Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles

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Introduction

"I feel as never before that this whole question of women's rights turns on the pivot of the marriage relation, and, mark my word, sooner or later it will be the topic for discussion."[1]

Marriage[2] historically has functioned as a cornerstone of family and society.[3] In recognition of the importance of marriage, the law has sought to promote marital unity.[4] The traditional common law conception of marital unity was that "man and wife are one — but the man is the one."[5] This view of the marital regime was premised on severely unequal marital roles. As "the one," the husband exercised almost complete authority over his wife in the home and had complete authority to speak for her outside the home.[6] The wife, as less than "the one," held very little authority in marriage or

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1. JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 276 (1991) (quoting 1853 letter from Elizabeth Cady Stanton to Susan B. Anthony).

2. This article discusses marriage as a legal union between a woman and a man. Same-sex marriage is not explored here. For a discussion of this issue, see Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539 (1991).

3. *See, e.g.*, Maynard v. Hill, 125 U.S. 190 (1888). Marriage "is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society." *Id.* at 211. The Supreme Court has characterized marriage as a fundamental right. Loving v. Virginia, 388 U.S. 1, 12 (1967).

4. *See, e.g.*, DeBurgh v. DeBurgh, 250 P.2d 598 (1952). "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life .... Since the family is the core of our society, the law seeks to foster and preserve marriage." *Id.* at 601. States provide married couples with a number of benefits, including parenting and custody rights, health care for spouse and dependents, bereavement leave, tax benefits, inheritance and property rights, pensions, and social security. Wilson, *supra* note 2, at 540.

5. Glanville L. Williams, *The Legal Unity of Husband and Wife*, 10 MOD. L. REV. 16, 18 (1947).

6. "A man has just as good a right to his wife, as to *the property* acquired under a marriage contract." Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 696 (1819) (Story, J., concurring) (emphasis in original). The authority of the husband in early American law is described "as unquestioned as that of a military officer." ROB-

society.[7] As a result, common law tradition steadfastly held married women in a private and subordinate position while granting husbands the decision-making authority. By promoting these traditional ideas of marital unity, the law bolstered and validated this extreme power imbalance in marital roles.[8]

This article argues that courts and legislatures continue to conceptualize and promote marital unity based on hierarchical marital roles which grant husbands an extensive amount of authority over their wives. Married women remain constrained by a legal and legislative climate unsympathetic to their need for equality. Part I presents an historical overview of marriage, focusing on the ways in which the common law traditionally relegated wives to a subordinate role, and explores some of the forces that eventually prodded American courts and legislatures into allowing married women more decision-making power. Parts II and III illustrate that despite increasing equality in the status of married women, common law views of unequal marital roles continue to shape judicial decisions and legislative action.

Part II discusses the confidential communication privilege in evidence law. The confidential communication privilege, which is aimed at fostering marital unity, largely functions to prevent the witness-wife[9] from testifying against her defendant-husband,[10] thereby silencing the wife and maintaining her subordinate status.

ERT O. BLOOD, JR. & DONALD M. WOLFE, HUSBANDS & WIVES: THE DYNAMICS OF MARRIED LIVING 3 (1960).

7. A wife's "great virtue was submissiveness and obedience to the will of her spouse . . . . [N]o one wished to consider what [wives] might do on their own account or for their own reasons." John Demos, *The American Family in Past Time*, *in* FAMILY IN TRANSITION 59, 68 (Arlene S. Skolnick & Jerome H. Skolnick eds., 2d ed. 1977).

8. *See, e.g.*, Bradwell v. Illinois 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring).

> [C]ivil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . . The harmony . . . [of] the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Id. at 141.

For an example of the persistence of this judicial approval of law mandating unequal marital roles, see Hoyt v. Florida, 368 U.S. 57 (1961), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Id.* at 61-62.

9. For an explanation of why this article uses this gender-specific term, see *infra* note 131.

10. *See infra* note 131.

Part II concludes by proposing two modifications to this privilege to ensure that it is no longer used to attain a type of marital unity premised on depriving a married woman of decision-making authority.

Part III discusses the husband notification requirement that the Supreme Court invalidated in *Planned Parenthood v. Casey*[11] by a five to four vote. The aim of the requirement was to foster marital unity by compelling married women seeking an abortion to notify their husbands of their decision. The majority opinion illustrates the law's progress away from common law notions of marital unity, which were premised on unequal marital roles, while the dissenting opinion shows how stubbornly some portions of the judiciary cling to these traditional roles.

The article concludes that the law's current attempts to promote marital unity are dangerous failures. Common law perceptions of a married woman's proper, subordinate role continue to shape and mold the thinking of large segments of the courts and legislatures. This thinking cannot be regarded as a safely sentimental attachment to history and tradition, but must be recognized as a threat to a woman's full and equal status in marriage and in society. Courts, legislatures and society at large must confront the troubling history of unequal marital roles and refuse to tolerate the continuance of these roles. The article ends by offering a number of suggestions on how the legal community can change to grant women equal status in marriage.

I. Marital Authority in America

A. *Lost Streams: America's Inheritance From England*

"[W]edlock is a locking together. It is true that man and wife are one person; but understand in what manner. When a small brooke or little river incorporateth with . . . the Thames, the poor rivulet looseth her name; . . . A woman, as soon as she is married, is called covert; . . . she hath lost her streame."[12]

American marriage law developed from a patriarchal background.[13] The United States' legal conception of marriage is founded in English common law, which sprang from the feudal doc-

11. 112 S. Ct. 2791 (1992).

12. THE LAWES RESOLUTION OF WOMEN'S RIGHTS (1632) *reprinted in* 1 WOMEN IN AMERICAN LAW 27 (Marlene Stein Wortman ed., 1985) (emphasis in original).

13. BLOOD & WOLFE, *supra* note 6, at 15; *see also* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 7 (1986) (noting that the Puritans "created a social and legal system in America that personified [patriarchy]").

trine of coverture.[14] In modern terms, coverture is defined rather innocuously as the principle of marital unity.[15] William Blackstone's *Commentaries* more dramatically describe coverture as it existed in eighteenth century England: "[T]he husband and wife are *one person in law*: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[16] This view of marital unity placed husbands in a position of economic control over their wives because the act of marriage deprived the women of their legal personality.[17] Specifically, coverture meant that married women forfeited control of their real property to their husbands and relinquished all rights to chattels owned at the time of marriage.[18] Married women also lost the right to contract and to sue.[19] Additionally, wives were absolved of certain crimes they committed in the presence of their husbands, because the law presumed they acted at their husbands' direction.[20] Moreover, the marital prop-

14. LEO KANOWITZ, WOMEN AND THE LAW 35 (1969). The concept of male dominance embedded in this doctrine has been traced to early biblical interpretation. *Id.* at 35, 37; *see also* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975). For an explanation that offers some economic reasons for this traditional male-female arrangement of power, see Judd Marmor, *Changing Patterns of Femininity*, *in* FAMILY IN TRANSITION 210 (Arlene S. Skolnick & Jerome H. Skolnick eds., 1971). "With the evolution of agriculture, and the gradual development of private property, the transfer of property from father to son became a paramount socio-economic factor, and families began to be organized along patrilineal lines . . . . [G]radually woman began to occupy a more and more subordinate role as a sexual chattel of man." *Id.*

15. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 14 ("Traditional images of family and gender roles became embodied in 'coverture', the legal principle of marital unity. From this concept flow the particular rights, obligations, and legal disabilities of a wife.").

