader context of anti–marital rape activism in the United States. This history is one of fits and starts, of visionary female leadership, and of bipartisanship. With the personal accounts of numerous legislators and activists, this essay seeks to show how individual idiosyncrasies and historical contingency largely explain the social progression and regression in the Mount Rushmore State. While it is recognized that South Dakota was the first state to eliminate spousal immunity, there has been little to no primary-source research conducted on how this elimination occurred. This essay will illuminate the state's progressivism in terms of and beyond marital rape, both of which have largely been left out of the historical record. It will also argue that the curious history of

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[3] David Ortbahn (Chief Analyst for Research & Legal Services, South Dakota Legislative Research Council), in discussion with the author, October 27, 2017.

[4] Criminal Code Revised: An Act, ch. 189, section 51, 52 S. Dak. laws 258, 268 (1977).

marital rape law in South Dakota is an instructive barometer of the complexities of legal and cultural change regarding rape in America.

HISTORICAL BACKGROUND

Marital rape, while a relatively new legal category, is a timeless phenomenon. For most of history, wives had no legal redress—rape in marriage was not conceptualized because the conjugal bond implied permanent sexual consent on behalf of the wife. This conceptualization was rarely questioned. This doctrine of "implied consent" was famously elucidated by Sir Matthew Hale, Britain's Lord Chief Justice in the seventeenth century in his magnum opus *Historia Placitorum Coronae*: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[5] Although Lord Hale spends only a few lines of his major work discussing marital rape and provides no legal precedent to justify his views, his words became canon within the common-law tradition and ended up dictating American rape law for most of the country's history. Hale's views would remain unquestioned in the United States until the mid-nineteenth century, when American women first organized a mass feminist movement.

According to Jill Elaine Hasday, a historian of marital rape, the American anti–marital rape movement began right after the Seneca Falls Convention in 1848 when "feminists waged a vigorous, public, and extraordinarily frank campaign against a man's right to forced sex in marriage."[6] Feminists in this period called for sexual self-possession within marriage, believing

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[5] Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, (Philadelphia: Robert H. Small, 1847), Vol. 1, 629.
[6] Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, *California Law Review* 88, no. 5 (2000): 1377.

that marriage was at the root of female subordination.[7] Women such as Elizabeth Cady Stanton focused specifically on obligatory sex as evidence of the oppression of women.[8] These women were in many ways classically liberal, seeking to apply the values of the Declaration of Independence to both men and women without changing or challenging the document.[9]

Though these nineteenth-century feminists saw little statutory change, they were able to conduce slight social progress through prescriptive literature that encouraged husbands to consider their wives' wishes in the bedroom.[10] Prescriptive authors generally framed this change in attitude toward sex within marriage as mutually beneficial, though they were sure not to attack a husband's conjugal *right* to have sex with his wife.[11] Although many living in the nineteenth century were willing to acknowledge the harm caused by forced sex in marriage, a man's right to have sex with his wife against her wishes remained supported by a legal framework that consistently subordinated women to men. This framework was maintained through coverture, a principle that suspended a woman's legal existence during marriage.[12] Marriage involved a contract between a man and wife, one that included certain obligations and privileges. With coverture, women were legally protected, but this protection came at a costly price. Hasday argues:

> But while the marital relationship was reciprocal, it was also explicitly hierarchical. Wives were vastly more constrained; they surrendered many more legal rights by marrying. The marital rape exemption, with its unequal demands on husband and wife, was just one more example of coverture principles at work. And the widespread commitment to the operative tenets of coverture was another reason that [Sir] Hale's irretractible consent theory struck authoritative legal sources in the nineteenth century as so satisfactory.[13]

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[7] Hasday, *Contest and Consent*, 1277-1279.
[8] David Finkelhor and Kersti Yllo, *License to Rape* (New York: The Free Press, 1985), 3.
[9] Hasday, *Contest and Consent*, 1414.
[10] Ibid., 1379.
[11] Ibid.
[12] Ibid., 1389.
[13] Ibid., 1400.

The irretractible consent theory was further bolstered by the fact that, in nineteenth-century America, the only legal type of sex was that within marriage—marital intercourse was definitionally legal and marital rape was thus a contradiction in terms.[14] The theory also made female social and economic independence impossible, therefore turning unwanted sex between husband and wife into legalized prostitution of women who were definitionally not prostitutes. [15] These women had a very specific feminine role—they were expected to raise the next generation of virtuous, republican Americans. It was within this gendered framework that feminists argued for sexual self-possession—in order for them to be good mothers (i.e. not prostitutes), they needed to have control over marital intercourse, an interaction that was inextricably connected to child-bearing.[16] But by the turn of the century, the nineteenth-century feminist campaign against marital rape ran out of steam. Early twentieth-century feminists would focus primarily on women's suffrage, relegating sexual consent within the conjugal bond to the backburner.

It would not be until the mid-twentieth century that debates about marital rape would resurface—this time pushed for by both women and men. Around mid-century, legal scholars began discussing marital rape. These discussions occurred within the context of changing social norms related to sexuality. In the early 1950s, Dr. Alfred Kinsey revolutionized the way Americans, especially intellectuals, understood sexual behavior through his reports titled: *Sexual Behavior in the Human Male* (1950) and *Sexual Behavior in the Human Female* (1953).[17] In the words of historian Douglas Brode, "[Kinsey's research] insisted that, far from being disgusted by the thought of sex, normal women were obsessed with it."[18] These reports, along with shifting

[14] Hasday, *Contest and Consent*, 1401.
[15] Ibid.
[16] Ibid., 1417.
[17] Douglas Brode, *Sex, Drugs & Rock 'n' Roll: The Evolution of an American Youth Culture* (New York: Peter Lang Publishing, 2015), 115.
[18] Ibid.

social norms, helped push the FDA to approve the first oral contraceptive in 1960, which became available solely to married women.[19] Although access to oral contraception was heavily constrained, it still monumentally affected society. Contraception revolutionized the way Americans thought about sex within the conjugal bond; because women finally had the ability to choose whether they wanted to reproduce, sex became about more than simply having children. The nineteenth-century fight for voluntary motherhood was thus replaced by the twentieth-century struggle for effective and accessible contraception.[20]

The post-Kinsey wave of sexual progressivism had an immense impact upon the legal world. Many legal scholars began to critique marital norms, and some even focused on the marital rape exemption itself. In 1995 her article on the history of the marital rape exemption, Rebecca M. Ryan wrote, "The 1950s reevaluations [of sex-related laws] nominally rejected the construct of marital unity and paid lip service to the wife's right to physical self-sovereignty."[21] At first glance, many of these writers seem progressive. But they often had what may seem to be an odd combination of political views—they were pro-Kinsey *and* pro-marital rape exemption. An anonymous 1954 *Stanford Law Review* article was one of the first academic pieces to broach the topic of marital rape. Toward its beginning, the author makes a somewhat progressive argument against implied consent, claiming that it is "unreasonable to infer that a wife intends to make her body accessible to her husband whenever he wants her."[22] Instead, the author argues, marriage implies that a woman will *usually* consent to intercourse.[23] Though the author seems to

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[19] *Griswold v. Connecticut* (1965) ruled that bans on contraception were unconstitutional because they violated the right to marital privacy. The arguments used in *Griswold* would soon be used as arguments in favor of the marital rape exemption.
[20] Finkelhor and Yllo, *License to Rape*, 4.
[21] Rebecca M. Ryan, "The Sex Right: A Legal History of the Marital Rape Exemption," *Law & Social Inquiry* 20, no. 4 (1995), 955.
[22] "Rape and Battery between Husband and Wife," *Stanford Law Review* 6, no. 4 (July 1954): 722.
[23] Ibid.

suggest that both non-married *and* married women should have a right to the consent framework—a groundbreaking idea at the time—he later distinguishes marital rape from what he terms "classical rape," claiming that marital rape is less harmful than "classical" forms of sexual violence. He writes, "Forcible rape between unmarried persons is the culmination of a desire whose very inception is disapproved; but between married persons it is a loss of control over an explosive but encouraged situation."[24] The author ultimately upholds the distinction between "moral" sex within marriage and "immoral" sex outside of it. In addition, he argues that marital rape should not be criminalized because it would "stifle the last prospects for reconciliation,"[25] suggesting that marriages involving rape are worth saving. He casts doubt on women who come forward with marital rape accusations by arguing that they are "unlikely to recollect objectively" and that they may use accusations in a vindictive manner for material gain.[26] The author ends the article with the claim that "a seeming lack of consent may be simply a manifestation of the fact that resistance during preliminary love-making greatly increases the sexual pleasure of some women."[27] In this anonymous piece, the author combines progressive and antiquated norms about sexuality in an ostensibly inconsistent way, and this tendency was certainly not unique to him. But though scholars were beginning to debate the merits of the marital rape exemption, marital rape was still a niche topic, even within the legal world.

SEXUAL PROGRESSIVISM AND LEGAL REGRESSIVISM

In 1962, the American Law Institute (ALI) first produced its Model Penal Code, a lengthy text that sought to suggest changes to U.S. statutes. During this era, many legal scholars

[24] "Rape and Battery between Husband and Wife," 725.
[25] Ibid., 727.
[26] Ibid., 725.
[27] Ibid., 728.

began to see the criminalization of what was deemed to be "immoral" sexual behavior as antiquated, calling for the state to decriminalize premarital sex and sodomy, among other things. The ALI reformers sought to update U.S. statutes to reflect increasingly liberal sexual mores through their self-consciously progressive Model Penal Code.[28] Their progressivism went only so far, however. The Code's section on "Sexual Offenses" advocated for statutory changes that exposed an old-fashioned and overwhelmingly male worldview. Perhaps unsurprisingly, all of the Code's drafters for the "Sexual Offenses" section were male.[29] The Code created three rules in order to work toward the "objective" adjudication of rape and sexual assault cases. Its first rule instituted corroboration requirements for rape cases, though the Code did not demand corroboration for other crimes.[30] This rule went beyond the British common-law tradition by explicitly requiring that a woman's testimony had to be supported by other evidence, which was a high bar given most instances of rape and sexual assault occur without a witness.[31] The second rule required victims to file complaints within three months, a rule that quickly had an impact on state laws and thus further constrained the reporting abilities of victims of rape and sexual assault.[32] The third rule went back to Lord Hale. Claiming to protect the interests of the accused, it required that juries had to be warned "to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."[33] The ALI's "peculiar traditionalism"[34] supported practically unreasonable corroboration requirements,

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[28] Ryan, "The Sex Right," 954.
[29] Fred Strebeigh, *Equal: Women Reshape American Law*, (New York: W.W. Norton & Company, 2009), 321.
[30] Ibid., 321.
[31] Ibid.
[32] Ibid.
[33] Ibid., 322.
[34] Ryan, "The Sex Right," 954.

advocated for a rather short statute of limitations in rape cases, and encouraged juries to doubt victims' testimonies.

