A COMPARISON OF AMERICAN AND JEWISH LEGAL VIEWS ON RAPE

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Historically, American law has regarded the cry of rape with a high degree of suspicion.[1] These misgivings on the part of jurists have led to unfair treatment of rape victims. Recently, feminist critics have been instrumental in highlighting problems with the way that rape law treats female victims. Examples of these problems include the evidentiary requirement of more than subjective non-consent, the extreme skepticism of rape victims' testimony, the refusal to recognize marital rape, and the lack of an affirmative duty for bystander intervention.[2] Although the law has changed somewhat in response to these criticisms,[3] some critics still see room for improving the legal definition of rape and ameliorating its effect on victims.[4] In seeking suggestions for improving American rape law, we can look to Jewish law because of its detailed treatment of rape. The following comparison of American and Jewish rape law will show that in some respects, Jewish law provides a more sympathetic and protective legal system for rape victims than American law does, both historically and currently.

INTRODUCTION

The term "Jewish law" refers to the over 3,000-year-old legal system which has governed and continues to govern Jewish life.[5] Jewish law originated with the Torah.[6] The Torah contains 613 laws, referred to as *Mitzvot* or Commandments,[7] which are incumbent upon the members of the

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[1] For the purposes of this paper, the term "rape" is limited to rape perpetrated by men against women over the statutory age.

[2] See, e.g., Catharine A. MacKinnon, Toward a Feminist Theory of the State (1989); Susan Estrich, Real Rape (1987); Susan Brownmiller, Against Our Will (1972).

[3] See infra note 206.

[4] See supra note 2.

[5] I. Menachem Elon, Jewish Law, History, Sources, Principles 1 (1994).

[6] The Torah consists of the first five books of the Bible: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. Although the history of the Jewish people began almost 6,000 years ago, the legal system only dates back to about 3,000 years ago. Elon, supra note 5, at 2.

[7] The 613 Commandments include the Ten Commandments common to both

Jewish community.[8] These laws concern every aspect of life. Because the Commandments tend to state prohibitions and obligations in broad terms, rabbis through the millennia have interpreted and explained their intent.[9]

The Talmud is the compilation of these rabbinical commentaries. It is a highly sophisticated legal code, ranging from traditional legal topics such as torts, contracts, and crimes to nontraditional legal topics like prayer and proper diet. The Commandments are akin to statutes whereas the Talmud is comparable to case law; both have the force of law.

As reflected in the Talmudic commentaries, Jewish law has evolved through precedent and interpretation.[10] The vehicles for interpreting the law and resolving legal disputes are the courts and scholarly men. The Torah requires the establishment of a court system designed to deal exclusively with legal issues arising from the Commandments and outlines the procedure for doing so.[11] Where novel or unclear questions of law are presented, only the most learned rabbis have the authority and knowledge to interpret the laws.[12] However, since the Orthodox view holds that the laws are divinely inspired, its adherents, including rabbis, cannot change the laws.[13] Accordingly, unlike American law, the laws themselves cannot be amended or repealed. Thus, the corpus of Jewish law has remained mostly unchanged except through interpretation.

I. APPROACHES OF AMERICAN AND JEWISH LAW

A major difference between the American and Jewish legal systems lies in their respective approaches. Much of American law focuses on the individual, both in granting rights and in imposing responsibilities.[14]

Judaism and Christianity.

[8] Today, only Orthodox Jews believe that all of the Commandments are binding upon them. The Conservative movement proclaims the right of religious authorities to modernize the law. Jewish Theological Seminary, Rabbinical Assembly, Emet Ve'Emunah: Statement of Principles of Conservative Judaism 23 (1988). The Reform and other liberal movements do not consider the Commandments to be obligatory. Jack Wertheimer, A People Divided 96 (1993).

[9] See infra note 12 and accompanying text.

[10] Elon, supra note 5, at 46–51.

[11] Deuteronomy 16:18; see also Exodus 18:21–26.

[12] Elon, supra note 5, at 9. In fact, the rabbis continually have to determine how new situations fit into the law. For example, there is a proscription against using fire on the Sabbath. Exodus 35:3. The discovery of electricity required the rabbis to determine whether electricity qualified as fire. Although their actual decision is quite complex, the simple answer is yes. Rabbi Levi Yitzchak Halperin, Shabbat and Electricity 13 (compiled by Rabbi David Oratz 1993).

[13] Elon, supra note 5, at 4.

[14] The tort and criminal systems impose culpability on an individual basis. Gary

Jewish law, on the other hand, focuses on the community. It intentionally incorporates a duty-oriented community ethic into its legal theory and edicts.[15] As a result, Jewish law addresses situations that American law avoids.[16] The best example of Judaism's broader coverage is its imposition of affirmative duties to rescue. Under Jewish law, every witness to a crime has an obligation to intervene to prevent the crime, especially to save a life.[17] In contrast, American law limits affirmative duties to rescue to cases involving special duties, such as those inherent in family or fiduciary relationships.[18] This dichotomy highlights a fundamental difference in the underlying philosophies of American and Jewish jurisprudence.

Although American law generally avoids imposing obligations based on a community ethic, the values of the community influence the law nonetheless. Specifically, community values on morality and gender have influenced the formation and implementation of rape laws.[19] Catharine MacKinnon aptly noted the detrimental effect of this influence on rape law:

> The law of rape divides women into spheres of consent. . . . These categories tell men whom they can legally fuck, who is open season and who is off limits. . . . Virtuous women, like young girls, are unconsenting, virginal, rapable. Unvirtuous

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Peller, Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties, 67 Tul. L. Rev. 2231, 2236 (1993). The Bill of Rights grants individual liberties. Charles M. Freeland, Note, The Political Process As Final Solution, 68 Ind. L.J. 525, 529-33 (1993). See Philip S. Stamatakos, The Bar In America: The Role of Elitism in a Liberal Democracy, 26 U. Mich. J.L. Ref. 853, 875 (1993). For a discussion on how the imposition of legal responsibility in torts shifted in the nineteenth century from a more communal basis to a more individual basis, see Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 101–108 (1977).

[15] 11 Encyclopedia Judaica, 1480–84 (1972); see Ben Zion Eliash, To Leave Or Not To Leave: The Good Samaritan In Jewish Law, 38 St. Louis U. L.J. 619, 626 (1994).

[16] One obvious reason for the lesser scope of American law is the limitation imposed by the First Amendment. Whereas Jewish law intentionally incorporates morality, American law is barred from doing so by the constitutional mandate against the fusion of church and state. U.S. Const. amend. I. Of course, this constitutional prohibition in American law is only effective against the more obvious attempts to legislate religious morality. As shown in the next paragraph, community morals do have a subtle impact on the law.

[17] Maimonides, Mishneh Torah, Book of Torts, Hilkhot Rotzeah I, 10–11 (Hyman Klein trans. 1954) (referring to Deuteronomy 22:26–27); see also 11 Encyclopedia Judaica, supra note 15, at 754; Hyman Goldin, Hebrew Criminal Law 177 (1952).

[18] Restatement Second of Torts §314A (1965); John M. Adler, Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others, 1991 Wis. L. Rev. 867, 874 n.35 (1991).

[19] See infra notes 21, 23.

> women, like wives and prostitutes, are consenting, whores, unrapable.[20]

As MacKinnon's quote suggests, rape laws reflect imbedded sexual stereotypes of women. One source of these stereotypes is Victorian sexual morality, which viewed woman as properly frigid.[21] Another source of stereotypes is early Christian theologians who held a negative view of sexuality.[22] The reflection of these stereotypes in rape law fostered an attitude of blaming the woman for her mere association with sexual activity, regardless of whether the association was voluntary.[23] For this reason,

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[20] See MacKinnon, supra note 2, at 175.

[21] Mary Ryan, Womanhood in America 158–62 (1975); Jane Larson, Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 Colum. L. Rev. 374, 392–93 (1993).

[22] St. Paul recommends celibacy, but concedes that marriage is preferable to lust:

> It is a good thing for a man to have nothing to do with women; but because there is so much immorality, let each man have his own wife and each woman her own husband. . . . All this I say by way of concession, not command . . . . It is better to marry than to burn with lust.

1 Corinthians 7:3–7. St. Augustine evinces a stronger negativity towards sex by connecting intercourse with the passage of original sin. "'Christ was begotten and conceived without any fleshly pleasure and so he also remained free from every kind of defilement by original sin.'" Augustine, Enchiridion 13, 41, as quoted in Uta Ranke-Heinemann, Eunuchs For the Kingdom of Heaven 77–78 (1990). Augustine also saw sexual pleasure as antithetical to holiness. "'I am convinced . . . that nothing turns the spirit of man away from the heights more than the caresses of woman and those movements of the body, without which a man cannot possess a wife.'" Augustine, Soliloquies 1, 10, as quoted in Ranke-Heinemann, supra, at 86. See also John T. Noonan, Jr., Contraception, A History of Its Treatment By the Catholic Theologians and Canonists 42 (1986); Robert Gordis, Love & Sex 46–50 (1978); Linda Gordon, Women's Body, Women's Right 6–8 (1977). For a comparison of Jewish and Christian views on sexuality, see David Feldman, Birth Control in Jewish Law 81–102 (1968).

[23] Some courts have allowed bias against women to affect trials by including evidence of prior sexual activity as probative of the complainant's consent. Brown v. State, 280 So. 2d 177, 179 (Ala. Crim. App. 1973), referring to Nickels v. State, 106 So. 497 (Fla. 1925) ("Where the defense is based entirely upon the fact of consent . . . evidence of the general reputation of the prosecutrix for chastity is competent evidence bearing on the probability of her consent."); Shepard v. State, 437 P.2d 565, 600 (Okla. Crim. App. 1967) ("In the event that the evidence on behalf of the prosecution or of the defense, raises the issue of consent, then evidence of the general reputation of the prosecutrix for unchastity is admissible."); Wisconsin v. Muhammed, 162 N.W.2d 567, 571 (1968) ("Furthermore, complainant was a woman of considerable experience. By her own testimony, she was not a virgin at the time of the alleged rape, and in fact she was unable to say how many different males she had had sexual intercourse with prior to [the date of the incident]."). Although states now exclude evidence of a rape victim's past sexual history through rape shield statutes, these statutes do not present an absolute bar to such evidence.

> Despite the virtue of the general rule that such evidence is inadmissible, however, in the circumstances of a particular case evidence of a complainant's

American jurors have often prejudged female victims as guilty of provoking the rape, and prosecutors have foreclosed the opportunity of going to trial by deciding not to prosecute.[24]

In contrast to this negative view of sexuality, Judaism views women approvingly as highly sexual beings.[25] In fact, Jewish law imposes an obligation upon the husband to satisfy his wife sexually.[26] This is one reason why Jewish rape law is more favorable to women; it does not bear the initial prejudice against sexually active, married women that American law does.