16. 1 WILLIAM BLACKSTONE, COMMENTARIES *430 (1765) (emphasis added). This description concerns the legal conception of marriage. The common law pictured an "ideal" marriage between affluent parties. SALMON, *supra* note 13, at 14. The reality for the majority of married couples differed greatly. However, the common law's ideal of marital unity is explored in this article because the law pursued the ideal for generations. Over this period of time, and continuing into the present, the law has attempted to impose these "ideal" marital roles on marriages.

17. Marriage at this time was generally a permanent commitment. Aside from extremely rare private divorce bills issued by Parliament, divorce was not allowed in England until 1857. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 181 (1973).

18. KANOWITZ, *supra* note 14, at 36.

19. 1 BLACKSTONE, *supra* note 16, at *432; *see infra* notes 24-25 and accompanying text.

20. *Id.* The grant to women of immunity from criminal prosecution in certain instances "depend[ed] upon a sex-based discriminatory practice." KANOWITZ, *supra* note 14, at 89. This immunity was based on the doctrine of presumed coercion. *Id.* at 88. The doctrine was premised on the notion that "where a crime . . . was committed by a married woman conjointly with or in the presence of her husband, prima facie she was not liable, as it was presumed that she acted in obedience to his commands and under his coercion." O'Donnell v. State 117 P.2d. 139, 141 (1941). This

erty laws enforced the authority of the husband over the family.[21] Lastly, the common law expressly held that married women were inferior to their husbands, and considered married women incapable of independent thought or action.[22]

Marriage also imposed duties upon husbands. Husbands were obliged to support their wives, although this obligation did not extend beyond providing wives with necessities.[23] Placing the duty on husbands to support their wives relieved the state of its burden of supporting women who, faced with the economic and social constraints of the time, would have been rendered destitute.[24] Husbands also were held responsible for their wives' premarital debts, as well as all debts that occurred during the marriage.[25]

Two additional aspects of the common law on marriage are helpful in establishing the eighteenth century legal view of married women. First, the common law permitted a husband to physically discipline his wife.[26] The English common law's grant of physical

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absolution, however, did not extend to treason or murder. 1 BLACKSTONE, *supra* note 16, at *432. The Supreme Court repudiated the blanket presumption of coercion in U.S. v. Dege, 364 U.S. 51 (1960). However, a modified version of the presumption still exists in some jurisdictions and is still an issue in criminal proceedings. *See, e.g.*, State of Missouri v. Isa, 850 S.W.2d 876 (1993) (rejecting a modified claim for the coerced presumption by appellant-wife. Mrs. Isa was appealing a conviction of first degree murder of her daughter committed in the presence of the appellant's husband.).

21. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 13. The common law marital property regime endowed the husband with control over the real property, including property brought into the marriage by the wife. *Id.* at 14. Upon the death of her husband, the wife received a dower right which allowed her a life interest in up to 50% of her husband's real property. *Id.* at 17. This dower right did not permit the wife to sell or give away the property. *Id.* at 18. "A wife, in practice, was a tenant." *Id.*

22. "But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion." 1 BLACKSTONE, *supra* note 16, at *432. Thus, the wife was held to be under the wing, protection and cover of her husband, for whom she was to perform everything. *Id.* at *430.

23. *Id.* at *430.

24. While single women could not vote or serve on juries, they could contract and own property. KANOWITZ, *supra* note 14, at 35.

25. The wife's debts were shifted to her husband because through the act of marriage he had "adopted her and her circumstances together." 1 BLACKSTONE, *supra* note 16, at *430-31. Additionally, a wife could not sue without her husband's "concurrence" nor could she be sued without the husband being made a defendant. *Id.* at *431.

26. A husband legally was allowed to "give his wife moderate correction." 1 BLACKSTONE, *supra* note 16 at *432. Blackstone also observed that "this power of correction was confined within reasonable bounds." *Id.* Reasonable correction meant that a husband could use a switch to "chastise" his wife if the "switch were no bigger than his thumb." Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 177 (1982) [hereinafter *The Equality Crisis*].

power to the husband was supported by a seemingly evenhanded and dispassionate rationale. Blackstone noted that "[f]or, as [a husband] is to answer for [a wife's] misbehavior, the law thought it *reasonable* to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his *servants or children*."[27] Common law thus pointedly grouped married women with populations perceived as less capable and untrustworthy.[28] These populations, like married women, were accorded low social status and were legally deprived of a large measure of their autonomy.

Second, neither husband nor wife was allowed to testify against the other because this would entail the anomaly of one legal personality effectively testifying against himself.[29] This English common law mandate was divided into two separate prohibitions: the adverse testimony privilege and the spousal disqualification doctrine.[30] The adverse testimony privilege applied in civil and criminal cases.[31] Early English common law granted the husband the power to hold the privilege, meaning that he decided whether to allow his wife to testify against him.[32] The spousal disqualification doctrine, which can be seen as the flip side of the adverse testimony privilege, automatically deemed a wife incompetent to testify *for* her husband because courts reasoned that the husband's and wife's

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27. 1 BLACKSTONE, *supra* note 16, at *432 (emphasis added). Blackstone used much the same language in explaining that a teacher's authority permitted the teacher to physically discipline students. *Id.* at *134. The teacher-student relationship, like the common law master-servant, parent-child, and husband-wife relationships, was premised on the notion that the wiser party justifiably held power over the less rational and less capable party.

28. Another example showing that the common law equated married women with these populations is that the law absolved servants of many crimes. *Id.* at *417. As with married women, the law assumed the servant acted at the master's (husband's) express or implied command. *Id.*

29. *Id.* at *431. *See also* 8 J. WIGMORE, EVIDENCE § 2227 (McNaughton rev. 1961).

30. 8 WIGMORE, *supra* note 29, at § 2227. The spousal disqualification doctrine and the adverse testimony privilege both served to silence spousal testimony "regardless of the actual testimony to be elicited." JOHN W. STRONG, 1 MCCORMICK ON EVIDENCE §§ 78, 79 (4th ed., 1992) [hereinafter MCCORMICK]. In 1853, a third privilege was statutorily enacted in England. *Id.* The privilege, which survives in America, is called the "confidential communication privilege." *Id.* This additional privilege is examined *infra* Part II.