In addition to drafting these three rules to regulate the adjudication of rape and sexual assault cases, the drafters also chose to throw their support behind the age-old marital rape exemption. Section 213.1 of the 1962 version of the Model Penal Code states:

> A male who has sexual intercourse with a female *not his wife* is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or (c) the female is unconscious; or (d) the female is less than 10 years old.[35]

The drafters considered themselves progressive, especially in regard to sexuality. They read the Kinsey Reports and wanted the state out of the bedroom (for the most part). They were very much opposed to coverture, and they advocated for moderate female self-sovereignty. But they continued to support the marital rape exemption by arguing that sex between a husband and his wife was distinguishable from all other types of sex because of psychological, legal, and moral reasons—they insisted that there was something sacred about the conjugal bond.[36] This distinguishability was undermined by the Code itself, however. The Code rejected the criminalization of adultery and fornication, thereby collapsing the legal difference between marital and non-marital sex and undermining the drafters' own arguments in favor of the marital rape exemption.[37]

Mid-century arguments in favor of the marital rape exemption were generally made within the context of "marital privacy," but the Code, which supported the exemption, took

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[35] The American Law Institute, *Model Penal Code: Proposed Official Draft: Submitted by the Council to the Members for Discussion at the Thirty-ninth Annual Meeting on May 23, 24, 25, and 26, 1962* (Philadelphia: The American Law Institute, 1962), 142 (emphasis added).
[36] Ibid., 956.
[37] Ibid., 959-960.

enormous steps in undermining the foundations of privacy for a husband and his wife. According to Reva Siegel, a professor of law and inequality, legal scholars in this era often justified non-intervention in domestic violence (including marital rape) with notions of privacy. Siegel argues that courts and legal thinkers preferred to keep most domestic issues out of the public eye, perhaps because "it is easier for an altruistic wife to forgive her husband's impulsive violence than it is for a husband to suffer the loss of authority entailed in having this exercise of prerogative reviewed by public authorities."[38] Siegel's words seem to ring true historically. Even by the mid-twentieth century, most male legal thinkers were most concerned with protecting male "dignity," often to the detriment of women.

Even with these arguments in mind, from the Code's dissemination in 1962 to the 1990s, U.S. statutes regarding rape, specifically marital rape, changed immensely, as did discussions surrounding rape and sexual assault in America. According to David Finkelhor and Kersti Yllo, out of thirty-one marriage and family textbooks published in the 1970s, only one mentioned marital rape or anything related.[39] Regardless some progress—however tepid—was made on marital rape awareness in the early 1970s. Before South Dakota made its groundbreaking leap in 1975 and fully eliminated spousal immunity, in 1974 Michigan and Delaware made some less significant, but still noteworthy changes to their statutes. Michigan criminalized rape between a man and woman who were married, but only when they were living apart and had filed for divorce.[40] Delaware criminalized forcible rape of a "voluntary social companion," which could be anything from a wife to a friend, but made this crime much less serious than forcible rape

[38] Reva B. Siegel, ""The Rule of Love": Wife Beating as Prerogative and Privacy," *Faculty Scholarship Series*, Paper 1092 (1996), 2156.
[39] Finkelhor and Yllo, *License to Rape*, 6.
[40] An Act of Aug. 12 1974, ch. 266, 1974 Mich. laws 1025, 1029 (amending penal code).

between involuntary social companions.[41] In Delaware, if a woman had chosen to be in the presence of a man or if she had previously had sex with him and he raped her, he would suffer a significantly less serious penalty than a man in a "rape in an alleyway" situation would. While these two changes were certainly significant, they were not nearly as revolutionary as South Dakota's changes in 1975. The changes supported the idea that if a woman knew her rapist, then the crime was less harmful—the same idea that supported the marital rape exemption for hundreds of years.

To be fair to Michigan and Delaware, though, even feminist organizations like the National Organization for Women (NOW) were not advocating for absolutely no spousal immunity in 1974. NOW established the NOW Rape Task Force (NOWRTF) in 1973, the first national anti-rape organizing effort.[42] The group focused on suggesting statutory changes, reforming police and hospital procedures, and establishing rape crisis response centers.[43] It published various pamphlets with information about rape in America, seeking to shed light on an issue that was generally absent from public discussion. In its piece titled "Politics of Rape," the group proclaims: "Rape forces a woman to confront her own powerlessness. She has no real control over her own life…. As long as women must appeal to men and male institutions for our needs, we will not have any real control over our lives." It was this desire for self-sovereignty that compelled the anti-rape movement; in order for women to be autonomous equals in society, they had to be autonomous equals in the bedroom.

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[41] An Act to Amend Title 11, ch. 547, section 2, 59 Del. laws 1773 (1974) (amending criminal code).
[42] Mary Ann Largen, "The Anti-Rape Movement: Past and Present," in *Rape and Sexual Assault: A Research Handbook*, ed. Ann Wolbert Burgess (New York: Garland Publishing, 1985), 9.
[43] Estelle B. Freedman, *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation* (Cambridge: Harvard University Press, 2013), 279.

In January 1974, Mary Ann Largen,[44] the then leader of the NOWRTF, sent out the group's first model rape law to members of the force, in preparation for its presentation at the NOW national conference later that year.[45] The stated goal of the model law was: "To revise the present laws which overwhelmingly favor the defendant; impede convictions; allow the victim, as a witness, to be treated in a manner which is both humiliating and damaging to her emotional health; and which further discourages victims from reporting the crime to the officials."[46] Largen began her letter to the group with a warning: "Keep in mind that for some of you the proposals will not be radical enough. For others, the proposals will be too radical."[47] To the latter group, Largen advised that they "should remember that when you are bargaining you must always ask for more than you expect to gain."[48] Largen attempted to temper expectations on both sides—she knew that their goals were cutting-edge, and she knew that she would face opposition. In this initial call for comments, the NOWRTF deemed one of its objectives as: "To broaden the law to permit the prosecution for rape in the case of non-consent of a spouse to sexual intercourse."[49] The group sought to dismantle a husband's conjugal right to his wife's body, to give women the right to choose whether they wanted to have sex with their husbands. Given that the issue of rape

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[44] Largen, in addition to helping found the National Organization for Women's Rape Task Force, was a historian of the anti-rape movement itself. She wrote about the early movement, ultimately contributing to the compilation *Rape and Sexual Assault: A Research Handbook*, cited in note 42. As head of the NOWRTF, Largen worked within NOW's chapter structure, seeking to collect localized information about what rape-related reforms were needed. After leading the NOWRTF, she served as a director at the National Coalition Against Sexual Assault and as a policy analyst at the Center for Women Policy Studies. Much of this information and how the NOWRTF interacted with other early anti-rape groups is chronicled in Maria Bevacqua's book *Rape on the Public Agenda: Feminism and the Politics of Sexual Assault* (Boston: Northeastern University Press, 2000), 36-37; 48-50.

[45] Mary Ann Largen to NOW Rape Task Force Members, January 23, 1974, Carton 49, Folder 5, National Organization for Women Records, 1959-2002, MC 496, Schlesinger Library, Radcliffe Institute, Harvard University.

[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Ibid.

more broadly joined the national NOW agenda only in 1973, the NOWRTF's stated goal of ending spousal immunity sheds light on the group's, especially Largen's, visionary thinking.

Though the NOWRTF's January 1974 goal was far-reaching, the draft resolution produced at the NOW national conference in May 1974 ultimately suggested permitting prosecution of a husband only "when the couple are living separate or apart and one has filed for divorce or separate maintenance."[50] At the conference, NOW members were clearly hesitant to take the step to criminalize marital rape in all situations—they were afraid to completely destroy spousal immunity. Instead of keeping the ostensibly more revolutionary goal from January 1974, NOW representatives at the Houston conference chose to advocate for a law that applied only to couples who had filed specific separation measures. Their decision was likely made out of both prudence and prudishness. Their actions were in line with those of Michigan and Delaware, revealing cautious feminism regarding marital rape. The ways Michigan, Delaware, and NOW handled the issue of marital rape in 1974 help explain just how cutting-edge South Dakota was in wholly eliminating spousal immunity in 1975—even the country's foremost feminist organization was not ready to advocate for such a substantial leap.

A TIME FOR RADICAL CHANGE: EARLY 1970s SOUTH DAKOTA

It was within this broader context that in 1975 South Dakota became the first state to eliminate the marital rape exemption.[51] With the aforementioned events of the early 1970s in mind, it might seem surprising that South Dakota took this step. But by examining early 1970s South Dakota history, the state's early criminalization makes more sense. During this time,

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[50] Resolutions Adopted at 1974 NOW National Conference, May 29, 1974, Carton 23, Folder 64, National Organization for Women Records, 1959-2002, MC 496, Schlesinger Library, Radcliffe Institute, Harvard University.
[51] An Act Revising Rape Laws, 1975.

Democrats gained both the governorship and control of the state legislature, something that was incredibly abnormal for South Dakota. Richard Kneip was elected in 1971 as the fourth Democratic governor in the state's history.[52] During the 1972 elections, the average age in the legislature dropped twenty years and female representation doubled, fundamentally changing the political landscape.[53] Linda Viken was elected to the South Dakota House of Representatives in 1972, just ten days into her 27th year. A homegrown South Dakotan, Viken was selected as the states "Outstanding Young Woman" in 1974.[54] While serving in the legislature in the early 1970s, Viken also worked as a civics and typing teacher at a junior high school in Sioux Falls.[55] Viken was one of multiple visionary South Dakotan women in this era who sought to bring about immense changes to legislation in the state, many of which involved governmental transparency. In the early 1970s, Democrats made many substantial changes to the way bills were passed. All of a sudden, committees could not be closed to the public, every bill had to have a hearing, and votes had to be recorded, thereby, Viken argues, enabling greater public participation in the legislative process and

Linda Viken, pictured in the CSW's January 1975 newsletter. South Dakota State Historical Society Records

[52] "Governor Richard Kneip," Travel South Dakota, accessed March 8, 2018, https://www.travelsouthdakota.com/newsroom/press-releases/south-dakotas-great-faces/governor-richard-kneip.
[53] Linda Viken in discussion with the author, November 5, 2017. Viken's last name was previously Miller. Sources from this era list her as Linda Miller.
[54] January 1975 South Dakota Commission on the Status of Women Newsletter, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society.
[55] Ibid.

progressive change.[56] That same year, the Human Relations Act of 1972 was passed, creating the South Dakota Division of Human Rights.[57] The act provided for "equal opportunity and prohibit[ed] discrimination because of race, color, creed, religion, sex, national origin, or ancestry."[58]

Mary Lynn Myers, then 26 years old, was the first director of the South Dakota Division of Human Rights. Myers was a fourth-generation South Dakotan who would work to improve women's rights in the state for decades. She was the first coordinator for NOW in South Dakota and ultimately worked to establish numerous chapters throughout the state.[59] As director, Myers fought to use South Dakota's human rights legislation to change how many disempowered populations, especially women and Native Americans, were treated in the state. Myers described the act as "about as powerful a law as any in the country with more teeth than most had."[60] According to Myers, the bill emerged from a strong coalition effort in the Mount Rushmore State—both

Mary Lynn Myers, pictured in the CSW's June 1976 newsletter. South Dakota State Historical Society Records

[56] Linda Viken in discussion with the author.
[57] The Division of Human Rights was originally called the Human Relations Commission. The name was changed in the mid-1970s when the state reorganized the government into departments and divisions (Mary Lynn Myers, email message to the author, March 30, 2018).
[58] Report on the Status of Women and Minorities in South Dakota State Government, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society, Appendix B, 26.
[59] "Legacy of Achievement: Hall of Fame Inductee Mary Lynn Myers," South Dakota Hall of Fame, accessed March 18, 2018, http://sdexcellence.org/Mary_Lynn_Myers. Myers came from a family of feminists. Her mother, Lona Crandall, was instrumental in establishing NOW's presence in the state, working tirelessly to support Myers' efforts and encourage South Dakota women to join the organization (Mary Lynn Myers, in discussion with the author, February 23, 2018).
[60] Mary Lynn Myers, in discussion with the author, February 23, 2018.