However, Jewish law appears degrading to women in other ways. For example, Jewish law does not always deem rape a crime. Depending on the victim's marital status, the act may merit only civil penalties. There are four categories of civil penalties: (1) a set fine for the intercourse itself, (2) compensation for the victim's humiliation, (3) compensation for the victim's pain, and (4) compensation for the blemish to her reputation.[27] If the violated girl was an unmarried virgin, the rapist must compensate her with the above penalties.[28] Only when the raped woman is betrothed or married does the violation merit criminal penalties. The law imposes a more severe penalty in this instance because the intercourse is not only nonconsensual, but is also a sexual transgression, i.e. adultery.[29] Thus,

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prior sexual conduct may be so relevant and probative that the defendant's right to present it is constitutionally protected.

Wisconsin v. Pulizzano, 456 N.W.2d 325, 331 (1990). See also MacKinnon, supra note 2, at 188-90.

[24] Some social scientists posit that "criminal justice officials use legally irrelevant evaluations of the rape victim when making decisions about the handling of rape cases." Cassia Spohn & Julie Horney, Rape Law Reform 119 (1992). Such legally irrelevant evaluations center around the conduct of the victim prior to the rape, the past sexual history of the victim, and the appropriateness of the relationship between the rapist and victim. Id. at 18-19, 111, 154.

[25] Maimonides, A Maimonides Reader 124 (Isadore Twersky ed., 1976). However, Judaism qualifies its view by restricting sanctioned sexual activity to the context of marriage. Gordis, supra note 22, at 98-101. Unlike early Christianity, however, Judaism views marriage as a purifying influence rather than a sullying one. "Nor should a man live without a wife, since married estate is conducive to great purity." Maimonides, supra note 17.

[26] Interestingly, this duty is not reciprocal. Exodus 21:10; Yebamoth 65b; Maimonides, Mishneh Torah, Seder Nashim, Hilkhot Ishut 15:2 (Isaac Klein trans., 1972).

[27] Maimonides, Mishneh Torah, Seder Nashim, Na'arah Betulah 2:2 (Isaac Klein trans., 1972); The Babylonian Talmud, Seder Nashim, Ketubot 39a, 218 (Rabbi Epstein trans., 1936). The fine is set at 50 shekels. Deut. 22:29. However, the latter three categories are determined according to the individual circumstances of each case. Maimonides, Na'arah Betulah, supra, at 2:3-6.

[28] Maimonides, Na'arah Betulah, supra note 27, at 2:14.

[29] Deuteronomy 22:25-26; see also Rachel Biale, Women and Jewish Law 240

criminalizing the rape of a married woman but not the rape of an unmarried woman indicates a lesser regard for the harm suffered by the unmarried victim.

As with American law, property rights were the original basis in Jewish law for recognizing harm resulting from the rape of a minor.[30] Initially, the only penalty imposed for the rape of an unmarried minor was the first penalty described above—a set monetary fine—which was payable to her father.[31] However, later scholars supplemented this fine with damages for pain and suffering.[32] Here, if the unmarried woman is a minor, the monetary penalties accrue to her father.[33] If the unmarried woman has reached majority, she herself receives the latter three categories of compensation but is not entitled to the set fine.[34] The exclusion of the fine where the daughter is no longer under the legal control of her father suggests that the fine is based on the father's property interest in his minor daughter, i.e. her dowry.[35]

Despite its origins, Jewish law goes beyond the doctrinal constraints of the property rationale by recognizing psychological harm. In debating the issue, one rabbi argued that women should not receive damages for rape because they would endure the same pain from intercourse with their husbands.[36] Other rabbis rejected this argument and explained: "A woman having intercourse by her free will is not to be compared to one having intercourse by constraint."[37] This brief exchange demonstrates the rabbis' understanding that the harm incurred from rape surpasses the physical pain of a broken hymen. Although the law does not criminalize the rapist's conduct where the victim is an unmarried minor, it does recognize the psychological injury to the victim caused by force.[38]

(1984).

[30] Maimonides, Na'arah Betulah, supra note 27, at 2:6.

[31] Deuteronomy 22:28-29.

[32] The Babylonian Talmud, Seder Nezikin, Baba Kamma, 59a, 342 (Rabbi Dr. I. Epstein trans., 1935); Maimonides, Na'arah Betulah, supra note 27, at 2:2.

[33] Maimonides, Na'arah Betulah, supra note 27, at 2:14.

[34] Id. at 2:9, 2:11.

[35] Id; see also Exodus 22:16 ("When a man seduces a virgin who is not yet betrothed, he shall pay the bride-price for her to be his wife."). Seduction is distinguished from rape in that seduction is consensual sex. Maimonides, Na'arah Betulah, supra note 27, at 1:2. Although this passage applies to seduction and not rape, the fine in both instances compensates for the same thing, "the enjoyment of the intercourse." Id. at 2:1. Moreover, the fine is the same amount for both seduction and rape. Id; see also Biale, supra note 29, at 242.

[36] The Babylonian Talmud, Baba Kamma, supra note 32, at 59a.

[37] The Babylonian Talmud, Baba Kamma, supra note 32.

[38] Biale, supra note 29, at 245.

Another aspect of Jewish rape law seemingly adverse to women is the required marriage of rapist and victim, if the victim consents. If the victim was an unmarried virgin prior to the rape, the law requires the rapist to marry her but only if she desires the marriage.[39] Although on its face this provision seems to punish the victim, it was instead an attempt to rectify some of the harm she suffered. The law recognized that her rape would detract from her social appeal by decreasing her bridal value and desirability.[40] Consequently, the rape might preclude her from marriage and its benefits. To prevent the rape from becoming a lifetime punishment, the law offered the marriage to keep her "from being put away for all her days."[41] Although this treatment of the victim may not comport with modern responses to the harm caused by rape, it demonstrates concern for the negative ramifications of rape for the victim.

The Jewish and American legal systems share some flaws in their treatment of women. In other respects, however, Jewish law offers victims a fairer and more protective system of recourse. The following sections will compare four areas of American and Jewish rape law: consent, burden of proof, marital rape, and defense of others.

II. CONSENT

Consent is a valid defense to a charge of rape in both American and Jewish law.[42] However, the two systems differ in their treatment of the consent issue. Under Jewish law, a lack of consent is sufficient for a finding of rape.[43] Under American law, however, a lack of consent by itself is often not sufficient.[44] Also, American law excuses an attacker's conduct if he makes a reasonable mistake as to the victim's consent. By requiring additional elements of proof and by offering a mistake of fact defense, American law places less importance on the victim's consent.

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[39] Deuteronomy 22:29; Maimonides, Na'arah Betulah, supra note 27, at 1:3.

[40] Deuteronomy 22:28-29; Biale, supra note 29, at 243.

[41] Deuteronomy 22:28-29.

[42] Encyclopedia Talmudica, A Digest of Halachic Literature and Jewish Law From the Tannaitic Period to the Present Time 400 (Rabbi Meyer Berlin ed., 1974); Model Penal Code § 2.11 (1985).

[43] Maimonides, Na'arah Betulah, supra note 27, at 1:2; The Babylonian Talmud, supra note 32, at 39a-b, 219; see Biale, supra note 29, at 244.

[44] Model Penal Code § 213.1 (1985); 65 Am. Jur. 2d Rape § 1, at 762 (1962); see infra note 54.

A. American Law on Consent

American common law minimizes the significance of the victim's non-consent by emphasizing other elements of rape such as resistance and force. Traditionally, American common law defined rape as "the carnal knowledge of a woman, forcibly, and against her will."[45] As the common law developed, it added a resistance requirement as proof of the victim's non-consent.[46] Initially, the courts required the victim to exercise the "utmost" resistance and construed this standard to mean persistent resistance.[47] For example, the common law mandated that the victim's non-consent had to be continous throughout the attack; as proof of her non-consent, she also had to resist throughout the attack with unabated fervor.[48]

Early cases employed these unreasonable standards. In a 1906 case, a twenty-year-old man tripped a sixteen-year-old woman in a field and had intercourse with her.[49] Although she testified that "I screamed as hard as I could . . . and then he held his hand on my mouth until I was almost strangled," the court found that her resistance was insufficient to prove non-consent. "Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist . . . and this must . . . persist until the offense is consummated."[50] An 1889 case expressed the same view: "If the carnal knowledge was with the voluntary consent

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[45] 4 Blackstone Commentaries 210 (1825); see also People v. Snyder, 17 P. 208, 209 (Cal. 1888); McKinney v. State, 10 So. 732, 733 (Fla. 1892). Other cases set forth derivations of this definition. Williams v. Ohio, 14 Ohio 222, 226 (1846) ("Rape is defined to be the having unlawful and carnal knowledge of a woman, by force and against her will."); State v. Cutrer, 72 So. 800, 800 (La. 1916) ("Rape at common law is the unlawful carnal knowledge of a woman over the age of ten years, forcibly and without her consent.").

[46] Estrich, supra note 2, at 29.

[47] Reidhead v. State, 250 P. 366, 367 (Az. 1926) ("Under such circumstances, the female must resist to the utmost of her ability, and such resistance must continue till the offense is complete."); People v. Carey, 119 N.E. 83, 83 (N.Y. 1918) ("Rape is not committed unless the woman oppose the man to the utmost limit of her power. . . . A feigned or passive or perfunctory resistance is not enough. It must be genuine and active and proportioned to the outrage."); State v. Clark, 182 S.W.2d 619, 621 (Mo. 1944) (requiring utmost resistance); People v. Murphy, 145 Mich. 524 (1906); Brown v. State, 106 N.W. 536 (Wis. 1906); Reynolds v. State, 42 N.W. 903 (Neb. 1889); see also Estrich, supra note 2, at 29-31.

[48] Reidhead, 250 P. at 367; Carey, 119 N.E. at 83; Clark, 182 S.W.2d at 621; Murphy, 145 Mich. at 528; Brown, 106 N.W. at 538; Reynolds, 42 N.W. at 903; Estrich, supra note 2, at 29-31.

[49] Brown, 106 N.W. at 537.

[50] Id. at 538.

of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape."[51]

Later interpretations of the resistance requirement lowered the standard from "utmost" resistance to "reasonable" resistance.[52] Although the law today has officially abolished the requirement, some judges refuse to relinquish it. In a dissenting opinion in 1981, one judge expressed his attachment to the resistance requirement: "[A woman] must follow the natural instinct of every proud female to resist, by more than mere words."[53] Fortunately, the majority did not adopt his position, indicating that this thinking may be less acceptable today than in the past.

Although the victim's resistance is no longer required, most statutes still require that the rapist have used force.[54] The statutory language tends

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[51] Reynolds, 42 N.W. at 903.