31. Richard O. Lempert, *A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725, 726 (1981). The first known reference to the privilege is in a 1580 English case. 8 WIGMORE, *supra* note 29, § 2227. The privilege appears in statutory law in the second half of the nineteenth century. Joseph A. Fawal, Note, *Questioning the Marital Privilege*, 7 CUMB. L. REV. 307, 310 n.25 (1976).

32. Fairly early on in the development of the privilege, courts allowed an exception if the wife had been seriously injured by the husband and her testimony was the only means of convicting the husband. MCCORMICK, *supra* note 30, § 66.

interests inevitably were identical.[33] Courts found that because the husband was unable to testify on his own behalf due to his self-interest,[34] the wife similarly was disabled since her interests automatically mirrored her husband's.[35] Both the privilege and the incompetency doctrine were intended to promote marital unity[36] and both historically silenced the wife rather than the husband.[37]

As described by Blackstone and others, the common law plainly regarded the husband as the responsible party in the marriage.[38] The husband resided at the summit of the hierarchy over wife and family.[39] A husband's financial obligations were great, but so were his authority and status in the public world and in the private home.

Wives, meanwhile, existed at a subordinate and silent position in both the public and private realms.[40] The benefits they received from marriage were premised on their civil death and rebirth as

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33. 8 WIGMORE, *supra* note 29, § 2228. Identical interests meant that the husband's interests were considered the interests of the marriage. *See* Fawal, *supra* note 31, at 308 ("[T]his rule of exclusion was originally based upon the metaphysical premise of Lord Coke that husband and wife were one . . . . [T]he wife was assimilated with the husband and shared his disqualification as an interested party.").

34. The "then current judicial belief [wa]s that interested parties were not credible witness in their own causes." Note, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208 (1961) [hereinafter *Husband-Wife Privileges*].

35. By assuming that the wife's interests were inevitably identical with her husband's, the law again indicated its conception of married women as less than independent, less than capable, and literally "incompetent."

36. Blackstone expressly linked the privilege and the doctrine, stating that "in trials of any sort, [husband and wife] are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent; but *principally because of the union of person*." 1 BLACKSTONE, *supra* note 16, at *431 (emphasis added); *see also* JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 344 (1827). "The reason [behind both the adverse testimony privilege and the disqualification doctrine] that presents itself as . . . likely to have been the original one, is the grimgribber, nonsensical reason, . . . Baron and Feme are one person in law. . . . This quibble is the fountain of all reasoning." *Id.*

37. "[T]he early cases all deal with the privilege for a wife's testimony against her husband (not the husband against the wife)." 8 WIGMORE, *supra* note 29, § 2227; *see also* Lempert, *supra* note 31, at 727 (noting that "from the mid-seventeenth century on, only a handful [of cases] involve men in a position to incriminate their wives"). This has been attributed to the historically greater number of male defendants than female defendants. *Id.* As to the incompetency doctrine, see Note, *Developments in the Law - Privileged Communications*, 98 HARV. L. REV. 1450, 1564 (1985).

The confidential communication privilege, referred to *supra* note 30, also is intended to promote marital unity and often its effect is to silence the wife rather than the husband. *See infra* discussion Part II.

38. *See supra* notes 16-25 and accompanying text.

39. Husbands held legal authority over their children until the children attained the age of twenty-one. 1 BLACKSTONE, *supra* note 16, at *441. Wives possessed no legal authority over their children. *Id.*

40. One modern commentator has noted that at least the "wife was not reduced to the position of, say, a dog." Williams, *supra* note 5, at 18.

economic and legal responsibilities for husbands to bear. As legal nonentities, married women's independent economic potential was severely limited, which required that they remain under the protection and authority of their husbands.[41] The legal disabilities placed on married women, such as the inability to contract or to own property, generally rendered them incapable of resolving their debts independently. The law's forgiveness of married women for their debts and crimes was motivated by the belief that married women were incapable of bearing responsibility for their actions.[42] The adverse testimony privilege and the incompetency doctrine also communicated this belief.[43]

Blackstone failed to acknowledge that the legal impediments imposed on married women partly provoked married women's helplessness. Rather, Blackstone presented the common law not as a culprit, but as an ally to married women.[44] Equity jurisprudence began to address the handicaps that the common law "protections" imposed on married women.[45] The equity courts diminished some of the financial disadvantages women encountered in marriage by employing trusts, which allowed married women to hold real or per-

41. Professor Glendon notes that marital property law traditionally has represented an ideological statement about marriage and marital roles. Mary Ann Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21, 23 (1974). The fact that married women were denied control of their property indicates that the law pictured a married woman's proper role as one devoid of authority and under the control of their husband. *Id.*; *see also* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1043 (1972) (arguing that studying the common law system in conjunction with property law reveals assumptions about marital roles).

42. Remnants of this forgiveness persist in the current American criminal justice system. *See* HILARY ALLEN, JUSTICE UNBALANCED: GENDER, PSYCHIATRY AND JUDICIAL DECISIONS 10 (1987) (commenting on the criminal justice system's continued reluctance to criminalize women or to subject them to the most severe penalties).

43. One commentator noted that the privilege should be abolished because it "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime." 5 BENTHAM, *supra* note 36, at 338. This statement assumed that married women were too weak-minded and weak-willed to ever resist their husbands' commands.

44. The disabilities a married woman faced at common law "are for the most part intended for her protection and benefit." 1 BLACKSTONE, *supra* note 16, at *433. Blackstone closed his discourse on the law between husbands and wives with the solemn editorial comment that these disabilities evidence how "great a favourite is the female sex of the laws of England." *Id.* Almost two hundred years later, the Supreme Court characterized this comment as "self-deluding romanticism." United States v. Dege, 364 U.S. 51, 54 (1960).

45. *See, e.g.*, 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 15. As to the severity of English marriage law, one commentator has noted that "the English system was tolerable . . . only for upper-class landowners, and even then only because of the institutions mitigating its impact." FRIEDMAN, *supra* note 17, at 185. For a good summary of the impact of common law marital rules and equity in eighteenth century England, see Johnston, *supra* note 41, at 1044-57.

sonal property as single women, free from their husband's control.[46] In contrast to married women's disabilities in the courts of law, the courts of equity permitted a rudimentary capacity to contract.[47] This anomaly between married women's legal death in the common law courts and their apparent resurrection in equity courts indicates that even Blackstone's era began to recognize that the notion of marital unity premised on the complete legal disappearance of wives was, if not unjust, at least severely impractical.

The equity courts presented only limited avenues for avoiding the common law marital hierarchies.[48] Even the allowances made by equity courts on behalf of married women reinforced existing societal attitudes regarding the incompetency of married women. For example, before it was applied to married women, the equitable trust had been used only to protect minors and persons of diminished mental capacity.[49] As with Blackstone's description of husbands' power of domestic chastisement, equity expressly linked married women with populations inherently less capable and competent, and who therefore required protection.[50]

For all its tempering effects, then, the use of equity[51] resembled the common law system in two key respects. First, the benefits

46. KANOWITZ, *supra* note 14, at 38. An equitable estate could be created either by pre or post-nuptial agreement or upon the husband's "invoking the assistance of a court of equity to reduce the wife's choses in action to possession." *Id.* A married woman could dispose of her equitable estate by will, gift, or conveyance unless the instrument creating the estate prevented her from doing so. *Id.*

47. *Id.* at 39.