Democrats *and* Republicans were enthusiastic about the progressive human rights legislation.[61] Though the act was a bipartisan one, Myers said, "Once they realized that I was actually going to aggressively enforce the human rights legislation, many of the more conservative members of the government got a bit nervous."[62] And enforce it she did. During her tenure, Myers used the legislation to force local newspapers to cease publishing sex-segregated help wanted ads in 1972 and to create little leagues for young girls in 1974, both cutting-edge endeavors. The Division of Human Rights produced numerous reports about the state of human rights in South Dakota. In its 1973 "Report on the Status of Women and Minorities in South Dakota State Government," the Commission shed light on the issue of sex stereotyping in government positions.[63] The report found that females held 92.5% of clerical positions in the state, while only 12.5% of officials and managers were female.[64] According to the report, women faced many of the same issues in hiring as American Indians—employers claimed that "no qualified applicants" from these groups were applying.[65] Reports such as this one enabled the Division of Human Rights to make massive gains for human rights in South Dakota, but its success was only an aspect of the state's progressivism in the early 1970s.

During Governor Kneip's tenure, the South Dakota Commission on the Status of Women (CSW) was established, an organization that helped redefine the everyday lives of women in the state. Kneip led the charge to provide the newly established CSW with significant financial support to fund its initiatives. The CSW focused primarily on education and research, seeking to provide women in the state with information about how they could improve their lives through

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[61] Mary Lynn Myers, in discussion with the author, February 23, 2018.
[62] Ibid.
[63] Report on the Status of Women and Minorities in South Dakota State Government, 4.
[64] Ibid.
[65] Ibid.

work, political activism, and learning. The Commission regularly produced reports that exposed sex discrimination in the state. Its 1975 report "Women Seen Credit Where Credit Is Due" focused on how South Dakotan women were often denied credit, preventing them from achieving meaningful economic independence. In 1979, the CSW published a groundbreaking report on spousal abuse titled "Conspiracy of Silence," which focused on how many agencies, government workers, and even regular people were complicit in enabling spousal abuse to continue unhindered. The report included many harrowing accounts of neglect. Numerous women reported a lack of trust in the police, believing that some of the officers battered their own wives and believed the behavior to be acceptable.[66] One battered South Dakotan woman was told that it was "her fault" that her husband beat her and was advised by her minister to be "more tolerant and understanding of her husband, to forgive him and pray for him when he beat her."[67] "Conspiracy of Silence" was the first comprehensive documentation of domestic violence within South Dakota, and it brought about much needed changes to domestic violence laws and norms by bringing spousal abuse into public consciousness.[68]

The CSW also published a newsletter, which provided female South Dakotans with a variety of information, including tips on how to be more assertive, news regarding female leadership in the state, and details about various local feminist events (Figure 1, See Appendix). In its October 1974 newsletter, the CSW announced that Governor Kneip deemed August 26–31 "Women's Week," saying, "The encouragement has been overwhelming to have the Commission continue their effort in challenging, coordinating, and channeling research and

[66] "Conspiracy of Silence: A Report on Spouse Abuse in South Dakota," June 1979, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society, 22.
[67] "Conspiracy of Silence," 29.
[68] Linda Viken, in discussion with the author.

activities concerning human rights for women."[69] That same newsletter announced the creation of a "Women Against Rape" program in Pierre that would establish local crisis centers and plan an awareness week.[70] In the Commission's January 1975 newsletter, in honor of International Women's Year, the CSW happily announced that the state legislature's gender breakdown had changed—the chambers now included eleven female lawmakers, the largest number in state history.[71] Perhaps surprisingly, the party breakdown of the female lawmakers was almost equal—five Republicans and six Democrats. It was these women who broke through the "old boys' club" that was the legislature and managed to shape policy.[72] The CSW newsletter also mentioned how these female lawmakers were making rape reform a priority, hoping to focus on amending the state's rape law in the 1975 legislative session.

Governor Kneip celebrating the 56th anniversary of women's suffrage.
South Dakota State Historical Society Records

Even non-female-specific organizations and publications in this era raised awareness about rape. The South Dakota Department of Public Safety published the pamphlet "Protect Yourself Against Rape" around 1975. The pamphlet sought to provide South Dakotans with ways to avoid being raped by identifying certain locations as high-risk and advising women on

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[69] October 1974 South Dakota Commission on the Status of Women Newsletter, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society.
[70] Ibid.
[71] January 1975 South Dakota Commission on the Status of Women Newsletter. In 1975, the Democrats controlled the Senate with a three-member advantage (19-16). The House had 37 Republicans and 33 Democrats (David Ortbahn, in discussion with the author).
[72] Ruth Ann Alexander, "South Dakota Women Stake a Claim," *South Dakota History* 19, no. 4 (1990): 544.

how to better safeguard themselves when in those places. While the pamphlet acknowledged the home as a place where women are particularly at risk of being raped, it did not acknowledge a woman's husband as a potential assailant, instead cautioning readers against peeping toms. With great zeal, the pamphlet said:

> A most important reminder for all ladies is to be sure to PULL YOUR BLINDS, DRAPES, OR SHADE WHEN YOU ARE GOING TO DISROBE. Your own bedroom is or can be dangerous if you are careless when you disrobe. Men who will break into your home to commit rape are not normal or at least their actions are not normally accepted conduct. The fact of [a rapist's] abnormal desire makes him dangerous. The sight of a woman taking off her clothes is provocation enough for this person of criminal character. Some might only whistle and walk on by, but the person of deviant behavior might be activated to commit a terrible crime.[73]

The pamphlet had its faults. It failed to recognize husbands as potential rapists and plays into the idea that women are temptresses. But it also showed that, even in 1975, public safety officials in South Dakota were attempting to take rape seriously and raise awareness about the issue. South Dakotan newspapers were also shedding light on rape in the state. In August 1975, the *Mitchell Daily Republic* published a story titled "Rape is a crime of violence, hostility, not sex."[74] The article states, "a woman need not be young, attractive or dress seductively in order to be a victim. She only has to be in the wrong place at the wrong time."[75] It, like the public safety pamphlet, urged women to take some precautionary measures, such as avoiding being "overly friendly."[76] It also provided a personal example of cautious living from a female doctor who "drives at night with her German shepherd beside her in the car, has her keys ready so she doesn't have to

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[73] "Protect Yourself Against Rape: Suggestions to Women for Protection Against Assailants" pamphlet, Box 2182A, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society (original capitalization).
[74] "Rape is crime of violence, hostility, not sex," *Mitchell Daily Republic*, August 5, 1975, https://access.newspaperarchive.com/us/south-dakota/mitchell/mitchell-daily-republic/1975/08-05/page-5?tag=rape+law&rtserp=tags/rape-law?psi=88&pci=7&ndt=ex&py=1975&psb=relevance&search=y.
[75] Ibid.
[76] Ibid.

fumble for them, and even walks against the flow of pedestrian traffic so someone doesn't come up behind her."[77] A September article in the same publication announced that a North Dakotan farmer inventor had created a "protective glove invented to discourage rapers [*sic*]," a contraption it deems "the 20th Century [*sic*] equivalent of a mini-mace."[78] These examples too have their problems—they suggest that men are the only perpetrators of rape, could be accused of putting too much responsibility on the victim, and are sometimes even humorous in their attempts to protect women. However, they do show that South Dakotan media was taking rape seriously and that people in the state were beginning to see it as a public issue and were working to find ways to lower its incidence. Public acknowledgement of rape as an issue, along with fierce and forward-thinking leadership, helps elucidate why South Dakota criminalized marital rape in 1975.

SOUTH DAKOTA'S EPHEMERAL CRIMINALIZATION (1975–77)

The female-friendly nature of early 1970s South Dakota helps explain how and why the 1975 legislature was able to pass a bill eliminating all marital immunity, upending centuries of common-law tradition. This bill, S.B. 165, was introduced by Grace Mickelson and was sponsored by seven of the eleven women in the legislature and ultimately, after much time in committee, was passed unanimously by the House and Senate.[79] According to Larry Piersol, who was in the legislature until 1974, Mickelson was "a very smart, very tough, almost take-no-prisoners type of legislator who really knew her stuff. She would shepherd her bills and pay

[77] "Rape is crime of violence, hostility, not sex."
[78] "Protective glove invented to discourage rapers," *Mitchell Daily Republic*, September 9, 1975, https://access.newspaperarchive.com/us/south-dakota/mitchell/mitchell-daily-republic/1975/09-09/page-9?tag=rape+law&rtserp=tags/rape-law?page=2&psi=88&pci=7&ndt=ex&py=1975&search=y.
[79] An Act Revising Rape Laws, 1975.

close attention to them. She was a really good legislator with a bit of an iron jaw."[80] The bill was propelled by numerous strong and enthusiastic women, people who wanted to make their mark on the legislature. South Dakota NOW representatives played a substantial role in drafting the new "modernized" bill, which, in addition to criminalizing marital rape, limited admissible evidence, broadened rape to include misconduct beyond sexual penetration, and included homosexual rape.[81] Other than the criminalization of marital rape, changes to the rape law were somewhat widely publicized. The Commission on the Status of Women reported on the changes in its newsletter. The CSW's Summer 1975 newsletter listed "Laws of Interest to Women," including a section on the "substantially revised SD laws pertaining to the crime of rape."[82] It lists significant revisions in the bill. It focuses heavily on how the new law restricted the admissibility of evidence of the victim's previous sexual conduct, deeming it "perhaps the most significant revision from the woman's point of view."[83] The newsletter, like the above newspaper article, fails to mention the criminalization of marital rape, which was by far the most revolutionary part of the legislation. Whether the authors of the newsletter knew about the criminalization of marital rape is uncertain. But whether proponents of criminalization knew about the change is clear.