[52] Davis v. People, 150 P.2d 67, 70 (Colo. 1944) ("[I]f to a reasonable person, under like circumstances, resistance would have been useless, then . . . [the victim] would be excused for any failure she may have made in her resistance."); Jordan v. Commonwealth, 194 S.E. 719, 720 (Va. Ct. App. 1938) ("Where the female is of the age of consent, of sound mind and without physical disability, resistance should be by acts reasonably appropriate to the strength and opportunities of the woman."); State v. Muhammed, 162 N.W.2d 567, 570 (Wis. 1968) ("Thus it appears that 'utmost resistance' is measured by a subjective test of what resistance an individual victim is capable of exerting."); La. Rev. Stat. Ann. § 14.42.1 (West 1986) ("Forcible rape is a rape committed where the . . . intercourse is deemed to be without the lawful consent of the victim because the victim is prevented from resisting the act by force or threats of physical violence . . . where the victim reasonably believes that such resistance would not prevent the rape."); see Estrich, supra note 2, at 37.

[53] State v. Rusk, 424 A.2d 720, 733 (Md. Ct. App. 1981) (Cole, J., dissenting).

[54] Joshua Dressler, Understanding Criminal Law 516 (1992). The following are examples of statutes that include force as an element additional to consent. Cal. Penal Code § 261 (West 1995 Supp.) ("Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another."); D.C. Code Ann. § 22-2801 (1989) ("Whoever has carnal knowledge of a female forcibly and against her will."); Ga. Code Ann. § 16-6-1 (1992) ("A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will."); Idaho Code § 18-6101 (1994 Supp.) ("Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening . . . where she resists but her resistance is overcome by force or violence.").

Louisiana distinguishes between rape (which does not include force in the definition), aggravated rape, and forcible rape. La. Rev. Stat. Ann. § 14.41 (West 1995 Supp.); La. Rev. Stat. Ann. §14.42 (West 1995 Supp.) ("Aggravated rape is a rape committed where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim . . . when the victim resists the act to the utmost, but whose resistance is overcome by force."); La. Rev. Stat. Ann. § 14.42.1 (West 1986) ("Forcible rape is a rape committed where the . . . intercourse is deemed to be without the lawful consent of the victim because the victim is prevented from resisting the act by force or threats of physical violence . . . where the victim reasonably believes that such resistance would not prevent the rape.").

to include a combination of the following three phrases: (1) sexual intercourse achieved "forcibly," (2) "against the will" of the female, and (3) "without her consent."[55] Although a statute might not include all three phrases, the force requirement is standard.[56] Therefore, if the sexual intercourse occurred without the victim's consent but also without the requisite force, it will not satisfy the legal definition of rape. As a result, a woman's non-consent alone continues to be insufficient for a finding of rape.

For example, in *Commonwealth v. Berkowitz*,[57] both the victim and the attacker acknowledged that the victim said "no" several times during the attack.[58] However, neither party presented evidence at trial showing that the defendant used force to consummate the intercourse. Since the court found the force element lacking, it overturned the attacker's rape conviction; "although evidence of verbal protestations may be relevant to prove that the intercourse was against the victim's will, it is not dispositive or sufficient evidence of 'forcible compulsion.'"[59] Although the court nearly concedes that the victim did not consent, it nevertheless maintains that this fact alone is not dispositive. The holding in *Berkowitz* suggests that a woman's non-consent is subordinated by a man's desire for intercourse, assuming he does not use legally cognizable force.

The availability of the mistake of fact defense is another way in which the law devalues the victim's refusal. Legal recognition of this defense undermines the import of the victim's refusal by placing a burden upon her to make her non-consent reasonably clear to her attacker.[60] The common-

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The remainder of these statutes include force within the statute but not as a separate element from consent. Ala. Code § 13A-6-61 (1994) ("A male commits the crime of rape in the first degree if he engages in sexual intercourse with a female by forcible compulsion."); Ark. Code Ann. § 5-14-103 (Michie 1993 Supp.) ("A person commits rape if he engages in sexual intercourse . . . by forcible compulsion."); Ind. Code Ann. § 35-42-4-1 (West 1994 Supp.) ("A person who knowingly or intentionally has sexual intercourse . . . when the other person is compelled by force or imminent threat of force."); Colo. Rev. Stat. Ann. § 18-3-402 (West 1993 Supp.); Conn. Gen. Stat. Ann. § 53A-70 (West 1994); Haw. Rev. Stat. § 707-730 (1992 Supp.); Ky. Rev. Stat. Ann. § 510.040 (Michie 1990).

[55] See supra note 54.

[56] See supra note 54; see also Lani Remick, Read Her Lips: An Argument For a Verbal Consent Standard In Rape, 141 U. Pa. L. Rev. 1103, 1116 (1993).

[57] 609 A.2d 1338 (Pa. Super. Ct. 1992).

[58] Id. at 1341.

[59] Id. at 1348.

[60] See, e.g., State v. Smith, 554 A.2d 713, 717 (Conn. 1989) ("[A] defendant is not chargeable with knowledge of the internal workings of the minds of others except to the extent that he should reasonably have gained such knowledge from his observations of their conduct . . . . [W]hether a complainant has consented to

law rule relieved the accused of culpability if he asserted a valid mistake of fact defense. For a specific intent crime, the common law required the mistake to be both honest and reasonable; for a general intent crime like rape, the common law only required the mistake to be reasonable.[61] Therefore, the common law excused the rapist's conduct if he reasonably believed that the victim consented. In this way, "[a] realm of 'reasonable rape' is created in which women must bear the risk of men's mistakes."[62] By excusing the attacker's conduct when he reasonably believes the victim consented, the common law tolerated the fact that the attacker nonetheless perpetrated nonconsensual sex.

Today, many jurisdictions require the mistake to be both honest and reasonable.[63] In California, for example, the mistake of fact defense for rape requires both subjective and objective evidence of mistake.[64] The subjective component requires that the defendant honestly believed the victim consented based on her conduct. The objective component requires that the mistake be "formed under circumstances society will tolerate as

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intercourse depends upon her manifestations of such consent as reasonably construed."); People v. Mayberry, 542 P.2d 1337, 1346 (Cal. 1975) ("[T]he burden was on Franklin [the defendant] to prove that he had a bona fide and reasonable belief that the prosecutrix consented to the . . . sexual intercourse. As to that issue, he was only required to raise a reasonable doubt as to whether he had such a belief."); Commonwealth v. Cordeiro, 519 N.E.2d 1328, 1332 (Mass. 1988) ("If, from all the evidence, you have a reasonable doubt whether a particular defendant reasonably and in good faith, believed that [the victim] voluntarily consented to engage in sexual intercourse, you must give the defendant . . . the benefit of it, and acquit him of that charge."); see also Remick, supra note 56, at 1131–32.

[61] In this Article, general intent means the intent to do a certain act. Rape is a general intent crime because it requires the intent to have nonconsensual sex. Specific intent, however, means the intent to do a certain act and additional consequent conduct. Assault with intent to rape is a specific intent crime because it requires the intent to commit the assault and the intent to rape. Peter W. Low et al., Criminal Law 219, 232, 248 (1982).

[62] Remick, supra note 56, at 1132.

[63] See, e.g., People v. Burnham, 176 Cal. App. 3d 1134, 1141–42 (1986); Commonwealth v. Simcock, 575 N.E.2d 1137, 1141 (Mass. App. Ct. 1991) ("Commentators generally assume that one's honest and reasonable mistake as to consent may be a defense to rape, and such a defense is widely recognized in other jurisdictions."); United States v. Short, 4 C.M.A. 437 (1954); see also Sakthi Murphy, Rejecting Unreasonable Sexual Expectations, 79 Cal. L. Rev. 541, 549 (1991); Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases In the Courtroom, 77 Col. L. Rev. 1, 61 (1977).

[64] People v. Balcom, 867 P.2d 777, 781 (Cal. 1994); People v. Williams, 841 P.2d 961, 965 (Cal. 1992); Burnham, 176 Cal. App. 3d at 1141–42; People v. Mayberry, 542 P.2d 1337, 1345 (Cal. 1975).

reasonable."[65] These requirements are intended to guard against frivolous use of the defense.

Before most courts will permit a jury instruction on this defense, they usually require the defendant's counsel to produce evidence of the victim's equivocal conduct from which the accused could have reasonably mistaken consent.[66] In *Tyson v. State*,[67] defendant Tyson requested a mistake of fact defense. However, he did not allege any equivocal conduct on the part of the rape victim, D.W.. In response to questioning, he testified:

> A: We were having oral sex a little while, and she had told me to stop, and she had told me to come up, come up.
> Q: Meaning what?
> A: Indicating that she wanted me to insert my penis in her.

The court held that his testimony did not warrant a jury instruction on mistake of fact because "no gray area exists from which Tyson can logically argue that he misunderstood D.W.'s actions."[68] The court declined to offer the defense.[69]

Although the modern cases appear conservative in allowing the mistake of fact defense,[70] its very existence is illustrative of the law's view of consent. The defense places the burden on the victim to communicate her non-consent reasonably and reduces the need for the attacker to take responsibility for his actions. By limiting his responsibility, the law devalues the victim's perspective. As with the resistance requirement, the existence of the defense makes the victim's consent secondary.

B. Jewish Law on Consent

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[65] Williams, 841 P.2d at 965; see also Burnham, 176 Cal. App. 3d at 1141–42.

[66] Balcom, 867 P.2d at 781 ("These wholly divergent accounts create no middle ground from which the jury could conclude that defendant committed the proscribed act of engaging in sexual intercourse with the victim against her will by holding a gun to her head, but lacked criminal intent because, for example, he honestly and reasonably, but mistakenly, believed she voluntarily had consented."); Johnson v. State, 419 S.E.2d 96 (Ga. Ct. App. 1992) ("There is no construction of the evidence which would authorize a finding that, although the victim had never consented, appellant nevertheless acted in the reasonably mistaken belief that she had."); Tyson v. State, 619 N.E.2d 276, 295 (Ind. App. 1993); Williams, 841 P.2d at 965.

[67] 619 N.E.2d 276.

[68] Id. at 295.

[69] Id.

[70] Most of the cases surveyed did not permit a jury instruction on the mistake of fact defense because equivocal conduct was missing. See, e.g., supra note 66.

Unlike American law, the victim's consent is the central issue in a rape case under Jewish law. The Jewish definition of rape is "sexual intercourse with a woman against her will."[71] Jewish law has never required force as a predicate to a rape conviction, nor has the law ever formally required resistance.[72] Rather, Jewish law focuses its inquiry on whether the rape victim had any choice in the decision to engage in intercourse.[73]

Thus, consent negates the gravamen of the offense. Moreover, if a sexual assault begins without consent but ends with consent, Jewish law still regards it as rape.[74] "The crucial factor is the initiation of sexual intercourse under duress."[75] One extreme view asserted that even if the woman refuses rescue, the law will still regard the act as rape if it began under duress.[76] This ancient law is a significant departure from the early American legal requirement that the victim sustain her resistance throughout the act "because if she yielded at any time it would not be rape."[77]

Although Jewish law does not require resistance as an element of rape, it does encourage the victim to resist as evidence of non-consent. For example, if the rape occurs in a place where people are nearby, e.g., a city, her cries are considered evidence of non-consent.[78] However, the victim's failure to scream is not dispositive of the consent element; it merely raises a presumption against her.[79] Conversely, if the rape occurs in a secluded

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[71] 11 Encyclopedia Judaica, supra note 15, at 1548; see Maimonides, Na'arah Betulah, supra note 27, at 1:2.