48. Equitable trusts were designed and served only to assist the rich and therefore aided a relatively small population. FRIEDMAN, *supra* note 17, at 185. In addition, equity addressed only property and contract rights and failed to "reflect any fundamental social change in attitudes toward women." KANOWITZ, *supra* note 14, at 39. The fictional unity of the husband and wife persisted to form the basis of criminal, tort, evidence, and family laws that discriminated against married women. *Id.*

49. KANOWITZ, *supra* note 14 at 39-40. In the language of the times, equity traditionally was used on behalf of "infants and idiots." *Id.*

50. *See, e.g.*, HOFF, *supra* note 1, at 123 (explaining that equity jurisprudence was based on the traditional notion that women needed to be protected through special treatment).

51. In addition to equity, one other mitigating effect on the otherwise harsh law of marriage should be noted. Courts of law allowed women to make antenuptial contracts in order to ensure that their families retained control over the property that the women brought into marriages. As with equity, several factors indicate that such contracts had only a limited impact on the status of married women. First, the courts' willingness to recognize such contracts stemmed from the English aristocracy's concerns over property rights rather than a desire to provide legal impetus for a more balanced husband-wife relationship. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 19; *see also* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 88 (1989) [hereinafter TRANSFORMATION]. Additionally, while these antenuptial contracts ostensibly granted women more authority and control in the marriage, courts did so to quiet the fears of the woman's family. 1 WOMEN IN AMERICAN LAW, *supra*

of equity aided married women in some concrete ways (*e.g.*, allowing them to own property), while at the same time equity reinforced stereotypical images of women's helplessness, or worse, their incompetence. Second, neither system allowed married women to decide the degree of authority they should hold in marriage. In equity courts, the chancellor decided this issue; in common law courts, the judge guarded the common law tradition which granted husbands the power of decision. The views of married women were silenced by both systems.[52]

The common law's image of marital unity along with the tempering influence of equity combined to create a guardian/ward relationship between husbands and wives.[53] A guardian/ward relationship, by definition, establishes unequal roles because the concept of guardianship stems from the assumption that the guardian is more capable of speaking for the ward than the ward.[54] By tacitly appointing husbands as guardians, the English common law gave husbands the voice and authority within marriage, and at the same time "protected" helpless married women from themselves, and shielded society from untrustworthy and irrational married women. English common law deemed this unequal arrangement of marital power as reasonable and just for all parties concerned.[55] This marital regime, in which power was aligned along gender lines, served as the model for marriage in America.

B. The Right to Direct — Marital Authority in America

"Americans [n]ever supposed that democratic principles should undermine the husband's authority and make it doubtful who is in

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note 12, at 19. What seems likely, then, is that the acceptance of antenuptial contracts served, at least initially, to protect and foster the interests, not of the woman but of her blood relatives. TRANSFORMATION, *supra*, at 88. Lastly, the tempering legal influence of the courts of law, like equity, was limited to wealthy families and thus failed to balance power distributions in the vast majority of marriages. *Id.*

52. Women's silence in the face of society and the law has been noted by a number of writers. *See, e.g.*, CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED 163 (1987). For a commentary on women's silence, see HOFF, *supra* note 1, at 19, 35. The confidential communication privilege in evidence law continues to silence married women. *See* discussion *infra* part II.

53. Williams, *supra* note 5, at 18; *see generally*, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.1 (2d ed., student edition, 1988) (supplying a useful history of the legal relationship created by marriage).

54. A guardian is "[a] person lawfully invested with the power, and charged with the duty, of taking care of the person . . . who, for defect of age, understanding, or self-control, is considered incapable . . . ." BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

55. *See supra* note 44 and accompanying text.

charge of the family . . . . They therefore never deny him the right to direct his spouse." [56]

Marriage in early America was in many respects an economic matter[57] premised on the same sort of unequal marital roles as in England.[58] This similarity is not surprising because all the states[59] adopted Blackstone's version of the common law on marriage.[60] As in England, husbands were required to support their wives[61] and wives were required to obey their husbands.[62] The extensive authority of the husband was generally taken for granted.[63] Courts routinely denied wives their ownership, contractual, professional and civil rights, reasoning that married women lacked legal

56. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 324 (George Lawrence trans., 2d ed. 1990).

57. Daughters passed from the economic control of their parents to the control of their husbands. HOFF, *supra* note 1, at 282.

58. "To become a husband or a wife was to inhabit a legal role, a legal personality, that carried with it strong and stringent public expectations as to conduct and responsibility. That legal person, that collection of legal rights and duties - the husband, the wife - existed regardless of an individual's relative discontent with the identity." Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 97 (1991).

59. "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878). Because marriage was deemed a state responsibility, reform of the marital regime has proceeded on a piecemeal basis, state by state. *See* HOFF, *supra* note 1, at 280 (explaining conjugal relationships as regulated by state law, with the federal government or the Supreme Court intervening only when "the states appear to be infringing upon the private rights of individuals").

60. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 14. Blackstone's works provided "a primary reference on women's position through most of the nineteenth century" in America. *Id.* at 15; *see also* HOFF, *supra* note 1, at 88-89 (noting that Blackstone's *Commentaries* were used to train attorneys and as a guide in codifying American law).

Some differences did exist between marriage in England and marriage in early America. For example, common law marriages were recognized in early America, perhaps due to a scarcity of clergy able to perform the wedding ceremony and a dispersed population. FRIEDMAN, *supra* note 17, at 180. Divorce also seems to have been slightly easier to obtain in early America than in England. *Id.* at 181. Although, even in early America, the availability of divorce varied by regional area. *Id.*

61. The common law, as adopted by early America, imposed on husbands the obligation to support their wives. KANOWITZ, *supra* note 14, at 70. However, "[t]he precise nature of the husband's legal duty to support his wife is . . . rarely ever articulated while the marriage is in progress." *Id.* Some courts defined the husband's support obligations extremely narrowly. *See, e.g.*, McGuire v. McGuire, 59 N.W.2d 336 (1953) (finding that although the husband refused to purchase clothes for his wife over a period of years and also refused to install indoor plumbing, the husband nonetheless adequately supported his wife).

62. Demos, *supra* note 7, at 63 (explaining a woman's position within marriage as "distinctly subordinate").

63. "[T]he husband's economic and social roles almost *automatically* gave him pre-eminence." BLOOD & WOLFE, *supra* note 6, at 29 (emphasis added).

personalities separate from their husbands.[64] Also, America adopted[65] from England the adverse testimony privilege[66] as well as the spousal incompetency doctrine.[67] The American courts thus implicitly accepted that married women should not be given the power to testify against their husbands and the notion that wives' interests inevitably mirrored their husbands' interests.