The 1978 pocket supplement in the annotated South Dakota Codified Laws provides legislative intent, casually mentioning the monumental changes. It states, "The 1975 re-enactment…. eliminated requirements that the victim be female and not the wife of the

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[80] Larry Piersol, in discussion with the author, March 3, 2018.
[81] "Rape law is signed by governor," *Mitchell Daily Republic*, April 26, 1975, https://access.newspaperarchive.com/us/south-dakota/mitchell/mitchell-daily-republic/1975/04-26/page-6?tag=rape+law&rtserp=tags/rape-law?psi=88&pci=7&ndt=ex&py=1975&psb=relevance&search=y.
[82] Summer 1975 South Dakota Commission on the Status of Women Newsletter, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society, 2.
[83] Ibid.

perpetrator…. The 1977 amendment inserted "other than the actor's spouse" into the preliminary paragraph."[84] The 1975 change was certainly not an accident—many of the legislators in the 1975 session wanted to eliminate spousal immunity. According to Viken, this sort of legislation was enabled by the women who suddenly had a voice in the state legislature. These remarkable women intuited that marital rape was a heinous crime, something that deserved to be a criminal act. It was crucial that the women themselves sought criminalization; according to Mary Lynn Myers, the state's populist nature often led to a strong distrust of outside influence.[85] This period was a time of change; during it, Viken said, "Male legislators were just starting to accept the fact that women had concerns that needed to be dealt with legislatively. Many of them would end up being supportive of our legislation. Up until the 1970s, they really just didn't have women's issues on their radar."[86] Viken's observation certainly applies to the rest of the state—most South Dakotans in the 1970s probably would not have self-identified as "feminist." An April 3, 1975, article in the *Mission Todd County Tribune*, titled "1975 Legislative Action: What the Big Boys Did in Pierre," claims that many South Dakotans were disappointed with the actions of the 1975 legislature.[87] In particular, they apparently were upset with the legislature's failure to produce substantial tax reform. The article mentions that the rape law was "modernized," but it says nothing more on the topic. This article displays the differences in goals for many in the legislature. For social reformers, the session was in many ways a huge success. For legislators, mainly men, who focused on farm and tax reform, it was somewhat of a failure. With these

[84] S.D. Codified Laws § 22-22-1 (Supp. 1978).
[85] Mary Lynn Myers, in discussion with the author, January 5, 2018.
[86] Linda Viken, in discussion with the author.
[87] "1975 Legislative Action: What the Big Boys did in Pierre," *Mission Todd County Tribune*, April 3, 1975, https://access.newspaperarchive.com/us/south-dakota/mission/mission-todd-county-tribune/1975/04-03/page-4?tag=rape+law&rtserp=tags/rape-law?psi=88&pci=7&ndt=ex&py=1975&psb=relevance&search=y.

factors in mind, the lack of publicity surrounding the criminalization of marital rape in South Dakota makes much more sense.

The radical nature of the bill and the fact that no common-law entity had made such a step before clarifies why the South Dakota legislature's actions were kept silent. Multiple women who were present for the debates, both inside the legislature and outside in the public sphere, recall how proponents sought to keep public focus on other more mainstream, palatable aspects of the bill. Kay Jorgensen recalls this caution. Jorgensen was a young South Dakotan from Spearfish who was working in Pierre as a page advisor and a supply clerk during the 1975 legislative session. She would later serve in the state legislature for more than a decade, and today she is widely known as a mainstay on the South Dakotan politics scene. According to Jorgensen, the criminalization of marital rape in 1975 was vastly underpublicized, especially compared to later pushes for legislative change.[88] Jorgensen argues that this lack of publicity was a deliberate move—progressive legislators knew that criminalizing marital rape was a major leap, especially for 1975 South Dakota.[89]

Kay Jorgensen speaking on the House floor.
FACES Magazine

In order to be able to pass the bill, the bill's elimination of spousal immunity was kept quiet even within the legislature. Judith "Judy" Duhamel, who was on the state's Board of Education from 1972–83, was closely connected to the legislature because of her lobbying

[88] Kay Jorgensen, in discussion with the author, February 26, 2018.
[89] Ibid.

efforts.[90] About the lack of publicity, Duhamel said, "I remember that, given the climate, the discussion about marital rape was kind of camouflaged. It was deftly handled and certainly not just dumped out on the middle of the table for everyone to see and talk about."[91] This "camouflaged" approach was further enabled by the structure of the legislature. The 1975 South Dakota legislative session was short, lasting only 45 days.[92] Especially in 1975, most of the legislators were not career politicians, but instead people who worked full-time, often as farmers, teachers, or store owners.[93] In addition to these time constraints, the legislators had little available help, making it quite difficult to learn the ins and outs of every piece of legislation that came on their desks.[94] These limitations on time and information probably played a large role in facilitating the passing of the bill, Jorgensen said.[95] In describing how legislation is often passed in South Dakota, Jorgensen said, "Legislators often insert some language and say that it is just a part of the bill and that it's a simple amendment. If it happens to be a particularly busy day, people often won't ask questions and will allow it to pass. Many conservative legislators thus probably didn't realize the criminalization of marital rape until it was codified!"[96] The criminalization of marital rape in 1975 South Dakota was thus covert, hidden from those who would actively have worked to prevent it from becoming law. After the bill's unimpeded

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[90] "Legacy of Achievement: Hall of Fame Inductee Judy Olson Duhamel," South Dakota Hall of Fame, accessed March 25, 2018, http://sdexcellence.org/Judy_Olson_Duhamel. Duhamel would later serve in the legislature itself, sponsoring the 1990 bill that would criminalize wife rape for good in the state.
[91] Judy Duhamel, in discussion with the author, March 3, 2018.
[92] David Ortbahn, email message to the author, April 6, 2018
[93] Mary Lynn Myers, in discussion with the author, February 23, 2018.
[94] Ibid.
[95] Kay Jorgensen, in discussion with the author.
[96] Ibid.

passage, Mickelson, the primary sponsor of the bill, recalled remarking to coworkers, "I couldn't believe we had gotten it through without their figuring out what we were up to."[97]

Even though the change was, for the most part, camouflaged, some vehement opponents were aware of it. Right after the bill's passing, Jorgensen received a call from a relative who was upset about the monumental change. Her relative was incredulous, saying, "What the hell is the legislature doing? Rape does not exist within marriage! This bill will certainly lead to tons of unsubstantiated charges. I cannot believe this."[98] According to Jorgensen, this example is but one of many. A significant number of informed South Dakotans were in disbelief. They could not believe that their state criminalized forced sex within marriage. And they were not going to let this criminalization become the new status quo. The hushed nature of the bill was perhaps a double-edged sword—no cases were brought under the new law. And it would soon be overturned after "the massacre of 1976."

Just one year after South Dakota eliminated spousal immunity in a legislative victory for the Democrats and for feminists, what Linda Viken terms "the massacre of 1976" occurred, delivering a staunch Republican victory in the state legislature. The newly Republican-dominated criminal code committee inserted the phrase "other than the actor's spouse" back into the rape statute, undoing the actions of the 1975 legislature.[99] Massive cultural changes enabled this shift, one that occurred both in South Dakota and in the country more broadly throughout the late 1970s. In talking about the state's change in political leadership, Viken said, "The whole tenor of the legislature changed when the Republicans took over. When they came in they even

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[97] Gilbert Geis, "Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden," *Adelaide Law Review* 6, issue 2 (1977-1979): 295, note 74, http://heinonline.org/HOL/P?h=hein.journals/adelrev6&i=288.
[98] Kay Jorgensen, in discussion with the author.
[99] David Ortbahn, in discussion with the author.

tried to withdraw the state's Equal Rights Amendment ratification, which wasn't even constitutional."[100] South Dakotan women went from feeling limitless to feeling limited.

Anti-ERA and anti-feminist groups in South Dakota gained significant power in the latter half of the 1970s. To many feminists in the state, the ERA seemed rather basic, a straightforward acknowledgement that women deserved the same rights as men. When it came under attack in South Dakota, feminists felt that they had lost significant ground and that they needed to devote their efforts toward protecting the state's ratification. According to the *Huron Daily Plainsman*, though the South Dakota Women's Caucus discussed focusing on changing the state's rape law to include spousal rape at their October 1977 meeting, the proposal was ultimately tabled, and the group chose to focus primarily on supporting the ERA.[101] Mary Lynn Myers played an immense and instrumental role in the state's ERA efforts. Myers, who had run for president of NOW in 1975, believed in focusing on what she termed "bread and butter issues," feeling that although feminists had made great progress in the 1970s, there was still substantial work to be done.[102] She saw the ERA as one of these key issues, something that could vastly change the way women were treated in South Dakota and in the United States as a whole.

People like Myers were certainly needed in South Dakota. The state's anti-ERA movement was strong, led by Kitty Werthmann, who Myers termed "South Dakota's Phyllis Schlafly."[103] Werthmann spoke around the state about why South Dakotans should object to the

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[100] Linda Viken, in discussion with the author.
[101] "ERA top priority of Caucus," *Huron Daily Plainsman*, October 30, 1977, https://access.newspaperarchive.com/us/south-dakota/huron/huron-daily-plainsman/1977/10-30/page-8?tag=rape+committee+spouse+wife+marital+spousal&rtserp=tags/rape-committee?psi=88&pci=7&ndt=bd&pd=1&pe=1&pem=1&py=1977&pm=1&pey=1978&plo=spouse-wife-marital-spousal&psb=relevance.
[102] Mary Lynn Myers, in discussion with the author, February 23, 2018.
[103] Ibid.

ERA, often making reference to when she lived in Austria under the Hitler regime.[104] In a talk to around 150 people in Pierre, Werthmann proclaimed, "Hitler had ERA and it forced women to go to work because they had 50 percent responsibility for financing," claiming that this amendment was just part of the "gradually creeping socialism" that would come to the United States with the ratification of the ERA. She attacked women like Myers, claiming that NOW sought to:

> turn this nation into an Atheist nation. This is what they say… "we must abolish marriage, we must take children away from parents, we must promote divorce, we must destroy belief in God, we must promote other religions, we must promote abortion and lesbianism, we must promote sexual perversion, we must overthrow existing institutions." Being liberated is an illusion. It's the same thing we had under Hitler.[105]

NOW did not take these allegations lightly. After being made aware of these falsehoods and the fact that her words were being disseminated to community groups and individuals, NOW's national Vice President of Action sent Werthmann and her compatriots a letter explaining NOW's beliefs and that they were willing to take legal action to protect NOW's reputation. This example shows just how tense things had become in the Mount Rushmore State. Both sides of the debate were heated, and there was little to no bipartisanship.

In 1977, Myers flew back to her home state to debate Phyllis Schlafly on the ERA (Figure 2). In what was described as a "lively, and sometimes heated" debate, the two women passionately argued in front of hundreds of audience members who packed Huron College's auditorium about whether the ERA was good for women and for society at large.[106] One of

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[104] ERA foe says "There is no better place than here" article, March 29, 1978, Carton 124, Folder 26, National Organization for Women Records, 1959-2002, MC 496, Schlesinger Library, Radcliffe Institute, Harvard University.
[105] Ibid.
[106] "During Freedom Debate: ERA issue debated at H.C.," *Huron Daily Plainsman*, April 22, 1977, https://access.newspaperarchive.com/us/south-dakota/huron/huron-daily-plainsman/1977/04-22/page-14?tag=huron+daily+plainsman&rtserp=tags/huron-daily-plainsman?ndt=ex&pd=22&py=1977&pm=4&search=ymd.

Schlafly's primary arguments against the ERA involved the draft; she argued that women were not fit for war and that the ERA would force them to be drafted. Myers and her compatriots disagreed wholeheartedly, arguing that women wanted the rights of full citizens and thus also wanted the duties. In addition, most pro-ERA people were against the draft itself, so this argument seemed to be a non-starter.[107] According to the *Huron Daily Plainsman*, proponents of the ERA were more vocal during the talk, constantly countering Schlafly's points. Though supporters of the ERA came out in large numbers, the debate itself is an example of how anti-feminist groups in the state were gaining power—the ERA was no longer something that could be taken for granted. Schlafly's visit was a harbinger of things to come; in 1979, the South Dakota state legislature would nullify their ratification of the ERA, an act that, even today, is considered to be constitutionally dubious. Although the constitutionality of nullification was dubious, one thing was for sure—women were losing ground in the state.