[72] Maimonides, Na'arah Betulah, supra note 27, at 1:2; 11 Encyclopedia Judaica, supra note 15, at 1548.

[73] In a response to a letter written around the turn of the nineteenth century, Rabbi Kook, the late chief rabbi of Israel, explained the law of rape. He gave several examples of situations where the law recognizes a rape:

> If he attacked her in a way that she could not save herself; if she yelled and there was no one around or the rapist closed her mouth and she could not yell; if he approached her with all his weaponry and he threatened to kill her if she yelled or did not listen to him.

Rav Kook, She'elot u'Teshuvot, Ezrat Kohen 11 (library personnel at Asher Library, Spertus Institute, Chicago, Illinois trans., 1969). He explains further that it is not rape if she consents because she is worried about offending the man by refusing him. Id. at 11-18.

[74] The Babylonian Talmud, Ketubot, supra note 27, at 51b, 297-98.

[75] The Babylonian Talmud, Ketubot, supra note 27, at 51b, 297-98; see Biale, supra note 29, at 249.

[76] Some sources believed that a woman's robust sexual drive overcame her rational and moral sensibilities after sex began. The Babylonian Talmud, Ketubot, supra note 27, at 51b, 297-98; Biale, supra note 29, at 249-50.

[77] People v. Murphy, 145 Mich. 524, 528 (1906); Brown v. State, 106 N.W. 536, 538 (Wis. 1906); Reynolds v. State, 42 N.W. 903, 903 (Neb. 1889).

[78] Deuteronomy 22:23-24; Maimonides, Na'arah Betulah, supra note 27, at 1:2.

[79] See Deuteronomy 22:23-24; see also Maimonides, Na'arah Betulah, supra note

area, e.g., the countryside, she need not scream as evidence of non-consent.[80] The court will presume that intercourse was nonconsensual. Thus, the location of the rape determines whether the victim must show that she resisted, and nonresistance merely raises a presumption rather than satisfying a requirement.

The role of resistance in Jewish law is significantly different than in American law. American courts initially included resistance as an element of the offense,[81] whereas Jewish law has always simply considered it as evidence. Moreover, under American law, courts once required the victim to have physically resisted with every muscle, whereas Jewish law has always found vocal resistance sufficient.[82] Even now, not all American courts recognize verbal resistance as sufficient.[83]

Unlike American law, Jewish law focuses its inquiry on whether the woman consented to the act. It acknowledges the victim's right to physical autonomy and views verbal refusal as sufficient. By seeing the woman's consent as the crux of the issue, Jewish law coincides with some feminist thinking.[84] Although American law has rectified many negative aspects of its rape laws, Judaism has maintained its comparatively feminist view for thousands of years.

III. BURDEN OF PROOF

American criminal law consistently places the burden of proof on the alleged victim.[85] This approach relies on broad constitutional principles designed to protect the due process rights of the defendant. "The Due Process Clause protects the accused against conviction except upon proof

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27, at 1:2.

[80] Deuteronomy 22:25–27; Maimonides, Na'arah Betulah, supra note 27, at 1:2.

[81] See cases cited supra note 47; see also Estrich, supra note 2, at 29–31.

[82] See Deuteronomy 22:23–27; see also Maimonides, Na'arah Betulah, supra note 27, at 1:2.

[83] See Commonwealth v. Berkowitz, 609 A.2d 1338, 1347 (Pa. Super. Ct. 1992).

[84] See Lucy Reed Harris, Towards a Consent Standard in the Law of Rape, 43 U. Chi. L. Rev. 613, 628 (1976) ("It is submitted that neither the traditional nor the reformed categorical approaches to rape law focuses sufficient attention on what should be the central inquiry—whether the woman consented to the act of intercourse in question."); Brownmiller, supra note 2, at 8 ("A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape."); Remick, supra note 56, at 1126 ("A verbal standard [of consent] . . . accords with the principle of maximum autonomy for women.").

[85] See In re Winship, 397 U.S. 358, 364 (1970); Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[86] By contrast, Jewish law allocates the burden of proof in a rape case according to the facts of the situation. "A woman subjected to intercourse in the open field is presumed to have been violated . . . [while] a woman subjected to intercourse in the city is presumed to have been seduced . . . ."[87] In effect, American law emphasizes defendants' rights in rape cases in keeping with fundamental legal principles, while Judaism balances the victim's and defendant's rights by acknowledging the victim's evidentiary disadvantage in a rape trial.

A. American Law on Burden of Proof

With uniformity and consistency as goals, American criminal law applies legal principles equally to all crimes and strives to protect defendants' rights.[88] The basic tenet of criminal law is that the accused is presumed innocent until proven guilty.[89] This standard purports to protect defendants from being convicted on false accusations.[90] Accordingly, the state bears the burden of proving the defendant's guilt beyond a reasonable doubt.[91] The Supreme Court has confirmed this fundamental principle: "Guilt in a criminal case must be proved beyond a reasonable doubt . . . . These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions."[92] Thus, the legal system seeks to protect defendants' rights by presuming their innocence.

In the interest of protecting defendants, American rape cases have overzealously pursued a course of suspecting the complainant by effectively putting her on trial.[93] The primary reason for such treatment of complainants in rape cases is that courts have viewed rape as especially susceptible to problems of proof. Lord Hale described rape as a claim "easily to be made and hard to be proved, and harder to be defended by the

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[86] In re Winship, 397 U.S. at 364; see also Brinegar v. United States, 338 U.S. 160, 174 (1949).

[87] Maimonides, Na'arah Betulah, supra note 27, at 1:2; see alsoDeuteronomy 22:23-29.

[88] See U.S. Const. amend. IV, V, VI.

[89] Coffin v. United States, 156 U.S. 432, 453, 459 (1895); In re Winship, 397 U.S. at 363.

[90] In re Winship, 397 U.S. at 363; Brinegar, 338 U.S. at 174.

[91] Patterson v. New York, 432 U.S. 197, 211 (1977); In re Winship, 397 U.S. at 364; Brinegar, 338 U.S. at 174.

[92] Brinegar, 338 U.S. at 174.

[93] See Berger, supra note 63; see also Harris, supra note 84.

party accused, tho' never so innocent."[94] Many jurists agreed with Hale that a claim of rape was inherently dubious and that false accusations could lead to unjust convictions because of problems of proof.[95] As recently as 1970, the Wigmore Treatise on Evidence declared that every woman complainant in a rape case should undergo a psychiatric evaluation "to ascertain whether she suffers from some mental or moral delusion. . . ."[96] Thus, fears about the dangers of false accusations made a rape claim highly suspicious.

To protect against these dangers, the courts developed special safeguards for rape cases. For example, they required a victim to present corroborating evidence of the rape[97] and proof that she resisted to her utmost ability.[98] The corroboration and resistance requirements served to

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[94] Lord Matthew Hale, The History of the Pleas of the Crown 635 (Emlyn ed. 1874).

[95] People v. Adams, 93 P.2d 146, 151 (Cal. 1939). Although the Adams court denied the need for corroboration, it expressed distrust of the victim by giving the jury instruction offered by the prosecution. The instruction cautioned the jury to be wary of the victim's testimony, warning that "a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and defendant are generally the only witnesses. The law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you examine her testimony with caution." See also Witt v. State, 233 P. 788, 789 (Okla. Crim. App. 1925) ("The charge is one that arouses the passions and prejudices of jurors, and for that reason it is the duty of the court to closely scrutinize the evidence, and where the evidence of the state is unreasonable, inconsistent, and contradictory, and there is inherent evidence of improbability or indication that the prosecution is maliciously inspired, the court should not permit a conviction to stand."); see Estrich, supra note 2, at 5.

[96] 3A Wigmore, Evidence § 924a, at 747 (Chadbourn Rev. 1970). Although dismissing Wigmore as too radical, a North Carolina court went on to confirm the rationale behind his suggestion: "Obviously, there are types of sex offenses, notably incest, in which, by the very nature of the charge, there is grave danger of completely false accusations by young girls of innocent appearance but unsound minds, susceptible to sexual fantasies and possessed of malicious, vengeful spirits." North Carolina v. Looney, 240 S.E.2d 612, 622 (1978).

[97] State v. Raymond, 124 P. 495, 498 (1912) ("We are of the opinion that since appellant must necessarily be connected with the act of intercourse, and also with the act of accomplishing it by forcibly overcoming her resistance thereto, the corroborating evidence must tend to prove both of these facts."); People v. Simone, 167 N.Y.S. 678, 678 (1917) (referring to People v. Page, 56 N.E. 750 (N.Y. 1900)) ("Conviction for rape by force cannot rest upon the woman's testimony, unsupported by other evidence. As her testimony alone is not sufficient to establish force beyond a reasonable doubt, other evidence must corroborate her testimony as to force."); People v. Countryman, 195 N.Y.S. 728, 730 (1922) ("It has long been the law that no conviction can be had for rape or defilement on the testimony of the female defiled, unsupported by other evidence.").

[98] For cases requiring utmost resistance from the rape victim, see supra note 47.

mitigate the perceived danger of false accusations inherent in a rape claim.[99] Both of these "safeguards" were pushed to the point of irrationality when courts virtually required that the victim be injured as proof of rape.[100]

By including corroboration and resistance as elements of rape, the courts focused on the conduct of the victim rather than that of the attacker. This focus turned the trial into an examination of the victim's culpability. Rather than simply determining the issue of the victim's consent, the courts assumed that she was at fault for inadequately resisting the rapist. In effect, the court instituted a standard of guilty until proven innocent for the victim.[101]

Implicit in the American formulation of rape law is an extreme distrust of the victim. Although most jurisdictions have officially eliminated the corroboration and resistance requirements,[102] some courts unofficially continue to consider these elements in their final disposition of a rape

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[99] People v. Benson, 6 Cal. 221, 224 (1856) ("From the days of Lord Hale to the present time, no case has ever gone to the jury, upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony."); Brown v. State, 106 N.W. 536, 538 (Wis. 1906) ("We need not reiterate those considerations of the ease of assertion of the forcible accomplishment of the sexual act with impossibility of defense . . . which have led courts, and none more strenuously than this, to hold to a very strict rule of proof. . . . [T]here must be the most vehement exercise of every physical means or faculty within the woman's power . . . ."); Estrich, supra note 2, at 47–49.