Given the widespread belief that married women were less capable than their husbands, the legal handicaps placed on married women generally were accepted and endorsed by society.[68] Legal opinions have objectified married women to the extent that they are defined as a property interest upon which husbands have a right of

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64. HOFF, *supra* note 1, at 22. Interestingly, as in England, single women in America held more rights than their married counterparts and were allowed to contract and to sue and be sued. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 89. Perhaps one reason single women were permitted these rights was simply because the vast majority of women were married. Michael Grossberg, *Guarding the Altar*, *in* LAW, SOCIETY AND DOMESTIC RELATIONS 198 (Kermit L. Hall ed., 1987) (almost ninety percent of men and women were married); *see also* MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN 53 (1988) (In some English dialects in early America, the word "wife" was synonymous with the word "woman."). "[C]olonial laws encouraged white women and men to marry. . . ." *Id.* at 55. Allowing limited rights to a small population of unmarried women may not have been perceived as any great threat or concession to the then existing marital regime. This dichotomy between a married woman's rights and a single woman's rights continues today. *See infra* parts II and III.A.

65. "Prior to the enactment of legislation governing the applicability of common law privileges in federal proceedings, United States federal courts assumed that all such privileges applied and, in the absence of legislation, could be modified as the courts saw fit." Amy G. Bermingham, Note, *Partners in Crime: The Joint Participants Exception to the Privilege Against Adverse Spousal Testimony*, 53 FORDHAM L. REV. 1019, 1023 (1985) (citing Wolfe v. United States, 291 U.S. 7 (1934)).

66. Stein v. Bowman, 38 U.S. 209 (1839), was the earliest Supreme Court case to recognize the privilege. "Public policy and established principles forbid [the wife's voluntary or compelled testimony]. This rule is founded upon the dearest and soundest principles of our nature." *Id.* at 223.

As construed by courts in this country, the privilege commenced upon marriage and terminated when the marriage ended. MCCORMICK, *supra* note 30, § 66. Exceptions were allowed in criminal prosecutions against the husband for bodily injury to his wife. *Id.* These exceptions were expanded to include cases of bigamy, adultery, rape, crimes against the child of either spouse, and support proceedings. *Id.* at n.11. There is some authority to suggest that the early privilege expressly prevented wives from testifying against their husbands and only later became a gender-neutral prohibition. *See* People v. Hamacher, 438 N.W.2d 43, 55 (Mich. 1989) (Boyle, J., dissenting).

67. In Jin Fuey Moy v. United States, 254 U.S. 189 (1920), the Court found the disqualification doctrine to be so well established that it "hardly requir[ed] mention." *Id.* at 195.

68. The Old Testament's patriarchal model, economics, and the law contributed to this conception. ABRAMOVITZ, *supra* note 64, at 54. There were also unspoken but unmistakably real feelings of suspicion and fear toward women generally. Demos, *supra* note 7, at 63.

control.[69] Societal norms have supported the image of wives as controlled pieces of property. Simultaneously, the public approval of such legal decisions indicates that the law shaped and validated unequal marital roles.[70]

American equity courts helped alleviate some of the harshest restrictions which the courts of law imposed on married women.[71] As in England, these equitable means of counteracting the severity of the common law were limited.[72] Moreover, by grouping women with less capable, less rational, and less trustworthy populations and emphasizing their perceived weakness,[73] the law of equity also

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69. *See, e.g.*, Dartmouth College v. Woodward, 17 U.S. (1 Wheat.) 518, 696-7 (1819) (Story, J., concurring).

> A man has just as good a right to his wife, as to *the property* acquired under a marriage contract. He has a legal right to her society and her fortune; and to devest [sic] such right without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate.

Id. (emphasis in original).

70. "[W]hatever is authoritatively *said* creates reality." MACKINNON, *supra* note 52, at 220 (emphasis in original); *see also* HOFF, *supra* note 1, at 105. "*Dartmouth College* is . . . important as a general reflection of how entrenched the social construction of married women according to Blackstonian views on their common-law disabilities was within the top echelon of the judicial system. . . ." *Id.*

71. Equity, through antenuptial agreements and bequests, made it possible for wives to control the use and "disposition of the property [they] brought into marriage or acquired during marriage." 1 WOMEN IN AMERICAN LAW *supra* note 12, at 20. Although equity permitted married women the ability to control such property, in reality women were far more concerned with the right to bequeath their property to persons of their choosing. *Id.* Inheritance served as an important method of obtaining capital in early America, and the power to bequeath was a key determinant to the next generation's status. *Id.* Therefore, "the ability to choose a beneficiary . . . [was] central to the issue of power and status." *Id.* This increased control and independence was perceived as troublesome because it changed the otherwise inviolate structure of authority within marriage and was therefore thought to undermine unity. *Id.*

72. Several factors limited the mitigating impact of equity. First, in theory as well as in practice, the laws governing the marriage regime expressed the values of elites. *See* TRANSFORMATION, *supra* note 51, at 88 (commenting on the ignored needs of the middle and lower classes during the eighteenth and early nineteenth centuries). Second, married women and their families who resorted to courts of equity were hampered by the limited number of these courts. FRIEDMAN, *supra* note 17, at 185. Third, in early America, married women tended not to take advantage of equity and legal developments that allowed them more control over their property. SALMON, *supra* note 13, at 13. These women often feared the autonomy that was becoming available. *Id.* Even with equitable practices, most married women in 1800 still were legally incapable of being parties to litigation or of owning property in their own names. HOFF, *supra* note 1, at 89.

73. As Justice Story noted:

> [In] the exercise of jurisdiction by Courts of Equity in regard to married women, for their protection, support and relief . . . . as well as in . . . regard to *infants and lunatics*, we cannot fail to observe the *parental solicitude*, with which Courts of Equity administer to the wants, and guard the interests, and succor the *weakness* of those who are left without any other *protectors*. . . .

confirmed the perception that married women were ill equipped to cope with any amount of authority beyond the minimal power that marriage accorded them.[74]

The Married Women's Property Acts (the Acts) of the mid-nineteenth century improved their legal position. These Acts allowed married women to sue and be sued without joining their husbands, to contract, to oversee the property they brought into the marriage, and to work without their husbands' permission as well as retain their earnings from this employment.[75] Passage of the Acts was prompted by economic concerns, in particular, the morass of common law rules impeding the speed and efficiency of the land market.[76] A related economic reason for passage of the Acts is that husbands were given such an extensive degree of control over their wives, any default or misstep by husbands, such as desertion or improvident investment, rendered their wives and children economically helpless. The state was then forced to assume responsibility. Married women's situation thus improved, not because of a general desire to grant them a more equal role in marriage and in society,[77]

JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 2:654-55 (Boston, Charles C. Little and James Brown, 1839) (emphasis added).