SHARING THE SPEAKER'S PLATFORM to present their cases on the Equal Rights Amendment (ERA) at Huron College Thursday night were, standing Phyllis Schlafly, who heads STOP E.R.A., and, Mary Lynn Myers, a proponent of the issue. Hundreds crowded into Timmins Fine Arts Center to hear the two-hour debate. (Plainsman Photo)

Mary Lynn Myers debating Phyllis Schlafly.
Huron Daily Plainsman photo

In addition to the rise of anti-ERA and anti-feminist groups, Bill Janklow, the then newly elected Republican governor, took a substantial amount of funding away from the Commission on the Status of Women. The CSW, however, was still able to publish multiple groundbreaking reports after 1977, including the aforementioned "Conspiracy of Silence: A Report on Spouse

[107] Mary Lynn Myers, in discussion with the author, February 23, 2018.

Abuse in South Dakota" and "The Legal Status of Homemakers in South Dakota," which included a section on domestic violence. In researching the latter report, the Commission found that spouse abuse in the state was often enabled by a police system that actively chose to turn a blind eye to domestic violence. The report stated, "The police refusal to take criminal action against a wife-beater has, in effect, amended the law to say that assault between married people is legal."[108] The trailblazing reports uncovered a "conspiracy of silence"— people being complicit in perpetuating domestic violence in the state. They would be useful to legislators for years to come, providing invaluable information that would lead to anti-domestic violence legislation.[109] The Janklow-imposed budgetary constraints forced the Commission to discontinue its newsletter. Its final newsletter was longer than any previous one, taking great pains to list various resources that South Dakota women might need. It included a list of rape crisis teams in the state, provided readers with contact information, and encouraged women to start teams in their own communities. It also provided readers with statistics regarding women in South Dakota—women were making 53.5% of similarly employed men, and one out of every three families with female heads were in poverty.[110] In describing how the newsletter would no longer be published, it stated:

> We will continue to do our best, although our role will have to change radically, and our services to the people of the state will be severely curtailed…. Our efforts to increase the governor's recommended budget have failed. But our will hasn't. And neither has our determination to serve the majority of citizens in this state who are women, and who represent the single greatest undeveloped resource in South Dakota.[111]

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[108] "The Legal Status of Homemakers in South Dakota" report, June 1977, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society, 10.
[109] Linda Viken, in discussion with the author.
[110] August 1977 South Dakota Commission on the Status of Women Newsletter, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society, 3.
[111] Ibid., 1.

The dejected yet perseverant tone of the newsletter perhaps best captures the state of feminism in late 1970s South Dakota. Feminists in the state were crestfallen, but they had not given up. Though the state was not as supportive as it had been, many feminists continued to fight for women's rights in the Mount Rushmore State. After feminists in the state lost the ERA battle in 1979, they turned to the abortion issue, hoping to preserve the outcome of *Roe v. Wade*. In early 1980s South Dakota there was one doctor, Buck J. Williams, who was willing to perform abortions. Beloved by some and hated by many others, Williams regularly received threats for his actions.[112] According to Myers, abortion rights became the hot-button issue in South Dakota during the 1980s, as many pro-life groups focused on implementing waiting periods and counseling requirements.[113] Some South Dakota feminists remained active in groups like NOW, working within established organizations to achieve various goals. Many, however, chose instead to try to incorporate feminism into their everyday lives. After the tumultuous 1970s, Mary Lynn Myers chose to work in Sioux Falls as a banker, spending her time working to help women get access to credit and thus economic independence.[114] Linda Viken graduated from the South Dakota School of Law in 1977, and she has since practiced family law for over forty years. She would go on to become the first female Magistrate Judge in Pennington County, South Dakota. Although marital rape would be put on the backburner in South Dakota for the late 1970s and much of the 1980s, the rest of the country started to grapple with the issue in meaningful and public ways.

[112] Mary Lynn Myers, in discussion with the author, March 4, 2018.
[113] Ibid.
[114] Ibid.

THE ANTI–MARITAL RAPE MOVEMENT GOES NATIONAL (1978–84)

Though a few states criminalized marital rape in the years after 1975 and some feminists began focusing on the issue, marital rape did not enter national consciousness until 1978, when, for the very first time in the United States, a husband was charged with raping his wife while they were still living together.[115] The infamous Oregon *Rideout* case made marital rape a national issue and a household topic. Oregon criminalized marital rape in 1977, the same year that South Dakota decriminalized it.[116] This action made Oregon one of three U.S. states that did not have marital immunity, thereby enabling Greta Rideout to bring her husband to court for raping her.[117] Greta alleged that after refusing to have sex with her husband, John, he chased her around their apartment, threw her onto the floor, and struck her three times while choking her.[118] Although a doctor and a rape crisis center substantiated Greta's story,[119] the jury of eight women and four men acquitted her husband because they doubted Greta's testimony.[120] The trial left Greta without state protection from her husband and feeling that the public airing of her sex life was more painful than the rape itself, [121] a phenomenon famously termed the "second assault."[122] Feminist commentators remarked that *Rideout* would hopefully catalyze national change, that women would start to bring rape cases against their husbands. They were correct. The first conviction of marital rape would occur just one year later, with James Chretien of

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[115] Joann M. Ross, "Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage," (PhD diss., University of Nebraska, 2015), 1.
[116] Finkelhor and Yllo, *License to Rape*, 18.
[117] Ross, "Making Marital Rape Visible," 1.
[118] "Rape? No A wife loses," *Time*, January 8, 1979, http://eds.a.ebscohost.com/ehost/detail/detail?vid=4&sid=1793e7a9-5738-4da8-bdbf-63c3a5c4246e%40sessionmgr4010&bdata=JnNpdGU9ZWhvc3QtbGl2ZSZzY29wZT1zaXRl#AN=53523819&db=aph.
[119] Finkelhor and Yllo, *License to Rape*, 20.
[120] Siegel, "The Rule of Love," 365.
[121] "Rape? No A wife loses."
[122] Joyce E. Williams and Karen A. Holmes, *The Second Assault: Rape and Public Attitudes* (Westport, Greenwood Press, 1981).

Massachusetts.[123] Before the alleged incident, Chretien's wife had separated from him and filed a judgment nisi of divorce, which was quickly granted. James, who worked as a bartender, drunkenly broke into his estranged wife's house, dragged her up a flight of stairs by her neck, threatened to kill her, and raped her. Chretien was sentenced to three to five years in state prison, marking changing attitudes about conjugal rights in America.[124]

Heightened awareness regarding the issue forced the academic community to begin to focus on marital rape. In 1982, Diana Russell's pioneering book *Rape in Marriage* toppled numerous assumptions about marital rape, showing that it was, in fact, as harmful as, and often even more harmful than, "real rape." Finkelhor and Yllo's 1985 book *License to Rape: Sexual Abuse of Wives* further illuminated the topic. The authors conducted studies on both raped wives and husbands who rape, providing victims a voice and the public a greater understanding of how marital rape occurs. Numerous feminist thinkers began to focus on rape more broadly, prompting debates within academia and pushing the broader feminist community to focus on changing norms that often prevented many victims from achieving justice. The legal community itself was forced to confront the topic of marital rape because of the work of numerous feminist scholars. According to Ryan, legal change regarding marital rape would not have been possible without these feminist thinkers who pushed their male counterparts to acknowledge that the marital rape exemption had lost its legal underpinnings decades before. She writes:

> Not until the 1970s, however, was the marital rape exemption ripe for an attack. After scholars had stripped the exemption of its theoretic foundation—the legal regulation of sexuality in general and marital unity in particular—certain changes within the legal discourse had only to discredit the thin shroud of marital privilege in order to reveal the sex right beneath it. But it was 1970s feminism's critique of gender inequality in

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[123] *Commonwealth v. James K. Chretien*, 383 Mass. 123 (1981).
[124] "Wife Rape: The first conviction," *Time*, October 8, 1979, http://eds.a.ebscohost.com/ehost/detail/detail?vid=7&sid=1793e7a9-5738-4da8-bdbf-63c3a5c4246e%40sessionmgr4010&bdata=JnNpdGU9ZWhvc3QtbGl2ZSZzY29wZT1zaXRl#AN=53525513&db=aph.

> sexuality that discredited the exposed sex right in the minds of the legal elite. As marital privilege continued to decay under the pressure of the women's movements, this critique made marital rape exemption look more and more, to a legal community that thought it had rejected marriage's dialectic of rights a century earlier, like an unjust right to dominate.[125]

Not everyone saw marital immunity as an "unjust right to dominate," however.

On the other side, those in favor of marital immunity generally continued focusing on using marital privacy as a justification, especially in the aftermath of *Griswold v. Connecticut*, which, through its endorsement of contraception use within marriage, provided legal scholars with further ammunition for the doctrine of marital privacy. They also began to focus on the rights of the accused, believing that false accusations were widespread. Eighteen years after the first Model Penal Code was published in 1962, the American Law Institute still chose to endorse the marital rape exemption. The drafters argued that marriage implies "generalized consent," which is "valid until revoked."[126] With this fact in mind, the drafters expressed their concerns about criminalizing certain types of marital sex that they believed to be harmless, such as when a man has sex with his unconscious wife.[127] The drafters also contended that by criminalizing marital rape, the state would hinder "the ongoing process of adjustment in the marital relationship."[128] To them, forced sex in marriage was perhaps just part of the "adjustment process."