[100] People v. Doyle, 142 N.Y.S. 884, 886 (1913) ("The story that the defendant took the complainant by the arm in a public highway and led her forcibly without her consent into the woods is not very probable. If her resistance had been genuine, she could have fallen to the ground and called for help. . . . It does not appear that he was in any way scratched from any struggle on her part to resist, or that her limbs were in any way bruised."); People v. Simone, 167 N.Y.S. 678, 678 (1917) ("As a rule, a rape by force is attended by some circumstances as to time and place that in themselves point to violence, or is indicated by some physical marks upon the woman. But the circumstances in the case at bar are not inconsistent with the coition upon consent. There were no injuries upon her body, nor marks of force. There was not such prompt complaint from her as could have been expected under the circumstances. She testifies that the defendant tore her drawers, and there is proof that they were found in that condition, but whether the defendant tore them depends entirely upon her veracity . . . ."); Moore v. State, 9 So. 2d 146, 147 (Ala. 1942) ("Yet, for the defendant, it can be said that this contention of nonconsent was strongly rebutted by certain other facts and circumstances, such as that, though there was no claim that she yielded through fear or duress—actual force being her claim—she bore no bruises, except a knot (no wound) on her head, a bruise on one thigh and 'rubs' on her arms (there were no abrasions of the skin); she was not shown to have been disheveled or otherwise distraught upon her arrival home; her clothing was apparently intact and untorn . . . .").

[101] Estrich, supra note 2, at 5.

[102] See supra note 54.

case.[103] In fact, the commentaries to the Model Penal Code also endorse the corroboration requirement.[104] Beyond simply protecting the defendant's rights, laws emulating the Model Penal Code denigrate the victim by labelling her testimony inherently untrustworthy.[105] Thus, the distrust persists.[106]

Further proof that the legacy of distrust continues is provided by the fact that the force requirement remains in most jurisdictions.[107] Despite legal and societal advances in understanding the act of rape and its effect on victims, the courts' tenacious retention of the force and corroboration requirements demonstrates that the legal community's distrust of rape victims lingers. Ultimately, the law emphasizes the defendant's rights over those of the victim. While the protection of defendants' rights is laudable, the pursuit of this goal presents a danger of quashing rape victims' rights.

B. Jewish Law on Burden of Proof

By contrast, Jewish law does not embrace this legacy of distrust. Jewish law recognizes that corroborating evidence in rape cases is unavailable in certain circumstances. However, it requires neither force nor resistance as elements of rape; thus, a woman's lack of consent is sufficient to satisfy the legal definition of rape. Rather than penalizing the victim for the lack of corroboration, Jewish law favors the victim by switching the burden of proof to the alleged attacker.

This case-by-case approach allocates the burden of proof based on where the rape occurred. If the rape occurred in a place where no one could have heard the victim had she screamed for help, then the burden of proof automatically switches to the alleged attacker.[108] The traditional

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[103] Estrich cites to several studies indicating that the availability of corroborative testimony and evidence of resistance are factors used in deciding rape cases. Estrich, supra note 2, at 19–23, 42–43. Although the California courts rejected the resistance requirement in 1946, the rape conviction in *People v. Bales* was reversed because the evidence was deemed insufficient to show real resistance. People v. Bales, 169 P.2d 262, 265 (1946).

[104] Model Penal Code § 213.6 (1985) ("No person shall be convicted of any felony under this Article [Article 213—Sexual Offenses] upon the uncorroborated testimony of the alleged victim.").

[105] Spohn & Horney, supra note 24, at 17.

[106] Estrich, supra note 2, at 43; Brownmiller, supra note 2, at 8.

[107] For statutes retaining the force requirement, see supra note 54; Remick, supra note 56, at 1116; see also Jones v. State, 589 N.E.2d 241, 243 (Ind. 1992); Skiver v. State, 826 S.W.2d 309, 310 (Az. 1992); State v. Fontan, 624 So. 2d 916, 920 (La. Ct. App. 1993).

[108] Deuteronomy, 22:23–29; see also Maimonides, Na'arah Betulah, supra note 27,

example of such a location is a rural setting, where the sparse population makes it unlikely that a witness would hear the victim's cries. Absent any witness testimony or evidence to the contrary, the court would presume that the accused committed the rape.[109]

However, if the rape occurred in a place where someone could have heard the victim's cry for help, then the burden of proof rests with the victim. The traditional example of this location is the city. Because a city is more heavily populated, the chances increase that someone would be available to rescue her.[110] Absent witness testimony that the victim's attacker threatened to kill her, the court will infer the victim's complicity from her lack of vocal resistance.[111] Other authorities have modified the "city" rule by changing the inquiry for determining her consent from whether she screamed in the appropriate location to whether there were rescuers available.[112] In other words, the victim is believed if rescue was impossible, regardless of where the rape occurred.[113] Generally, however, when the alleged rape occurred in a place that people frequented, the court would presume that the accused was innocent if there was no corroborating evidence to the contrary.

The value of these situational distinctions for resolving the issue of consent is that they favor the victim when she is at an evidentiary disadvantage. Where there is little or no possibility of corroborating evidence on the victim's behalf, the law switches the burden of proof to the defendant. This procedural ploy levels the playing field. In effect, if no one was actually present to rescue the victim in the city, then the law would not presume consent from her silence.[114] This approach posits that the victim's inability to receive aid should not be determinative of her case.

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at 1:2; Biale, supra note 29, at 246.

[109] See Deuteronomy, supra note 108; see also Maimonides, Na'arah Betulah, supra note 27, at 1:2; Biale, supra note 29, at 246.

[110] See Deuteronomy, supra note 108; see also Maimonides, Na'arah Betulah, supra note 27, at 1:2; Biale, supra note 29, at 246.

[111] Maimonides, Na'arah Betulah, supra note 27, at 1:2; see Irving J. Rosenbaum, The Holocaust and Halakhah 146 (1976).

[112] Nachmanides, Commentary on Torah, Deuteronomy, 22:23 (Rabbi Dr. Charles B. Chavel trans., 1974). Otherwise known as Rabbi Moses ben Nachman, Nachmanides was a rabbi and legal scholar who lived in Spain from 1194 until 1270. 11 Encyclopedia Judaica, supra note 15, at 774; see also Rosenbaum, supra note 111, at 146 (referring to Shulchan Aruch, Nodah ben-Yehudah, Mahadura Tinyana 201, Ketav Sofer, Even ha-Ezer 17, and Mishpatei Uziel, Even ha-Ezer 23).

[113] See Nachmanides, supra note 112; Rosenbaum, supra note 111, at 146.

[114] See Deuteronomy, supra note 108; Maimonides, Na'arah Betulah, supra note 27, at 1:2; Biale, supra note 29, at 246; see also Nachmanides, supra note 112.

These rules offer a level of protection for the victim that does not exist in American law.

Jewish law approaches rape from a less biased perspective because it does not carry the legacy of distrust for rape victims that permeates American law. Unlike the Model Penal Code's retention of the corroboration requirement,[115] Jewish law presumes the truth of the victim's allegations where there is little or no possibility of corroboration.[116] Thus, Jewish law recognizes the evidentiary disadvantage of a rape victim and remedies it with a presumption in her favor. American law cannot accommodate a similar presumption in favor of the victim because the burden of proof always remains with the prosecution. Through a more flexible allocation of the burden of proof, Jewish law demonstrates a greater trust in the reliability of the victim's testimony.

IV. MARITAL RAPE

In the area of marital rape, American and Jewish law have distinctly different approaches. Historically, American law has condoned exempting marital rape from prosecution.[117] This exemption is consistent with the legal distinction between public and private sex made by the Supreme Court.[118] According to this distinction, marital sex is a private matter and outside the jurisdiction of American law.[119]

Conversely, Jewish law does not rely on a public/private distinction. Because it regulates every aspect of daily life, Jewish law does not recognize anything as too private for its jurisdiction. Thus, the topic of

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[115] See supra note 104.

[116] See Deuteronomy, supra note 108; Maimonides, Na'arah Betulah, supra note 27, at 1:2; Biale, supra note 29, at 246; see also Nachmanides, supra note 112.

[117] Hale, supra note 94, at 629; People v. Trumbley, 96 N.E. 573, 575 (Ill. 1911); Frazier v. State, 86 S.W. 754 (Tex. Crim. App. 1905).

[118] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding unconstitutional a Connecticut statute that outlawed contraceptive use because it impermissibly infringed upon the right of marital privacy.). The Supreme Court has also distinguished between public and private sex when dealing with obscenity. See Miller v. California, 413 U.S. 15, 25-26 (1973) ("Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation anymore than live sex and nudity can be exhibited or sold without limit in such public places."); Paris Adult Bookstore v. Dallas, 493 U.S. 215, 258 (1990) ("The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity.") (J. Scalia, concurring and dissenting).

[119] Griswold, 381 U.S. at 485-86, 491.

marital relations falls within the purview of the law, and Jewish law has always criminalized marital rape.

A. American Law: The Private/Public Dichotomy & Marital Rape

The prevailing American legal perspective on sex draws a bright line between private and public sex, e.g., marital and extramarital sex.[120] The line determines whether the sexual activity is subject to regulation. Within the private confines of marriage, sexual intercourse is beyond the law because it is seen as sacrosanct.[121] Outside the confines of marriage, however, sexual intercourse does not have a holy imprimatur and is subject to regulation.[122] Using these guidelines as a framework, marital sex, regardless of consent, is a private matter and beyond the purview of the law. Accordingly, American law has traditionally exempted marital rape from punishment.

1. Private/Public Dichotomy

The Supreme Court has distinguished marital sex as especially deserving of protection from legal intrusion. In *Griswold v. Connecticut*,[123] the Court recognized a constitutional right of privacy that included the right of married persons to use contraceptives.[124] In effect, the Court granted immunity from government regulation to "the sacred precincts of marital bedrooms."[125] By restricting government intervention, the Court created a special status for marital sex.[126]

The primary reason for the Court's "hands off" policy is the reverence the Court accords marital sex. As the majority explained in *Griswold*, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[127] In describing the marital

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[120] See cases cited supra note 118.

[121] Griswold, 381 U.S. at 485-86, 491.

[122] See Miller, 413 U.S. at 25-26; Paris Adult Bookstore, 493 U.S. at 258 (J. Scalia, concurring and dissenting).

[123] 381 U.S. 479.

[124] Id. at 485-86.

[125] Id. at 485.

[126] Although later cases extended the right of reproductive autonomy to unmarried individuals, they did not recognize a general right of privacy for all sexual conduct. Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972); Carey v. Population Services Int'l., 431 U.S. 678, 687 (1977); Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

[127] Griswold, 381 U.S. at 486. Seemingly, the proposition that intimacy is inherent

bedroom as "sacred," the Court invokes a religious element and reserves special treatment for marital sex. Another way in which the Court elevates marital sex is by invoking a procreative element, again through the word "sacred." The Court's nexus between marital sex and sacredness appears to arise from the act's ennobling function—procreation.[128] Under the Court's view, marriage implicates procreation because of its traditional role as a family institution.[129] Because procreation has traditionally enjoyed a privileged status in our society, the Court granted special protection to marriage.[130] These "notions of privacy surrounding the marital relationship" keep the government from regulating sex that occurs within the confines of marital relationships.[131]

By permitting the government to regulate nonmarital sex, the Court further demonstrated its bias in favor of marital sex. Homosexual acts and other forms of extramarital sex do not have the same constitutional right of privacy and can be regulated by the government.[132] The apparent rationale is the absence of procreative intent. As the Court noted in *Bowers*, "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . ."[133] However, marital partners do not always have sex to procreate either. The real justification is still to uphold the traditional family unit.