74. This pervasive sense that women were intrinsically less capable than men had "hardened into a nearly unshakable ideology by the Civil War." Michael S. Hindus & Lynne E. Withey, *The Law of Husband and Wife in Nineteenth-Century America: Changing Views of Divorce*, *in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 133, 134 (Kelly Weisberg ed., 1982).

75. KANOWITZ, *supra* note 14, at 40. Mississippi, in 1839, was the first state to enact such an act. FRIEDMAN, *supra* note 17, at 185. By 1850, seventeen states had similar laws. *Id.* at 186. England did not give married women control over their earnings until 1870. Glendon, *supra* note 41, at 31.

Provisions of the Married Women's Property Acts differed greatly from state to state. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 118. Some judges limited the ameliorative impact of these laws. KANOWITZ, *supra* note 14, at 40. Nonetheless, these acts have been termed a "Pandora's box" because they represented the first signs of legal improvement for married women. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 120. For a brief summary of these acts, see Johnston, *supra* note 41, at 1057-70. For a thorough discussion of American women's property rights in general, see SALMON, *supra* note 13.

76. FRIEDMAN, *supra* note 17, at 186; *see also*, 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 16. "For the market system to work effectively . . . creditors and purchasers needed procedures for conveying land and securing full title that were simpler than the common-law legal forms." *Id.*

77. In accepting the validity of the Married Women's Property Acts, the Supreme Court adopted a somewhat resigned tone: "[t]he statutes have not deprived the husband of the services of the wife in the household, in the care of the family, or in and about his business, yet they have bestowed on her, independent of him, her earnings on her own account, and given her authority to acquire them." Texas & Pac. Ry. v. Humble, 181 U.S. 57, 63 (1901). "To a certain limited extent, as, for example, in fixing the domicil, and in being responsible under ordinary circumstances for its orderly management, the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control." *Id.* at 65.

but instead because of state financial concerns. Common law disabilities which did not overtly harm economic matters remained intact.[78]

Despite the Married Women's Property Acts' removal of the worst civil disabilities placed on married women, women continued to occupy a lower rung in the marital hierarchy.[79] Married women now were recognized legally in some aspects, but were still situated in a private and subordinate sphere.[80] Wives' authority extended over the home and children.[81] Husbands, however, had the final say concerning family life.[82]

The tradition of noninterference, even after passage of the Married Women's Property Acts, meant that the courts would not intervene in the home unless divorce, separation, or abandonment occurred.[83] Noninterference helped to cement the husband's authority by allowing him to exercise extensive economic and social

78. For example, married women still did not have the right to keep their name upon marriage, and they were legally obligated to live wherever their husbands chose to establish domicile. KANOWITZ, *supra* note 14, at 41-52. Married women also remained subject to their husbands' physical coercion, were required to provide domestic services, and to obey their husbands. JUDITH A. BAER, 2 WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT 123 (1991).

79. *The Equality Crisis*, *supra* note 26, at 177. Blackstone's theory of marital unity was "replaced by a theory that recognized women's legal personhood but which assigned her a place before the law different and distinct from that of her husband." *Id.* Under this new theory, of separate spheres, "the husband was the couple's representative in the public world and its breadwinner; the wife was the center of the private world of the family." *Id.* (citing NANCY COTT, THE BONDS OF WOMANHOOD, at 197-200 (1977)). Although the separate spheres theory advanced the position of married women, it also "preserved and promoted the dominance of male over female." *Id.*

80. *See, e.g.*, *On Women's Sphere*, 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 154. Mrs. A.J. Graves wrote in 1841 "[t]hat [a] woman should regard home as her appropriate domain is not only the dictate of religion, but of enlightened human reason." *Id.* Even in the nineteenth century, divorce was difficult to obtain. Hartog, *supra* note 58, at 105. Insisting on an illusion of marital unity, courts declined to grant divorces even for marriages that were obviously over. *Id.* Wives continued to be viewed as dependent beings, expected to submit to the superior will of their husbands. Demos, *supra* note 7, at 68. *See generally* NANCY F. COTT, THE BONDS OF WOMANHOOD (1977) (explaining in depth the separate spheres theory).

81. TRANSFORMATION, *supra* note 51, at 88.

82. *Id.* Americans believed "that nature . . . clearly intended to give [husbands' and wives'] diverse faculties a diverse employment." TOCQUEVILLE, *supra* note 56, at 324. The "family home was . . . a man's castle but a woman's place." ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 63 (1988) [hereinafter UNEASY ACCESS].

83. *See, e.g.*, TRANSFORMATION, *supra* note 51, at 86 (noting that the long-standing practice of noninterference in private life came in time to be regarded as principle"). In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court stated that the marital relationship was protected by "a right of privacy older than the Bill of Rights. . . ." *Id.* at 486.

authority as he saw fit. Also, because husbands still legally possessed physical authority over their wives, the courts' general refusal to intervene in the home meant that domestic violence often went unpunished.[84]

In spite of their subordinate role, married women gained some degree of autonomy by obtaining reforms in "domestic matters," such as in housing and sanitation.[85] However, advances for married women were limited,[86] and attempts to deviate from traditional marital roles[87] were seen as threatening.[88]

Despite vociferous opposition, married women demanded increased autonomy.[89] Participants in the 1848 Women's Rights Convention in Seneca Falls protested the subordination of women,

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84. *See* LINDA GORDON, HEROES OF THEIR OWN LIVES 1 (1988) (explaining that domestic violence, while rooted in common law tenets, has generally only been recognized as a problem in the last twenty-five years). In 1989, more women suffered abuse by their husbands than were wed in the same period. STEPHANIE COONTZ, THE WAY WE NEVER WERE 3 (1992). For a discussion of the ways in which the legal concepts of noninterference and privacy have tacitly allowed domestic violence, see Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991).

85. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 372; *see also* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 26-51 (1980). *But see* UNEASY ACCESS, *supra* note 82, at 55 (arguing that "the privacy of women secluded at home without powers of effective decision-making concerning sex, pregnancy, vocation, and lifestyle has been something of 'an injury got up as a gift.'").

86. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 373. Even most suffrage activists, as a result of their ideology and reality, focused their efforts on family welfare policies. This emphasis on domestic matters underscored the fact that "women identified their rights with their role as mothers." *Id.*

87. "[J]udicial language seemed to lapse into near solipsism, as if by refusing to recognize the separation of interests implicit in the contract of marriage, judges were recreating marital harmony and unity." Hartog, *supra* note 58, at 106.