Alongside these legal and philosophical debates, laws, legal precedents, and cultural norms were rapidly changing.[129] Much of the anti–marital rape activism in this time involved a

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[125] Ryan, "The Sex Right," 968.
[126] The American Law Institute, *Model Penal Code and Commentaries: Part II, Definition of Specific Crimes* (Philadelphia: The American Law Institute, 1980), 344-345.
[127] Ibid.
[128] Ibid., 345.
[129] Some legislators in South Dakota attempted to criminalize marital rape in 1980 by removing the phrase "other than the actor's spouse" from the rape statute, but the bill was immediately tabled (Table of State Statutes, ca. 1980, Laura's Social Movements Archives, The Laura X Institute).

woman named Laura X. Laura herself became involved in the issue after hearing about the *Rideout* case in the media.[130] According to Laura, the way the case was handled made her realize that she would be working on marital rape for the rest of her life.[131] Laura founded the National Clearinghouse on Marital and Date Rape (NCMDR) in 1978, seeking to raise awareness and provide women with support.[132] The NCMDR aggregated information about marital rape and provided various legislators, lawyers, and activists with this information, facilitating learning about the topic. It also worked with various national organizations and organized targeted campaigns. Laura herself toured around the country speaking about wife rape, being featured on shows as famous as *60 Minutes* and *Donahue*.[133] She and the NCMDR were even involved in writing constitutional arguments that would enable New York's highest court to strike down the marital rape exemption.[134]

Laura X.
NCMDR Website

In 1984 the New York Court of Appeals under the leadership of Judge Sol Wachtler deemed marital rape unconstitutional, thereby providing the rest of the country with constitutional arguments against marital immunity. The case, *People v. Liberta*, involved a man

[130] Laura X, in discussion with the author, January 20, 2018.
[131] Ibid.
[132] Laura X, "Accomplishing the Impossible: An Advocate's Notes from the Successful Campaign to Make Marital and Date Rape a Crime in All 50 U.S. States and Other Countries," *Violence Against Women* 5, no. 9 (September 1999): 1064-65.
[133] Ibid., 1068.
[134] *People v. Liberta*, 474 N.E. 2d 567 (N.Y. 1984).

who, while living apart from his wife pursuant to a family court order, forcibly raped and sodomized her in front of their young son.[135] According to Wachtler, many more conservative legal scholars believed *Liberta* to be the work of an "activist court."[136] Wachtler and his fellow judges found the statutes for rape in the first degree and sodomy in the first degree to be "unconstitutionally underinclusive,"[137] choosing ultimately to enlarge the scope of these two criminal statutes without the help of the legislature.[138] Arguing that Liberta was "statutorily not married"[139] to his wife at the time of the alleged incident, the court claimed that the original rape and sodomy statutes applied to Liberta, thereby avoiding ex post facto issues. To Wachtler, this decision had colossal effects both in New York and throughout the rest of the country. He deemed New York the "beacon light of the common law,"[140] arguing that New York court decisions have an outsized impact on the legal world, in addition to decisions from the supreme courts in California and Illinois.[141] Though Wachtler's views on the impact of the decision are perhaps New York–centric, they certainly have some validity to them. According to Laura X, *Liberta* was a watershed moment in the history of marital rape in America, guiding the movement all the way to the present day.[142]

SOUTH DAKOTA TRIES CRIMINALIZATION AGAIN (1985)

It was within this national context that South Dakotan reformers attempted to criminalize marital rape once and for all in 1985. During the 1985 legislative session, legislators made a

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[135] *People v. Liberta*, 158.
[136] Sol Wachtler, in discussion with the author, February 23, 2018.
[137] *People v. Liberta*, 170.
[138] Ibid., 172.
[139] *People v. Liberta*, 161.
[140] Sol Wachtler, in discussion with the author.
[141] Ibid.
[142] Laura X, in discussion with the author.

strong push to end marital immunity, working under the leadership of Al Scovel, a Republican representative from Rapid City. Numerous Democrats and Republicans supported the effort, providing yet another example of South Dakota's remarkable bipartisanship. The attempt to eliminate spousal immunity was a part of a larger bill that sought to make substantial changes to South Dakota's rape law, a package Scovel believed to be "one of the most significant contributions in jurisprudence we've had in this state for a long time."[143]

The lead-up to the bill was intense—newspapers across the state covered how South Dakotans felt about the impending piece of legislation. Scovel himself admitted to the press that he did not "expect his bill making spousal rape a crime to win much applause in the South Dakota Legislature."[144] Based on previous experience, Scovel knew that the bill would be a hard one to pass. He lamented the fate of the 1980 bill and expressed his worries about the new legislation: "[The 1980 bill] died a swift death, which is a sad commentary. I'll tell you what, I'll be surprised if [the 1985 bill] makes it through committee."[145] Scovel was openly critical of contemporary South Dakota law: "What we're saying now in South Dakota is that if a man hits his wife he can be charged with assault, but if he rapes her it's not a crime. It's reflective of an attitude that married women are chattel, that they do not have the right to refuse sexual advances by their husbands."[146]

Newspapers also reported on the scope of the problem of marital rape in South Dakota. In the first few lines of an article titled, "Sexual access is issue in rape bill," the *Argus Leader* plainly stated: "She won't talk about it, but a woman you know probably has been raped by her

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[143] "Rape bills proposed," *Capital Journal*, December 27, 1984, Laura's Social Movements Archives, The Laura X Institute.
[144] "Bill would protect wives' right to say no," *Argus Leader*, January 30, 1985, Laura's Social Movements Archives, The Laura X Institute.
[145] Ibid.
[146] Ibid.

husband. Under state law, the rapist hasn't committed a crime."[147] Notably, the article implicitly endorsed the reformers' claims—that "rape is rape."[148] By referring to "her husband" as "the rapist," the *Argus Leader* took a stance on the hot-button issue, implying that forced sex in marriage is, in fact, rape. The article provided information about just how common marital rape was. According to Jean Goldsberry, the director of the mental health unit at the Capital Area Counseling Center, one in ten women in 1985 South Dakota had probably experienced marital rape.[149] The article further stated that rape in marriage is often "part of a cycle of physical and emotional abuse by the husband against the wife."[150] And it demonstrated a need for tougher anti-domestic violence legislation by mentioning that South Dakota's domestic violence crisis centers received over 2,000 calls in 1984, a massive number given that only a small percentage of victims of domestic abuse call for help.[151] By 1985, marital rape in South Dakota was in the news. South Dakotans were grappling with what was becoming a prevalent issue.

Unlike 1975, people from outside South Dakota were involved in legislators' efforts to criminalize marital rape. This time, Laura X, the founder of the National Clearinghouse on Marital and Date Rape, worked extensively with South Dakota legislators, particularly Al Scovel, and anti-rape groups in the state to push to end spousal immunity. Laura sent Scovel anti–marital rape materials, information about where he could find data on the topic, and advice on how to approach unenthusiastic legislators. She recommended that Scovel look into *People v. Liberta*, which had been decided just over a month before, believing that it may put South

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[147] Kevin Woster, "Sexual access is issue in rape bill," *Argus Leader*, February 5, 1985, Laura's Social Movements Archives, The Laura X Institute.
[148] Al Scovel, in discussion with the author, February 12, 2018.
[149] Woster, "Sexual access is issue in rape bill."
[150] Ibid.
[151] Ibid.

Dakota's legislation "in a new light."[152] Laura's letter to Scovel shows her impressive understanding of the legislative politics surrounding marital rape. She acknowledged that the bill could face defeat. If that would occur, she urged Scovel to go for a total repeal again, claiming that he will then be coming from a position of strength. She wrote:

> Let your opponents amend it into something unconstitutional, let the blood be on their hands, and then a bigger outcry will be raised by their attempt to make wives into second-class citizens. That outcry can then be used to support full repeal. Sometimes these things take several years, which is one reason that the opportunities we now have through the courts may be a little less wearing on heroic legislators and crisis workers.

Before ending her letter, Laura wrote that she was aware of the efforts in 1975 and in 1980, proving that she knowledgeable about South Dakota's legislative history. Laura's hesitant excitement was apt—Scovel was in for a tumultuous few weeks.

On February 14, 1985, the *Argus Leader* published the heading: "Bill makes rape of spouse a crime."[153] The article quotes Republican supporter of the bill Alyce McKay of Rapid City, who confidently said, "the House Judiciary Committee passed a message out to men…. From this day forward it's going to be known in South Dakota that you simply cannot rape your wife."[154] It also quotes Kitty Werthmann, the aforementioned "Phyllis Schlafly of South Dakota," who believed that the incidence of marital rape was exaggerated by women's groups and would be used vindictively: "It would cause a nightmare of blackmail. All women are not nice at all times. If a woman doesn't get what she wants, she can always say that you raped her."[155] The same day, the *Capital Journal* published an article titled, "Spouse rape bill clears

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[152] Letter from Laura X to Al Scovel, February 6, 1985, Laura's Social Movements Archives, The Laura X Institute.
[153] Kevin Woster, "Bill makes rape of spouse a crime," *Argus Leader*, February 14, 1985, Laura's Social Movements Archives, The Laura X Institute.
[154] Ibid.
[155] Ibid.

committee."[156] Quoted in the article is Mary Edelen, a Republican representative from Vermillion who supported the bill. She lamented South Dakota's position on marital rape relative to the rest of the country, saying "South Dakota is one of the very last states to have a spousal rape law. I think we want our laws to protect everyone equally."[157] Also quoted, however, is Republican House Majority Leader Joe Barnett, who was working against Edelen and other supporters of the bill. He believed that many spousal complaints were "questionable" and that the bill "would create more problems than it would solve."[158] Though the Judiciary Committee voted in favor of the bill 12–1, its fate was still rather uncertain.

When the bill hit the South Dakota House of Representatives, it ran into some roadblocks—opponents of the measure passed an amendment that made the bill apply only to spouses who were legally separated or not living together. Rep. Barnett, the sponsor of the amendment, brought out age-old marital privacy arguments to combat the bill's supporters. He argued that legislators were "bordering on intruding into the relationship between married men and women," adding that "if a relationship is to the point of rape, the spouse has the option of leaving."[159] Though nine legislators spoke against the Barnett amendment, he feverishly defended it, and the amendment passed 38–31.[160] Barnett even commented on the fact that South Dakota did have a provision against spousal rape in 1975, claiming that it was not missed.[161] Scovel was incensed by the amendment, believing that it prevented women from receiving equal

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[156] "Spouse rape bill clears committee," *Capital Journal*, February 14, 1985, Laura's Social Movements Archives, The Laura X Institute.
[157] Ibid.
[158] "Spouse rape bill clears committee."
[159] Kevin Woster, "House waters down spousal rape bill," *Argus Leader*, February 20, 1985, Laura's Social Movements Archives, The Laura X Institute.
[160] Ibid.
[161] Ibid.

protection under the law.[162] He declared, "The law we have now is a joke."[163]

The watered-down bill provoked strong responses from proponents of the original bill. A February 24 editorial in the *Argus Leader* strongly denounced the amendment. It opened with a compelling contrast: "Strangle a friend, neighbor or stranger, and it's murder. Is it any less of a crime if the victim shares your name and home? No. Murder is murder. Making an exception for a spouse would make no sense. Neither would making spousal rape a crime only when spouses are legally separated or not living together."[164] The *Argus Leader*, the South Dakotan newspaper with the largest circulation, fiercely condemned the amendment, exhorting legislators to change their minds and send the original bill through. The bill's backers did not give up either. Supportive House members met to rally support for the bill, working with the South Dakota Advocacy Network for Women to disseminate their message.[165] Rep. Edelen publicly claimed that opponents of the bill ignored a huge problem that exists in South Dakota, just as people once did with domestic abuse and incest in the state.[166] Just four days later, Senate proponents of the bill pushed the original version through in a 19–16 vote after an emotional debate on the floor.[167] During the debate, Senator James Stoick, a Republican from Mobridge, proposed another amendment to the original bill, one that would have required a woman to report marital rape within 24 hours. Stoick claimed that a 90-day window for reporting would enable manipulation, providing women with a chance to "bargain for a new house, a car, or a fur coat from their

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[162] Al Scovel, in discussion with the author.
[163] Woster, "House waters down spousal rape bill."
[164] Editorial Board, "Rape's rape, no matter what," *Argus Leader*, February 24, 1985, Laura's Social Movements Archives, The Laura X Institute.
[165] "Backers push spouse rape bill," *Argus Leader*, February 24, 1985, Laura's Social Movements Archives, The Laura X Institute.
[166] Ibid.
[167] Patrick Springer, "Proponents toughen rape bill," *Argus Leader*, February 28, 1985, Laura's Social Movements Archives, The Laura X Institute.

husbands."[168] His amendment was defeated, but only in an 18–16 vote.[169] While opponents of the original bill worried that marital rape accusations would be hard to prove, proponents saw this difficulty not as a reason to stop the bill but instead as a part of the legal process; Senator Leonard Andera, a Democrat from Chamberlain, declared, "If we were to try to repeal all the crimes that are difficult to prove we wouldn't have a lot left."[170] By late February 1985, tensions had reached their zenith. Although the South Dakota Senate passed the original bill, it could not become law unless the two legislative bodies could reach a compromise and get Governor Bill Janklow's stamp of approval.