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in marriage needs no support. Nevertheless, more legal support exists. Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 552–53 (1961), alludes to the intimate quality of marriage. In *Poe*, the Court dismissed a challenge to the same statute which was struck down in *Griswold* because the plaintiffs did not have standing. Id. at 497.

[128] See Maynard v. Hill, 125 U.S. 190, 205, 211 (1888).

[129] See Zablocki v. Redhail, 434 U.S. 374, 383–86 (1978) (describing marriage as "the relationship that is the foundation of the family in our society."); see also Maynard, 125 U.S. at 211 ("[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress.").

[130] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."). In Meyer v. Nebraska, the Court lists as fundamental liberties the right "to marry, establish a home and bring up children . . . ." 262 U.S. 390, 399 (1923); see also Griswold, 381 U.S. at 486, 491. Although spouses engaging in marital sex need not always intend to procreate, Justice Goldberg in his concurrence suggests that a traditional purpose of marriage is to procreate. Id. at 495–96.

[131] Griswold, 381 U.S. at 486.

[132] See Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is insupportable."). In *Bowers*, the Court looks again to tradition in deciding that the Fourteenth Amendment accords no fundamental right to engage in homosexual conduct. 478 U.S. at 192.

[133] Id. at 191.

In this way, the Court implies that extramarital sex is misdirected because it lacks the familial component.[134] It is therefore subject to government intrusion. This public/private dichotomy exemplifies the American legal system's inherent reluctance to intrude on the marital relationship.

2. *The Private/Public Distinction as Applied to Marital Rape*

The Court's avowal that marital sex is sacred has been misused by some courts to exempt marital rape from prosecution. While the marital rape exemption relies on the privacy of the marital bedroom, it fails to recognize that marital rape is not marital sex and, therefore, is not deserving of the same privacy.

Traditionally, English and American common law exempted marital rape from legal recourse. Lord Hale proclaimed the term "marital rape" to be an oxymoron: "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent, the wife hath given up herself in this kind unto her husband, which she cannot retract."[135]

The marital rape exemption rested on several rationales: implied consent, property, and unity in marriage. The primary rationale was the implied consent doctrine as elucidated by Hale.[136] As the above quotation indicates, Hale based this rationale on the premise that marriage is a contract under which a woman is obligated to provide sexual services.[137] Upon entering the contract, her consent to sexual intercourse becomes irrevocable.[138] Therefore, her husband can infer her consent to intercourse from the fact of their marriage.

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[134] See Griswold, 381 U.S. at 486, 491; Bowers, 478 U.S. at 190.

[135] Hale, supra note 94, at 629. Hale has the dubious distinction of being the creator of the marital rape exemption. See Warren v. State, 336 S.E.2d 221, 223 (Ga. 1985); Williams v. State, 494 So. 2d 819, 827 (Ala. Crim. App. 1986); Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 Yale J.L. & Feminism 207 (1992).

[136] Hale, supra note 94, at 629.

[137] Id.; see also State of New Jersey in the Interest of MTS, 609 A.2d 1266, 1273 (N.J. 1992) ("According to traditional reasoning, a man could not rape his wife because consent to sexual intercourse was implied by the marriage contract."); Williams, 494 So. 2d at 827 ("At common law, there was a 'marital exemption' for rape based on the theory that, when a woman makes her marriage vows, she impliedly consents to sexual intercourse with her husband during marriage.").

[138] Hale, supra note 94, at 629; Frazier v. State, 86 S.W. 754, 755 (Tex. Crim. App. 1905); Shunn v. State, 742 P.2d 775, 778 (Wyo. 1987); Jaye Sitton, Old Wine in New Bottles: The "Marital" Rape Allowance, 72 N.C. L. Rev. 261, 264 (1993).

Also, the idea that women were the property of their husbands was used to justify the exemption. In general, the common law based its view of the harm caused by rape on property rights.[139] A female victim was either the unmarried daughter or the wife of a man who owned her sexual rights. Since sexual violation decreased a woman's value, the man's property rights were abrogated.[140] By inference, then, he incurred the harm. "Such traditional rape laws protect the property or potential property of the male, and, it has been argued, reflect "a popular conception of a girl's . . . virginity as a 'thing' of social, economic, and personal value."[141]

A woman became the legal property of her husband upon marriage.[142] When an owner purposefully destroys personal property, its value to the owner is not decreased; a husband who raped his wife did not decrease her value to him.[143] The law will also not intervene to prevent a person from destroying his personal property. A wife's value would be decreased only where a man not her husband committed the rape. Thus, property rights furnished another basis for exempting marital rape.

The final rationale was the idea of unity in marriage, which set forth that the husband's identity subsumed that of his wife.[144] Blackstone proclaimed that "the husband and wife are one person in law . . . that is, the very being or legal existence of the woman is suspended during the marriage."[145] Logically, it follows that "a man could no more be charged with raping his wife than be charged with raping himself."[146]

The common law and statutory marital rape exemptions persisted until the 1980s. The renowned case abolishing the exemption was *People v. Liberta*, in which the court held that "there is no rational basis for

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[139] Brownmiller, supra note 2, at 8; Brande Stellings, The Public Harm of Private Violence: Rape, Sex Discrimination & Citizenship, 28 Harv. C.R.-C.L. L. Rev. 185, 208 n.102 (1993).

[140] Brownmiller, supra note 2, at 422; see People v. Liberta, 474 N.E.2d 567, 576 (N.Y. 1984) ("Rape statutes historically applied only to conduct by males against females, largely because the purpose behind the proscriptions was to protect the chastity of women and thus their property value to their fathers or husbands.").

[141] Paul J. Mirabile, Rape Laws, Equal Protection, and Privacy Rights, 54 Tul. L. Rev. 456, 457 (1980), (citing Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55, 76 (1952)).

[142] Id.; see Blackstone, supra note 45, at 442.

[143] Brownmiller, supra note 2, at 163; Sitton, supra note 138, at 264.

[144] Rene Augustine, Marriage: The Safe Haven For Rapists, 29 J. Fam. L. 559, 561 (1990-91); Sitton, supra note 138, at 264.

[145] Blackstone, supra note 45, at 442; Kennedy v. Camp, 102 A.2d 595, 599 (N.J. 1954).

[146] Augustine, supra note 144, at 561.

distinguishing between marital and nonmarital rape."[147] The court found that the rationales for the exemption were "based upon archaic notions about the consent and property rights incident to marriage."[148] No state retains the marital rape exemption, and all states now prosecute marital rape.[149] However, only some states have replaced the exemption with a special proscription against marital rape.[150]

Instead of simply including marital rape under the rubric of rape, these states have statutorily distinguished between marital and nonmarital rape.[151] Examples of this distinction include making marital rape a lesser offense and granting a limited exemption for marital rape. An Arizona statute provides an example of the former type, in which the crime of "spousal rape"[152] merits a lesser penalty than other sexual assaults.[153] An example of the latter is seen in an Alaska statute prohibiting sexual assaults upon those who are unable to consent.[154] Although Alaska does not recognize an absolute marital rape exemption, this statute includes married women under the category of those who are unable to consent. The basis for thus including married women may be the Model Penal Code doctrine that sexual consent may be implied from marital status, thereby rendering married women unable to consent.[155] Thus, some modern "reformed" laws on marital rape implicitly retain the implied consent doctrine.[156]

These distinctions between marital and nonmarital rape suggest that there is a lingering reluctance to criminalize rape which may be based on

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[147] 474 N.E.2d 567, 573 (N.Y. 1984).

[148] Id. at 573.

[149] Sitton, supra note 138, at 263 n.12; see also Cal. Penal Codes § 262 (Supp. 1995); Idaho Code § 18-6107 (Supp. 1994); Neb. Rev. Stat. §§ 28-319, 320 (1989); N.J. Stat. Ann. § 2C:14-2 (West Supp. 1994).

[150] See statutes cited supra note 149; Sitton, supra note 138, at 263 n.12.

[151] While eliminating the marital rape exemption as a complete ban on prosecution, several states, such as California, Connecticut, Georgia, and Idaho continue to distinguish between rape and marital rape.

[152] Ariz. Rev. Stat. Ann. § 13-1406.01 (Supp. 1994), as cited in Sitton, supra note 138, at 278 n.122.

[153] Ariz. Rev. Stat. Ann. § 13-1406(B) (Supp. 1994), as cited in Sitton, supra note 138, at 278 n.123.

[154] Alaska Stat. § 11.41.420(3) (Supp. 1994), as cited in Sitton, supra note 138, at 279 n.131.

[155] "The character of the voluntary association of husband and wife, in other words, may be thought to affect the nature of the harm involved in unwanted intercourse." Model Penal Code § 213.1(8)(c) cmt. b (1985).

[156] For examples of cases where the court has acquitted the husband on a consent defense despite graphic evidence to the contrary, see Catharine MacKinnon, Only Words 114 n.4 (1993).

the public/private dichotomy of *Griswold*. Ironically, this reluctance to criminalize marital rape is inconsistent with the Supreme Court's rationale for its hands-off policy on marital sex. Since the *Griswold* court granted immunity to the marital bedroom, it might follow that it would exempt marital rape from punishment. However, applying the Court's noninterventionist policy to marital rape would be inconsistent with the principles behind the policy. In justifying immunity for the marital bedroom, the Court proclaims the sanctity of the marital bedroom and the noble purpose of marital union.[157] But the violence of marital rape intuitively vitiates the sanctity of the marital bedroom. Therefore, marital rape exemptions countermand the *Griswold* court's interest in preserving marital sanctity.

The inconsistency between the marital rape exemption and the Court's stance on the sacred nature of marriage reveals American law's problematic perspective on marital rape. Previously, in the eyes of the law, marital rape did not violate the sanctity of marriage.[158] Although subsequent law has improved this legal perspective, some states cling to a remnant of the exemption by creating a lesser penalty for spousal rape.

B. Marital Rape Within Jewish Law

When viewed from a feminist perspective, Jewish law is more advanced than American law.[159] Unlike American or English common law, Jewish law has recognized for over 3,000 years that marital rape is not only possible but expressly forbidden:[160] "A woman is not a captive who

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[157] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[158] See Hale, supra note 94 and accompanying text.

[159] Jewish marital rape law satisfies the demands of some feminist criticisms of American marital rape law. MacKinnon, supra note 2, at 26 ("Rape is not illegal, it is regulated. When a man assaults his wife, it is still seen as a domestic squabble, as permissible . . . ."); To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev. 1255, 1260–61 (1986) (citing D. Finkelhor, Marital Rape: The Misunderstood Crime, Address to the New York County's Lawyer's Association (May 3, 1984)); ("A 'female perspective,' on the other hand, interprets marital rape as involving 'brutality and terror and violence and humiliation to rival the most graphic stranger rape."); Jennifer Nedelsky, Symposium: Can Feminists Use the Law to Effect Social Change in the 1990's, The Practical Possibilities of Feminist Theory, 87 Nw. U. L. Rev. 1286, 1296 (1993) ("If in our [feminists'] arguments . . . we always try to get people to see the patterns of relationship that a proposed law or interpretation will foster, then at least we can argue directly why rights that foster irresponsibility (like rape law that privileges the perspective of the accused) are destructive of genuine relationships of equality.").