88. Grossberg, *supra* note 64, at 198-99; *see, e.g.*, 8 WIGMORE, *supra* note 29, § 2228. In 1875, an American lawyer presented the following argument to prevent a married woman's adverse testimony regarding her husband from being admitted into evidence:

> [A]re we to forget that in what is called the progress of civilization that idea [of unity in the marriage relation] has been mangled and defaced? . . . In 1848 that unity was effectually impaired [by the property statutes]. . . . Once her true sphere was in the domestic circle and around the hearthstone, . . . but today by the voice and power of legislation she is ushered into the busy scenes of life, and becomes an active and independent actor in all its struggles.

Id. (citing ABBOTT, 2 THE TRIAL OF HENRY WARD BEECHER 87-88 (1875) (alterations in the original)).

89. *See* ABRAMOVITZ, *supra* note 64, at 124 (discussing the increasingly vocal disapproval of women's activism as indicative of growing tension between women's work, their place in the home, and traditional symbols of male domination); *See also* John Demos, *Images of the American Family, Then and Now*, *in* CHANGING IMAGES OF THE FAMILY 43, 45 (V. Tufte & B. Myerhoff eds., 1979) [hereinafter *Images of the American Family*] "After the mid-[nineteenth] century, popular literature on domestic life poured out a long litany of complaints: . . . authority was generally disrupted; . . . women were more and more restless in their roles as homemakers." *Id.* at 50.

and married women in particular.[90] In the Convention's Declaration of Sentiments, which was modeled on the Declaration of Independence, the participants offered their opinion on the doctrine of separate spheres and the husband's decision-making authority over his wife: "[[T]he husband] has usurped the prerogative of Jehovah himself, claiming it as his right to assign for [the wife] a *sphere of action*, when that belongs to her conscience and her God."[91] The signers of the Declaration of Sentiments thus sought what law, society, religion, and economic constraints historically had withheld from married women: the ability to decide for themselves what actions were and were not appropriate. While many of the Declaration's demands were not achieved for years,[92] the fact that these women openly demanded changes evidenced the increasing conflict over women's role in marriage. However, the Declaration of Sentiments failed to disturb the deep rooted conception of proper marital roles.[93]

Although legal restrictions on married women continued, some of these restrictions began to break down in the early twentieth century[94] as more married women entered the professional work force.[95] Economic changes and technological advancements initiated women's move into the workplace.[96] In addition, women had increased access to education and decreased emphasis on

90. HOFF, *supra* note 1, at 136.

91. *Id.* 2 app. at 384-85 (citing 1848 Declaration of Sentiments (emphasis added)).

92. For example, signers of the Declaration of Sentiments advocated that women be given the right to vote. *Id.* at 384. This right was denied to women for another seventy years, until 1920. U.S. CONST. amend. XIX.

93. DE TOCQUEVILLE, *supra* note 56, at 324 (stating that in the nineteenth century, Americans took for granted the husband's right to direct his wife).

94. *See, e.g.*, WILLYSTINE GOODSELL, A HISTORY OF MARRIAGE AND THE FAMILY 467 (1934). In 1892, for example, a majority of states had statutes allowing the husband custody over his wife's person. *Id.* at 467. In contrast, women were simultaneously gaining access to higher education, property rights, and increased rights of guardianship. *Id.* at 466-73.

95. COONTZ, *supra* note 84, at 156. While married women always had worked in the home, as of 1900, five to nine percent of married women worked professionally. *Id.* Many men supported women's exclusion from the labor force because they were concerned that "women's employment lowered male wage levels" and because the true occupation of a woman was to provide "counsel, comfort, and consolation" in the home. ABRAMOVITZ, *supra* note 64, at 119. Nonetheless, women not only entered the work place but also became activists. As early as 1825 women workers organized and protested their wages and working conditions. *Id.* at 124.

96. COONTZ, *supra* note 84, at 157. As the industrial revolution matured, more jobs in the workplace opened up for women. *Id.* Moreover, advances in household technology, such as mass production of food and clothing, allowed women more autonomy. *Id.* The industrial revolution utilized women as part of the labor market; however, it also served to reformulate a "gender division of labor and the ideology supporting women's subordination." ABRAMOVITZ, *supra* note 64, at 127.

childbearing,[97] making it easier for them to function in the professional workplace.[98] Finding paid work created options for both single and married women that had not existed before. Married women were no longer solely dependent on their husbands for economic support.[99] Professional work thus helped married women become independent of their husbands.[100]

By the 1920s, the social stigma against married women participating in the paid labor force had decreased.[101] With the increased numbers of working married women,[102] a few of the legal restrictions on married women were removed.[103] The spousal in-

97. The industrial revolution served to separate the place of work from the home. BLOOD & WOLFE, *supra* note 6, at 3. "As a result, the members of the family no longer worked together and . . . children became an economic liability instead of an asset." *Id.* Moreover, "the average number of children born to a woman who survived menopause fell from 4.24 in 1880 to 3.56 in 1900 and to 3.17 by 1920." COONTZ, *supra* note 84, at 157.

"[I]n the American democracy the improvement in the status of women — especially married women — has been synchronous with their higher education." Goodsell, *supra* note 94, at 467. The increased availability of education for women did not stem from an effort to equalize the position of men and women. COTT, *supra* note 80, at 105. Rather, early proponents of education for women thought it could transform a woman into "an agreeable companion[,] . . . . wife, mother, wielder not of public power but of private influence and morality." *Id.* (citing BENJAMIN RUSH, THOUGHTS UPON FEMALE EDUCATION, ACCOMMODATED TO THE PRESENT STATE OF SOCIETY, MANNERS, AND GOVERNMENT IN THE U.S.A. (Philadelphia: Prichard and Hall, 1787)). This "utilitarian" approach to the education of women, "centered on their social usefulness as daughters, wives and mothers, ... was based on a limited conception of woman's role." *Id.* at 108-9. Thus, although empowering, the education of women "stress[ed] a certain sexual destiny, . . . encourag[ing] women to understand gender as the essential determinant of their lives." *Id.* at 123.

98. Conceptions about women's abilities hindered this move into the professional workplace. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908). The *Muller* Court upheld restrictions that prevented women from working more than ten hours per day at professional laundries. The Court reasoned that women needed to be protected from taxing their physical strength not only for their own benefit but also because "healthy mothers are essential to vigorous offspring." *Id.* at 421. The Court supported its protectionist stance toward women by comparing them to minors who also required "especial care." *Id.*

99. BLOOD & WOLFE, *supra* note 6, at 3.

100. "There is a world of difference between a wife who works on the farm under her husband's leadership and the kind of independence gained by working for someone else." *Id.* Married women's work traditionally had focused on fulfilling the needs of others, especially their husbands. COTT, *supra* note 80, at 22.

101. COONTZ, *supra* note 84, at 158. The late 1920s also saw an increase in divorce, with more than one in six marriages ending in divorce. 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 290.

102. During the 1930's, as men took wage cuts or were laid off, the percentage of married women in the female labor force increased from 29 percent in the 1920s to 35.5 percent in the 1930's. COONTZ, *supra* note 84, at 158. For a brief discussion of how married women's ability to control their property reflects their marital roles, see *supra* note 41 and accompanying text.