After an intense fight between supporters and opponents of the bill, it ultimately passed but with a noteworthy caveat: women could file rape charges against their husbands only when they were no longer cohabiting or had filed for separate maintenance. Though the House ultimately approved the original bill, Governor Janklow objected to the legislation and got the final bill to include both the Barnett amendment and a 90-day statute of limitations. Scovel and his compatriots were saddened by the final result: "I've always believed that rape is rape. Married women deserve to receive equal protection under the law. And they didn't in 1985."[171] The hard work of legislators and activists in 1985 would not be in vain, however. Scovel and others knew that their work was unfinished. In an April 1985 letter to Laura X, Scovel thanked her for her assistance and lamented that "social legislation has a tough go of it here in South Dakota."[172] Scovel's determination and hopefulness showed in the letter; without skipping a

[168] Springer, "Proponents toughen rape bill."
[169] Ibid.
[170] Ibid.
[171] Al Scovel, in discussion with the author.
[172] Letter from Al Scovel to Laura X, April 25, 1985, Laura's Social Movements Archives, The Laura X Institute.

beat, he wrote that many of Laura's materials could be used in the next legislative session.[173] Between 1985–90, the criminalization of marital rape became the norm in the United States. As time passed, it became harder and harder for people like Janklow and Barnett to convincingly argue for a man's right to rape his wife.

CRIMINALIZATION AND BEYOND (1990–PRESENT)

In 1990, the South Dakota legislature finally criminalized marital rape by removing the phrase "other than the actor's spouse" from the state's rape statute. The bill, H.B. 1114, was titled "An act to change the elements of the crime of spousal rape."[174] The title shows that this time the legislature was not hiding its intentions; unlike in 1975, proponents of criminalization did not attempt to sneak it in as part of a bigger bill. Instead, they forthrightly announced their intentions, demonstrating the extent to which both South Dakotans and the rest of the country had come on the issue. By 1990, South Dakota was a lagging follower, one of the few states to still provide marital immunity to rapists. Criminalization was no longer radical and unprecedented in America—it had become the norm.

Nevertheless, H.B. 1114 still faced opposition. Republican House Majority Leader Jerome Lammers moved that the bill be amended to include the constraining clause: "provided, that at the time of the act the actor and his spouse are no longer cohabitating [*sic*] or are legally separated," attempting to sustain marital privilege for husbands in the state.[175] Lammers' amendment was quite popular in the House, provoking an emotional debate in the chamber.[176]

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[173] Letter from Al Scovel to Laura X.
[174] Spousal Rape Prohibited: An Act, ch. 161, section 2, 65 S. Dak. laws 207 (1990).
[175] Journal of the House 65th Session, State of South Dakota, January 9, 1990, in Linda Viken's possession.
[176] Linda Viken, in discussion with the author.

Though supporters of Lammers' amendment were primarily Republican, opposition to it was deeply bipartisan.[177] In addition to restricting marital rape to separated spouses, Lammers sought to preserve the 90-day statute of limitations, fervently believing that women would use the new law in vindictive ways. But Lammers did not get his way—through a coalition effort in the Republican-majority House, Democrats and Republicans worked together to veto the amendment, producing a 33–36 vote.[178] Though the 1990 state legislature was indisputably red, legislators fostered strong bipartisan ties, relationships that played a key role in passing the final bill. Judy Duhamel, one of the sponsors of H.B. 1114, fondly remembers 1990 as a time of balance and teamwork. "There was a remarkable spirit of cooperation that simply does not exist in today's polarized climate. When legislators on different sides of the aisle did disagree, there was never any animosity or no name-calling, even behind closed doors," she said.[179] This friendly climate enabled the 1990 state legislature to pass H.B. 1114, which eliminated spousal immunity and lengthened the statute of limitations for spousal rape significantly, from 90 days to seven years. The bill passed 42–28. Twenty-eight out of 70 legislators still did not want to end marital immunity. But, more importantly, 42 did.

Since 1990, anti–marital rape activists and legislators have continued to fight to eliminate vestiges of the marital rape exemption throughout the country. It was not until 1993 that marital rape would become illegal in every U.S. state.[180] Today, many loopholes still exist—some states treat marital rape less seriously than "real rape," giving out more lenient sentences for marital

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[177] Linda Viken, in discussion with the author.
[178] Journal of the House 65th Session.
[179] Judy Duhamel, in discussion with the author.
[180] Eric Berkowitz, *The Boundaries of Desire: A Century of Bad Laws, Good Sex, and Changing Identities* (Berkeley: Counterpoint, 2015), 21.

rape and allowing marriage to be used as a defense.[181] South Dakota's tumultuous story of criminalization sheds light on the complexities of legal and cultural change regarding marital rape. Moreover, this story highlights the contingency of progress, how vulnerable it is to reversal, the need to protect and maintain rights, and the importance of bipartisanship. By working in coalition, opponents of spousal immunity were able to criminalize marital rape in a seemingly permanent way.

South Dakota's curious story reminds us how American history can often focus too much on the coasts, forgetting to appreciate groundbreaking and exciting work in the Midwest. The story includes many fascinating characters and contingencies and shows how events in the "flyover states" have national (and sometimes international) implications that deserve attention from historians as well. Many dedicated women in South Dakota did meaningful work that deserves to be acknowledged, work on what Mary Lynn Myers called "bread and butter issues," problems that affect the everyday life of women in the state. Women such as Myers, Linda Viken, and Kay Jorgensen have continued to work on these issues for the past half-century. They have faced failures, but they have also faced great successes.

A Californian legislator arguing against criminalization infamously asked the question, "If you can't rape your wife, who can you rape?"[182] Because of the work of many dedicated South Dakotan women and men against marital rape, wives there can finally answer firmly with, "No one."

Word count: 11,781

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[181] "These 13 States Still Make Exceptions for Marital Rape," Vocativ, last modified July 28, 2015, http://www.vocativ.com/215942/these-13-states-still-make-exceptions-for-marital-rape/index.html.
[182] Berkowitz, *The Boundaries of Desire*, 21.

APPENDIX

Figure 1: *South Dakota Commission on the Status of Women October 1975 Newsletter*.[183]

SOUTH DAKOTA COMMISSION ON THE STATUS OF WOMEN

NEWSLETTER

Volume 2, No. 2 — October, 1975

Linda Fossi (right) confers with Rae Unzicker of Sioux Falls, director of technical assistance for the slide show productions resulting from Fossi's research on South Dakota women in unusual occupations.

Nontraditional careers beckon State women

A recent study for the Commission on the Status of Women (CSW) concerning unusual occupations for women has located many South Dakota women with unique careers. The study, according to Linda Fossi, Los Angeles research consultant, was intended to develop resource materials demonstrating the variety of successful role models available to South Dakota women.

Some 225 women across the state were contacted by Ms. Fossi during the six-weeks study. Many of these women were interviewed and photographed; due to time constraints, other women were reached through letters.

While Ms. Fossi reports she did not aim to stress blue-collar occupations, women in these careers responded readily to requests for input and information.

The resultant emphasis on blue-collar workers, she says, "demonstrates that women have taken strides in nontraditional fields in this rural state."

The study discovered many women such as construction workers, who have debunked the myths of male physique and mystique. Bridge builders, racers, plumbers, electricians, veterinarians, well diggers, rangers, doctors, lawyers and others were identified.

"Many of the women interviewed agreed," Fossi says, "that the most important part of making it in a nontraditional career is hope -- the ability to have a vision and go after it."

She states that of the women she interviewed, many accomplished efficiency and expertise in their field without the direct moral support of the women's movement or a new public consciousness of women.

"Without exception, there was no formal training or regular avenue of approach for these women in South Dakota.

"They just did it on their own," Fossi explains. For example, offers Fossi, a woman in Rapid City who has attained the title of air flight specialist after 30 years of work would probably have achieved that same goal in 7-10 years had she been a male.

But, to date, conditions have afforded various occupational opportunities to women through marriage or male friends and relatives.

Zella Barber, president of Barber Transportation Company, expanded her multimillion dollar company since she assumed the presidency after her husband's death in 1966. During this time, the trucking firm increased services to include the Denver area within its boundaries.

She states, "I came into it the way most women did -- through marriage."

Fossi hopes to encourage women by showing examples of women who had the ability to take the challenge, no matter how it arose.

Gwen Maddison of Belle Fourche has been an auto mechanic for 13 years, after beginning as a bookkeeper in the garage she now runs.

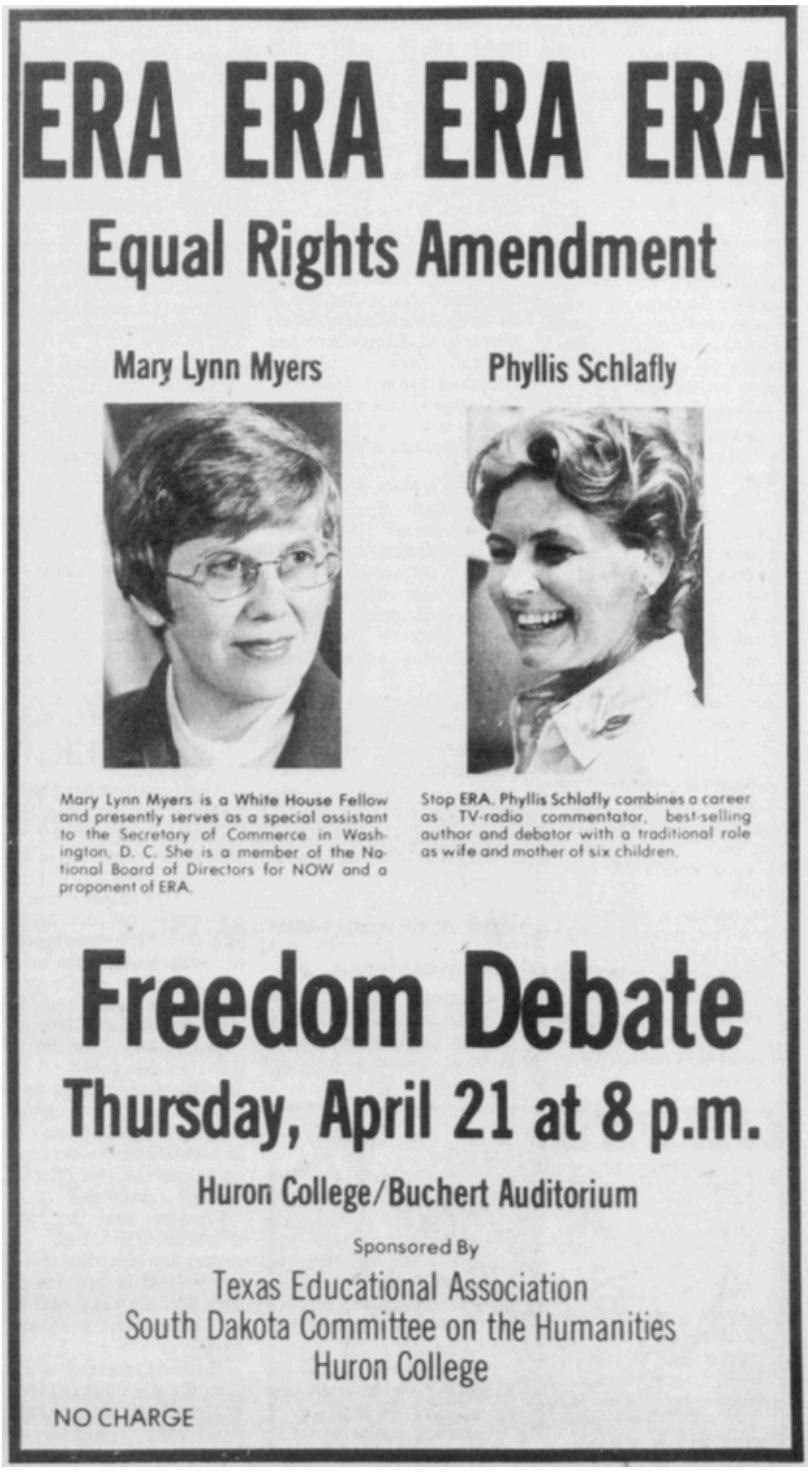
". . . the most important part . . . is hope--the ability to have a vision and go after it."