[160] The Babylonian Talmud, Seder Mo'ed, Eruvin 100b, 696 (Rabbi Dr. I. Epstein trans., 1938) ("A man is forbidden to compel his wife to the [marital] obligation.");

may be compelled to have intercourse with one who is hateful to her."[161] This proscription arises from the holiness placed on sexual intercourse between spouses. Unlike the rationale of *Griswold*, this concept of marital sanctity does not condone aggression by placing it beyond the realm of law. Instead, it outlaws such aggression by imposing standards of behavior on both wife and husband.

Implied consent for sexual intercourse is alien to Jewish law. The law commands the parties to engage in sex only of their own volition.[162] Because willingness is essential to the holiness of sex, a lack of consent by either party would negate the sacred aspect.[163] Jewish law is so emphatic about keeping the sexual act sacred and pleasurable that it forbids couples from having intercourse when one partner is angry at the other or when either partner is inebriated.[164] Unlike American law, the ban against marital rape in Jewish law extends to intercourse initiated while the woman is sleeping.[165] Because she is asleep, the woman cannot grant consent, and Jewish law will not presume her consent as American law will.[166]

Although Judaism applies a property rationale to marriage, property rights were never used to justify marital rape.[167] Similarly, the "unity in marriage" rationale as applied in American law is unacceptable in Jewish law. While Jewish law recognizes marriage as a union, it does not demand that the wife be subsumed into her husband's existence. Instead, it allows her to exercise control over her sexual needs. One rabbi characterized the sexual act as "the duty of the husband and the privilege of the wife."[168]

Proverbs 19:2 ("And he that hastens with his feet sins . . . . Also, without consent the soul is not good."); Maimonides, Hilkhot Ishut, supra note 26, at 15:17.

[161] D.B. Sinclair, Rape of a Wife, Jewish Law in the State of Israel, 6 The Jewish Law Annual 195 (1987) (citing Maimonides who was quoted in Moshe Cohen v. State of Israel C.A. 91/80 (unpublished)); see also Maimonides, Hilkhot Ishut, supra note 26, at 14:8.

[162] Mordecai Frishtik, Physical and Sexual Violence By Husbands As a Reason For Imposing a Divorce In Jewish Law, 9 The Jewish Law Annual 163 (1991); Maimonides, Kiddushin, Hilkhot Issurei Bi'ah 21:12 (Isaac Klein trans., 1972); Maimonides, Hilkhot Ishut, supra note 26, at 15:17.

[163] Frishtik, supra note 162.

[164] Shulchan Aruch, 4 The Code of Jewish Law, ch. 150:13 (Hyman E. Goldin trans., 1961); see Abraham ben David, Baalei HaNefesh, Shaar HaKedushah.

[165] See Maimonides, Hilkhot Issurei Bi'ah, supra note 162.

[166] See The Babylonian Talmud, Eruvin, supra note 160; Proverbs, supra note 160; Maimonides, Hilkhot Ishut, supra note 26, at 15:17.

[167] See Maimonides, Hilkhot Issurei Bi'ah, supra note 162.

[168] Susan Weidman Schneider, Jewish and Female 199 (1984) (quoting Rabbi David Feldman, an expert on Jewish laws of sexuality); see The Babylonian Talmud, Ketubot, supra note 27, at 47b; Exodus 21:11; David Biale, Eros and the Jews 54 (1992).

Jewish law neither places the woman under the sexual control of her husband nor abrogates her right to physical integrity.

Further, the Supreme Court's view of marital sex as sacred solely because of its procreative component is too limited a perspective by Jewish standards. Although Judaism places an extremely high value on procreation,[169] sex also has an important role in fostering intimacy and producing pleasure.[170] The wife is not regarded merely a vessel for the birth of children; she has sexual needs apart from her important role as a mother.[171] One Jewish scholar emphasized the priority of these needs: "Hurry not to arouse passion until her mood is ready; begin in love; let her [orgasm] take place first."[172] As mentioned earlier, the husband is contractually obligated to meet his wife's sexual demands.[173] Jewish law evinces a greater belief in the sacredness of marital sex than does American law, through a recognition of the many facets of marital sex.

Both the American and Jewish legal systems distinguish between marital rape and nonmarital rape. However, while American law distinguishes between them by exempting marital rape from punishment, Jewish law condemns marital rape as an especially egregious form of rape.[174] The commandment to procreate, incumbent only upon the male, is considered to be of the utmost importance.[175] However, rabbis have urged that a husband should not fulfill this commandment at the expense of his wife's consent. "He may not rape her by having intercourse against her will, but rather [let him do it] with her consent and in mutual arousal and joy."[176] Rabbis also believed that abrogation of the wife's consent would lead to unhealthy offspring. "Also, without consent the [child's] soul is not good."[177] These authorities indicate that sexual equality is essential to a healthy and spiritual relationship.[178] Also, by referring to the effect on

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[169] The first Commandment in the Torah is "Be fruitful and multiply." Genesis 1:28; see also Alan S. Green, Sex, God & Sabbath 20, 21 (1979).

[170] Gordis, supra note 22, at 10; see Arthur A. Cohen & Paul Mendes-Flohr, Contemporary Jewish Religious Thought 177-81 (1987); Louis Epstein, Sex Laws and Customs In Judaism 2-22 (1967); Feldman, supra note 22.

[171] See Gordis, supra note 22, at 10; Cohen & Mendes-Flohr, supra note 170; Epstein, supra note 170; Feldman, supra note 22.

[172] Nachmanides, Iggeret HaKodesh, The Holy Letter 144 (Seymour J. Cohen trans., 1976); see also Feldman, supra note 22, at 74.

[173] Maimonides, Hilkhot Ishut, supra note 26.

[174] See Maimonides, Hilkhot Ishut, supra note 26.

[175] See Genesis, supra note 169; Green, supra note 169.

[176] Maimonides, Hilkhot Ishut, supra note 26, at 15:17.

[177] Proverbs 19:2.

[178] See Aruch, supra note 164; ben David, supra note 164.

offspring, they allude to the lasting repercussions of treating one's wife as a sexual slave.[179] Thus, Jewish law recognizes that the harm resulting from rape is worse within the context of marriage.

In this respect, Jewish law comports with the viewpoint of at least one feminist reformer who stated, "When you are raped by a stranger you have to live with a frightened memory. When you are raped by your husband, you have to live with your rapist."[180] By acknowledging the extent and effect of the violation in marital rape, Jewish law exhibits a greater respect for marital sex than American law does.

V. DEFENSE OF OTHERS AS IT PERTAINS TO RAPE

Acting in the defense of others, like self-defense, is a recognized privilege in both American and Jewish criminal law under certain circumstances.[181] In American law, defense of others is a voluntary undertaking, whereas in Jewish law, it is an affirmative duty for certain crimes.[182] These contrasting approaches reflect different legal foundations. The American legal system emphasizes individual rights while the Jewish legal system has a greater emphasis on the community. Consequently, the American legal system declines to impose such duties upon individuals while the Jewish legal system does so unapologetically.

A. Defense of Others in American Law

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[179] See Aruch, supra note 164; ben David, supra note 164.

[180] National Center on Women and Family Law, Clearinghouse Rev., Nov. 1984 (citing Dr. David Finkelhor's testimony and statement in support of H.B. 516 to remove spousal exemption to sexual assault offenses presented to the Judiciary Committee, New Hampshire State Legislature (Mar. 25, 1981), p. 745), cited in Warren v. State, 336 S.E.2d 221, 222 n.4 (Ga. 1985).

[181] Dressler, supra note 54, at §§ 18.01, 19.01; Maimonides, Book of Torts, supra note 17, at 1:7–11.

[182] "If one person is able to save another and does not save him he transgresses the commandment, 'Neither shall thou stand idly by the blood of thy neighbor (Leviticus 19:16).' Similarly, if one person sees another drowning in the sea, or being attacked by bandits, or being attacked by wild animals, and although able to rescue him either alone or by hiring others, does not rescue him, or . . . if one acts in any similar way—he transgresses in each case the injunction, 'Neither shalt thou stand idly by the blood of thy neighbor.' [I]f one destroys the life of a single [person], it is regarded as though he destroyed the whole world, and if one preserves [the life of a person], it is regarded as though he preserved the whole world." Maimonides, Book of Torts, supra note 17, at 1:14, 1:16; also see Goldin, supra note 17.

The American legal system's absence of a communitarian ethic may encourage a reluctance to aid others.[183] In rape cases in particular, such reluctance is illustrated by examples of potential rescuers declining aid to the victim even where the aid presented no danger to the potential rescuer.

Neither American civil nor criminal law imposes an affirmative duty on individuals to rescue another except where a special relationship exists.[184] These include family relationships, contractual relationships, voluntary assumption of care, and statutorily created obligations. Outside of these exceptions, the law will not "impose upon a stranger the moral obligation of humanity."[185] The law extends this principle even to scenarios where an easy rescue is possible: "The expert swimmer . . . who sees another drowning . . . may sit on the dock, smoke his cigarette, and watch the man drown."[186] Generally, absent a special relationship, no duty to rescue exists regardless of the circumstances.

Whether a duty exists depends upon "the distinction between nonfeasance and misfeasance."[187] Nonfeasance refers to the omission of an act, and misfeasance refers to the commission of an act. Nonfeasance breaches no duty, whereas misfeasance does breach a duty.

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[183] For a discussion of societal reluctance to rescue others, see Alexander v. Maryland, 447 A.2d 880 (Md. Ct. Spec. App. 1982); Hughes v. Texas, 719 S.W.2d 560 (Tx. Crim. App. 1986) (concurring opinion); Philip P. Pan, Two Charged in '94 Slaying That Haunts Temple Hills, Women Screamed for Help, Banged on Doors, Washington Post, Oct. 21, 1995, at C3; Heroes and Good Neighbors, Cleveland Plain Dealer, Sept. 10, 1995, at 2C; Reuters, Open Ended Murder Charge in Plunge Off Detroit Bridge, San Fran. Chron., Sept. 2, 1995, at A2; Ellen Goodman, Good Samaritans, Wash. Post, March 3, 1984, Op. Ed. Another important example of reluctance to aid others is the Katharine Genovese case. New York v. Moseley, 228 N.E.2d 765 (N.Y. 1967).

[184] Restatement Second of Torts §§ 314, 314A (1965); W. Page Keeton et al., Prosser & Keeton on the Law of Torts §56, at 374 (5th ed. 1984); Lawrence M. Hettleman et al., Survey: Developments in Maryland Law, 1990-91, 51 Md. L. Rev. 804, 818 (1992). For the suggestion that common law has imposed a duty to rescue for criminal conduct, see Steven J. Heyman, Foundations of the Duty to Rescue, 47 Vand. L. Rev. 673, 689 (1994).