"I just want to be myself." But being "myself" implies something different for a woman in auto mechanics. She sums it up simply by saying, "Cause you always have to prove yourself."

continued on page 3

[183] October 1975 South Dakota Commission on the Status of Women Newsletter, Box 8452, Records of the Commission on the Status of Women, Accession GOVPUBS, South Dakota State Historical Society.

Figure 2: *Newspaper advertisement for Freedom Debate between Mary Lynn Myers and Phyllis Schlafly.*[184]



[184] ERA Freedom Debate Advertisement, *Huron Daily Plainsman*, April 17, 1977, https://access.newspaperarchive.com/us/south-dakota/huron/huron-daily-plainsman/1977/04-17.

BIBLIOGRAPHICAL ESSAY

As a History major at Yale, I've had the opportunity to spend much of my college career studying womanhood. I've been particularly struck by how, for most of history, rape was a distinctly female experience. To be raped was to be subordinate, to not have control over one's own life or place in society. Perhaps the most salient modern example of this female sexual subordination was the marital rape exemption, a legal fiction that until quite recently allowed men to forcibly rape their wives without repercussions. This senior essay began with a desire to gain a greater understanding of rape culture in the United States and how it interacts with the law, specifically through examining the marital rape exemption, one of the last vestiges of male ownership of women.

In trying to gain insight on American rape culture, I looked to Estelle Freedman's *Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation*, a book that highlights the many cultural, legal, and political changes that occurred in the nineteenth and twentieth centuries, totally redefining the way Americans understood rape. Freedman focuses specifically on how white women, black women, and black men were all negatively but differently affected by rape culture and American rape law. She argues, "On a rhetorical level, the constructions of black women as always consenting, white women as duplicitous, and black men as constant sexual threats all justified the very limitations on citizenship that reinforced white men's sexual privileges."[185] She claims that in preventing these three groups from having legitimate means to pursue justice related to rape, white men were both reserving the benefits of American citizenship for themselves and correspondingly preserving their political power. Consent is at the heart of Anglo-American understandings of individual liberty, so, consequently, "Only white

[185] Freedman, *Redefining Rape*, 2.

men had the capacity to enter into civil society because women, like non-Europeans, were seen as particularly irrational, sexually unlimited, and bound to nature" (6).

In her conclusion, titled “The Enduring Politics of Rape,” Freedman provides a concise yet thorough history of changes in American conceptions of rape that occurred in the latter half of the twentieth century. She mentions that after feminists made great strides in rape reform in the 1960s and 1970s, they began to focus on marital rape— “Given the radical feminist analysis of power relations within the family and the emergence of a movement against domestic violence, the time seemed ripe for reevaluating this remnant of coverture” (281). She connects the focus on marital rape to an increasing focus on sexual violence within the family, revealing that various battered women’s groups were instrumental in fighting the battle against marital rape. Freedman mentions that South Dakota was the first state to outlaw marital rape, but she neglects to say anything else about the state’s involvement in changes to marital rape law. Her book pushed me to think about two primary questions—How did notions of “duplicity” affect wife rape? Why did Freedman say so little about South Dakota’s seemingly decisive legislative changes?

In researching marital rape specifically, I came upon Morris Ploscowe, a legal scholar who was involved in drafting the Model Penal Code, a massive work that contained suggestions for revisions to U.S. statutes. Ploscowe vehemently defended intense corroboration requirements for rape, infamously defending them by claiming, “Because ladies lie.” It was within this context that the supposedly progressive Model Penal Code was drafted. In its 1962 iteration, the Code stated:

> A male who has sexual intercourse with a female *not his wife* is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct by administering or employing

> without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or (c) the female is unconscious; or (d) the female is less than 10 years old.[186]

I was able to find numerous newspaper articles about Ploscowe and others that illuminated my understanding of Ploscowe and the American Law Institute, the organization that drafted the Code.

After finding out about the oddly regressive nature of the Model Penal Code, I started to look into how changes were made—Who convinced people that wives could be raped? I looked to Rebecca M. Ryan's piece "The Sex Right: A Legal History of the Marital Rape Exemption," which provides a thorough history of the decline of the marital rape exemption in the United States. She focuses on the mid-to-late twentieth century, arguing that radical feminists ultimately drove legal elites to change the way they thought about conjugal rights and chastity. Though the Model Penal Code upheld the marital rape exemption, it did destroy the distinction between lawful and unlawful intercourse by decriminalizing fornication and adultery. In erasing the distinction, the Code destroyed the logical consistency that had existed before, making the exemption all the more vulnerable. In the 1960s and 1970s, legal elites focused on making arguments for the exemption based on notions of marital privacy. *Eisenstadt v. Baird* (1971) helped dismantle marital privacy by claiming that marital privileges or privacy violated the Equal Protection Clause of the Fourteenth Amendment—both married and unmarried women were *individuals* who deserved the right to choose whether to use contraception. Later, this logic would be used to argue against other inequalities between married and unmarried women. Female scholars began to push for "bodily integrity" while scholars in general began to argue for no-fault divorce, implicitly stating that marriage was no longer an end in itself and putting the individual above the unit. Finally, in *People v. Liberta*, New York's appellate court used the

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[186] The American Law Institute, *Model Penal Code: Proposed Official Draft* (1962) (emphasis added).

Eisenstadt logic to declare that neither unmarried nor married men would be granted immunity in rape cases. The fight to criminalize marital rape was very closely tied to the fight to end domestic violence, which helped dismantle the right to marital privacy. And the criminalization has required massive shifts in the way we conceive of rape and of marriage, both legally and culturally. Ryan provides an excellent explanation of the debates surrounding marital privacy, which were at their peak during the time period I ended up focusing my research on. She also provides a lot of useful information on how feminist thinkers were involved in efforts to criminalize marital rape. Ryan did not, however, mention South Dakota in her piece, continuing the pattern of ignoring the Mount Rushmore State's role in the criminalization of marital rape in America.

I began to seek out books and articles that specifically addressed the South Dakota case. Michael J. Gonring III's piece "Spousal Exemption to Rape" was the first piece I found that mentioned that although South Dakota was the first state to criminalize marital rape, it actually legalized it again about a year later. I was rather shocked by this finding—How could a legislature turn back the clock on this? How aware were South Dakotans? How aware were feminists across the country about what was going on there? Gilbert Geis, in his piece "Rape-In-Marriage: Law and Law Reform in England, the United States, and Sweden," acknowledged that reform in South Dakota was "short-lived," explaining, "The change stayed in force for but a single legislative session, however, until a new majority, tilted toward the conservative side and taking the opportunity afforded by a general revision of the state criminal code, redefined a potential rape victim as "any person other than the actor's spouse."" Working with the South Dakota legislative records, I realized that South Dakota did not re-criminalize marital rape until 1990, making it one of the last states to do so.

Finding little information about South Dakota in any other secondary sources, I reached out to people who were involved in the changes at the time. I got in contact with Linda Viken (formerly Linda Miller), who was in the legislature in both 1975 and 1990 and interviewed her about the changes. Ms. Viken provided invaluable input, as she explained that there was a small group of people who were deliberately working to outlaw marital rape in 1975, and they themselves knew just how radical this was. When the exemption was put back in in 1977, she said, many South Dakotans noticed and were frustrated with the state of affairs. When she returned to the legislature in 1990, she remembers immense awareness of the fact that they were not just criminalizing marital rape—they were criminalizing marital rape *again*.

Through Ms. Viken, I soon got in contact with many other South Dakotans who were instrumental to my research. Mary Lynn Myers provided me with invaluable information about early 1970s South Dakota and the battles between pro- and anti-ERA groups in the state. Her insights contextualized 1975's criminalization and the subsequent decriminalization. Kay Jorgensen was also crucial to my project, offering fascinating insights about her state's history and stories from the mid-1970s, a look into the past through the eyes of a young woman.

I ultimately got in contact with Laura X, a feminist who devoted her life to working to criminalize marital rape. Laura X provided me with numerous helpful documents that shed light on the confusing South Dakota situation. People knew what happened, people were often frustrated and confused about what happened, but still not much was done between 1975-1990. Though there was an impressive effort in 1985 to criminalize wife rape that had a lot of support across the state, the reformers managed to criminalize marital rape only when the husband and wife were separated. When the final drive was made in 1990, South Dakota was one of the last states to take the plunge.

This project has transformed from one about 1975 South Dakota specifically to a broader one regarding how South Dakota's experience with altering marital rape legislation can help us gain a greater understanding of just how difficult it is to make legal and cultural changes regarding rape. It has involved numerous interviews, attempting to provide texture to the history of marital rape in the United States. This project would not have been possible without the support of my advisor, Dr. John Witt, who, even with his insanely packed schedule, generously took me in as one of his advisees late in the summer. I also want to thank John Nann for his incredible patience, unmatched librarian skills, and perpetual willingness to discuss random aspects of South Dakota's legal history. I am also indebted to many others who helped me throughout the research and writing process: David Ortbahn, Sara Casper, and Sarah Kammer for helping me access the Mount Rushmore State's history from the far away Nutmeg State; Laura X and Mara Kelly for enabling me to dive into Laura's Social Movements Archives and find fascinating, untouched primary sources; all the South Dakotans and others who welcomed my questions and shared their stories with me; Professor Joe Fischel for never shying away from a discussion about consent in marriage; Professor Jay Gitlin for making me love research; and the librarians at Harvard's Schlesinger Library. Lastly, I could not have finished this project without the support of my family and friends. Thank you for the edits, the thoughtful questions, and the support.

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