[185] Keeton et al., supra note 184, at 375; see Commonwealth v. Pestinikas, 617 A.2d 1339, 1345 (Pa. Super. 1992) ("A failure to provide food and medicine, in this case, could not have been made the basis for prosecuting a stranger who learned of [the victim's] condition and failed to act.").

[186] Keeton et al., supra note 184, at 375; see also Handiboe v. McCarthy, 151 S.E.2d 905, 907 (Ga. App. 1966); Daniel B. Yeager, A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers, 71 Wash U. L.Q. 1, 22-23 (1993), noting that a few states have enacted easy rescue and duty to rescue statutes.

[187] Keeton et al., supra note 184, at 373.

> The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.[188]

Thus, the law deems the "refusal to become an instrument for good" nonfeasance, and this inaction breaches no legal duty.

One reason asserted for the absence of a duty to rescue in American law is the "extreme individualism typical of Anglo-Saxon legal thought."[189] Another perspective, held by legal positivists, asserts that "good morals, or . . . humane considerations are not within the domain of the law."[190] Moreover, courts have construed the Constitution as a "charter of negative rather than positive liberties."[191] In fact, the law has discouraged people from intervening by holding them to a standard of reasonable care if the attempted rescue goes awry.[192] The enactment of Good Samaritan statutes in some states has modified this hard line position by exculpating well-intentioned rescuers from liability.[193] Whether derived from an emphasis on individualism, the separation of law and

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[188] H.R. Moch Co., Inc. v. Rensselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928); see Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 343 (Cal. App. 1976).

[189] Jonathan M. Purver, Duty of One Other Than Carrier or Employer to Render Assistance to One for Whose Initial Injury He Is Not Liable, 33 A.L.R. 3d 301, 303 (1965) (referring to Gerald L. Gordon, Moral Challenge to the Legal Doctrine of Rescue, 14 Cleveland-Marshall L. Rev. 334, 337 (1965) and Francis H. Bohlen, The Moral Duty to Aid Others As a Basis of Tort Liability, 56 U. Pa. L. Rev. 217 (1908)); Leslie Bender, A Lawyer's Primer on Feminist Theory & Tort, 38 J. Legal Educ. 3, 33 (1988).

[190] Purver, supra note 190, at 303; Ronald Dworkin, Taking Rights Seriously 326-27 (1978). See generally H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958).

[191] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); see Deshaney v. Winnebago County Dept. of Soc. Services., 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

[192] Keeton et al., supra note 184, at 377.

[193] The first Good Samaritan statute was enacted in 1959 and by 1974 over 80% of the states had them. Samuel J. Hessel, Good Samaritan Laws: Bad Legislation, 2 J. Legal Med. 40, 40 (1974), as cited in Hettleman et al., supra note 184, at 816 n.98, 818 n.118.

Good Samaritan statutes either grant immunity to anyone who assists or to health care providers. See, e.g., La. Rev. Stat. Ann. § 9:2793 (1991), as cited in Thomas C. Galligan, Jr., Aiding and Altruism: A Mythopsycholegal Analysis, 27 U. Mich. J.L. Ref. 439, 461 n.141 (1994); Cal. Health & Safety Code § 1799.102 (West 1990), as cited in Hettleman et al., supra note 184, at 819, n.120; Conn. Gen. Stat. Ann. § 52-557b (West 1991), as cited in Hettleman et al., supra note 184, at 819 n.121.

morals, or negative liberties, American law discourages intervention by potential rescuers.

One sadly notorious example of this is the New Bedford rape case.[194] A woman was preparing to leave a bar when two men knocked her down and dragged her to a pool table.[195] While three men held her down, other men raped and sexually assaulted her. Several other men in the bar did not participate in the physical assault, but encouraged the attackers. Approximately fifteen men were present in the bar during the assault. Although the specific offenders in this case were brought to justice, the nonintervening bystanders could not be prosecuted because they had violated no legal duty.[196] Thus, tragically, the law neither encourages rescue nor provides a vehicle for prosecuting those who fail to act.[197]

B. Defense of Others in Jewish Law

Jewish law imposes affirmative duties to rescue because of its emphasis on obligations human beings owe each other.[198] For the crime of rape, Jewish law recognizes an affirmative duty to rescue on the part of any witness.[199] The witness is required to kill the attempted rapist if necessary to prevent the rape. If the rapist's death results, the law recognizes it as justifiable homicide unless the rescuer did not attempt a less drastic means first.[200] The legal fiction justifying killing here is similar to the one justifying killing to prevent a murder—just as the law infers that a person would rather be killed than shed blood, it also infers that a person would rather be killed than transgress the law of rape.[201] Thus, the death is justifiable because the transgressor did not really want to break the law. While the affirmative duty to prevent rape does emphasize the prevention

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[194] Commonwealth v. Vieira, 519 N.E.2d 1320 (Mass. 1988). For another example, see Austin Wehrwein, Nat'l L.J., Aug. 22, 1983, at 5; see also cases cited supra note 183.

[195] Vieira, 519 N.E.2d at 1321.

[196] Id. at 1320.

[197] In other instances, it has been suggested that the lack of assistance does not indicate an unwillingness to get involved. Rather, the witnesses assume from the large number of other witnesses that someone else will call for help. "This diffusion of responsibility operated to relieve everyone of the need to become involved." Mark F. Anderson, Encouraging Bone Marrow Transplants From Unrelated Donors: Some Proposed Solutions to a Pressing Social Problem, 54 U. Pitt. L. Rev. 477, 526 (1993).

[198] 11 Encyclopedia Judaica, supra note 15; see Eliash, supra note 15.

[199] Maimonides, Book of Torts, supra note 17; see Goldin, supra note 17, at 177.

[200] See Maimonides, Book of Torts, supra note 17; Goldin, supra note 17.

[201] The Babylonian Talmud, Seder Mo'ed, Yoma, 404 (Rabbi Dr. I. Epstein trans., 1938).

of illegal acts, the corollary emphasis is on preventing harm within the community.

Thus, in imposing affirmative duties to rescue, Jewish law parallels the approach advocated by American legal reformers. Classical liberal philosophers have emphasized the duty to prevent criminal conduct,[202] while some feminist thinkers have criticized the traditional American approach for its failure to recognize the interconnection between people in society.[203] Like these thinkers,[204] the Jewish approach in imposing affirmative duties to rescue for rape reinforces the importance of intervening on behalf of strangers. In contrast, the New Bedford rape case is representative of the shocking apathy of bystanders condoned by American rape laws. Given the discouragement to rescue inherent in the American legal system, this apathy is understandable. A legal system that emphasizes the interconnectedness of each member of society is perhaps more likely to achieve fairer results by encouraging others to intervene.[205] Thus, Jewish law reaches a more empathetic result in rape law through its emphasis on helping members of the community.

VI. CONCLUSION

The overarching theme of this Article is that Judaism offers a more protective legal system for rape victims than does American law. This idea can be summarized into four main points. First, the emphasis on the victim's consent in Jewish law is an important example of what the primary issue is in rape cases. Jewish law perceives the unique harm to the victim by focusing on her perspective. Second, Judaism's history of acknowledging marital rape exemplifies the respect that legal systems should accord women. Third, Jewish law is not hindered by the American bias against women's sexual activity. Because it lacks these underlying sexual stigmas, Jewish law acknowledges that rape victims are unlikely to fabricate a rape charge. Whereas American law requires corroboration in

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[202] Heyman, supra note 184, at 692–93; Bender, supra note 189, at 32–34.

[203] Bender, supra note 189, at 32–34; Carol Gilligan, In a Different Voice 242 (1982).

[204] See Heyman, supra note 184, at 692–93; Bender, supra note 189, at 32–34; Gilligan, supra note 203.

[205] "As a framework for moral decision, care is grounded in the assumption that self and other are interdependent, an assumption reflected in a view of action as responsive and, therefore, as arising in relationship rather than the view of action as emanating from within the self. . . ." Gilligan, supra note 203, at 24; see Anne Cucchiara Besser & Kalman J. Kaplan, The Good Samaritan: Jewish and American Legal Perspectives, 10 J.L. & Religion 193 (1993–94).

rape trials, Jewish law presumes rape where no corroboration is available. Finally, the fact that Jewish law imposes a duty on individuals to rescue a rape victim creates an "ethic of caring" that is missing from American law.

Despite the conclusion that Jewish law is more sympathetic to rape victims, American law has made great strides in improving the law of rape. It has shed much of its old veneer of sexism by abolishing former requirements such as evidence of resistance. In addition, the enactment of rape shield statutes upholds the dignity and privacy of rape victims.[206] However, while practices have changed, underlying sexual stereotypes are more difficult to eradicate.

Realistically, Jewish law is not a feasible model upon which to base changes in American law. The Jewish legal system works for a relatively small and cohesive group with a common religious bond. In contrast, the American legal system applies to a very large, diverse population with a common bond only in nationality. Despite similarities in certain patriarchal concepts, such as the notion of women as property, Jewish and American laws are informed by very separate traditions.

Even if American law were effectively modelled after Jewish law, it would be impossible to foretell if the change would cause the desired effect. If American law imposed an affirmative duty to rescue, more rescues would not necessarily result. However, comparing the two systems does demonstrate that alternative approaches exist.

Moreover, such changes would send a message to society. Because the law embodies standards of conduct, the law at a minimum provides guidance as to the parameters of societal behavior. Thus, the law should embody standards that inform society of changes in attitude toward rape. Although it is unclear how this message may be received, it nevertheless will crucially affect how rape victims are treated both in court and in society.

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[206] Congress and many states have enacted rape shield statutes which prevent the victim's previous sexual behavior from being admitted into evidence. For examples of rape shield statutes, see Ala. Code § 12-21-203 (1975); Alaska Stat. § 12.45.045 (1994); Ark. Code Ann. § 16-42-101 (Michie 1994); Colo. Rev. Stat. Ann. § 18-3-407 (Bradford 1986 & Supp. 1994); Conn. Gen. Stat. Ann. § 54-86f (West 1958); Fla. Stat. Ann. § 794.022 (West 1995); Ga. Code Ann. § 24-2-3 (Michie 1994); 725 ILCS 5/115-7 (1994); Kan. Stat. Ann. § 21-3525 (1993); Md. Code Ann. Art. 27 § 461a (Michie 1992 & Supp. 1994); Mass. Gen. Laws Ann. ch. 233, § 21B (West 1994); Mich. Comp. Laws Ann. § 750.520j (West 1994). They enacted these laws to countermand the common law rule which permitted such evidence. At common law, the parties could introduce evidence of the victim's sexual history which would then be subject to cross-examination. Recognizing that the victim's past behavior had no bearing on the issue of her consent in the instant case, the legislatures prohibited its admission during trial. Fed. R. Evid. 412 (1993); Mueller & Kirkpatrick, Evidence Under the Rules 496 (1988).