103. By the 1930s, for example, married women possessed the legal capability to sign contracts and to retain and control their own property. BAER, *supra* note 78, at 125.

competency doctrine was invalidated, allowing married women to choose whether to testify for their husbands.[104] In addition, while husbands rarely were legally sanctioned for physically abusing their wives, the law no longer granted them this "privilege."[105]

The increase in married women's economic and legal power was interpreted as a very real threat to marriage and family.[106] Married women's financial independence was considered dangerous, because it was thought to loosen the ties that confined married women to the home.[107] Despite the economic opportunities that now existed for married women,[108] they remained legally subordinate to their husbands.

C. *The New Unpredictability*

"Time was . . . when domestic life established sound patterns of authority which served to guarantee an orderly society.[109]

As the twentieth century progressed, married women continued to enter the paid labor force in increasing numbers.[110] By

104. The Court abolished the spousal incompetency doctrine for use in federal courts in Funk v. United States, 290 U.S. 371 (1933). The Court reasoned that the doctrine was no longer necessary due to cross-examination and better educated juries. The Court failed to note that the doctrine, which was founded on the belief that the wife's interests mirrored her husband's, had historically functioned to silence wives. A majority of states also no longer recognize this doctrine. MCCORMICK, *supra* note 30, § 66.

105. BAER, *supra* note 78, at 125.

106. A commentator in 1897 described the popular sentiment that:

> [t]he growing demand for female labor . . . is an insidious assault upon the home; it is the knife of the assassin, aimed at the family circle — the divine injunction. It debars the man, through financial embarrassment from family responsibility, and physically, mentally and socially excludes woman equally from nature's dearest impulse. . . .

Edward O'Donnell, *Women as Breadwinners — the Error of the Age*, *in* 1 WOMEN IN AMERICAN LAW, *supra* note 12, at 299.

Writing in 1934, Professor Goodsell commented that "[p]erhaps the characteristic of the twentieth-century family that most sharply challenges the attention . . . is its instability." GOODSELL, *supra* note 94, at 481. Changes in marital roles continue to evoke anxiety over the fate of the family. *See infra* note 117.

107. GOODSELL, *supra* note 94, at 461.

108. *E.g.*, GOODSELL, *supra* note 94, at 470-71 (discussing community property, contract rights and a wife's entitlement to her earnings).

109. Oliver J. Bjorksten & Thomas J. Stewart, *Contemporary Trends in American Marriage*, *in* MARRIAGE & DIVORCE 1, 3 (Carol C. Nadelson & Derek C. Polonsky eds., 1984).

110. During World War II, for example, the female labor force increased by over fifty percent; three-fourths of these new workers were married. COONTZ, *supra* note 84, at 159. Additionally, after the war many men remained in the military. This fact combined with the expansion of consumer industries caused demand for women workers to soar. *Id.* at 160. The demand for women workers exceeded the supply, leading to an increase in real wages for women. *Id.* "Rising real wages in women's industries increased the costs of staying home and provided new incentives for married women to work." *Id.* at 161.

1950, the majority of women working were married.[111] Married women's entry into the paid work force was a vital factor in the reshaping of marital roles that occurred and accelerated in the latter half of the twentieth century.[112]

Today, marital roles remain unequal, albeit not as drastically as in the past. One reason for this continued imbalance is economic. The spouse with the greatest income or financial resources generally wields the greatest power in marriage.[113] As a rule, women earn less than men.[114] The difference in earnings means that husbands tend to be advantaged economically and therefore possess more decision-making authority.[115]

While an equalization in earnings may remedy the imbalance somewhat, two remaining obstacles block the path toward balanced marital roles. First, traditional marital roles have always imposed very distinct, well-defined duties on husbands and wives.[116] These roles provide both the parties and society[117] with the security of unchanging and unambiguous modes of marital behavior.[118]

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111. BLOOD & WOLFE, *supra* note 6, at 3. While increasing numbers of married women worked professionally, the early 1950's also witnessed an attempt to give returning soldiers priority over women in obtaining education and jobs. Wini Breines, *Domineering Mothers in the 1950s: Image and Reality*, 8 WOMEN'S STUD. INT'L F. 601 (1985). These actions were taken in reaction to women's increased power. *Id.* at 603.

112. "[T]he American husband's diminishing authority is due in great part to this steadily increasing proportion of wives who work outside the home." BLOOD & WOLFE, *supra* note 6, at 3.

113. PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 53 (1983); *see also* BAER, *supra* note 78, at 129.

114. In 1980, women earned sixty-four cents for every dollar that men earned. THE AMERICAN WOMAN 1992-93: A STATUS REPORT 350 (Paula Ries & Anne J. Stone eds., 1992) [hereinafter THE AMERICAN WOMAN]. In 1990, women earned seventy-two cents for every dollar men earned. *Id.* Forty-six percent of all women who work professionally are employed in low paying service and administrative positions. *Id.* at 307. In addition, it still seems to be a societal given that husbands should earn more than wives. *See, e.g.*, Joan E. Rigdon, *A Wife's Higher Pay Can Test a Marriage*, WALL ST. J., Jan. 28, 1993, at B1.

115. BLUMSTEIN & SCHWARTZ, *supra* note 113, at 55.

116. *See* discussion *supra* parts I.A-B.

117. The arguments to maintain traditional marital roles invariably return to society's need to protect the family. *See, e.g.*, Jack Douglas, *The Ultimate Cost of the Retreat from Marriage and Family Life*, *in* THE RETREAT FROM MARRIAGE: CAUSES AND CONSEQUENCES 55 (Bryce J. Christensen ed., 1990). "The obvious fact is that the 'war on marriage' is now little more than a great many 'mopping up' political operations . . . of the central theatre of the 'war on the family.'" *Id.* at 61. Despite such worries about the stability of the institutions of marriage and the family, in 1990 the majority of adults were married. THE AMERICAN WOMAN, *supra* note 114, at 247. Further, married couple families remain the predominant type of family in America. *Id.* at 254.

118. One reason these roles furnish such a sense of security is because marriage traditionally was based at least as much on economic ties as on emotional bonds. TRANSFORMATION, *supra* note 51, at 293. Wives generally had far fewer economic

Newer, more balanced marital roles are less certain and depend on the interaction between individual husbands and wives rather than on a preconceived and generic set of marital roles.[119] While equality may be gained in more modern marital roles, the sense of stability offered by traditional roles is lost.

A second reason unequal marital roles continue is because they are stubbornly embedded in the American legal system.[120] Compared to Blackstone's description of marriage, the law's conception of marriage over the last thirty years represents a radical move toward acceptance and approval of more balanced roles in marriage.[121] At the same time, however, courts and legislatures persist in ruling and legislating based on the common law conception of unequal marital roles.[122] In doing so, courts and legislatures

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options, and thus were more likely to remain within the confines of their prescribed role. BLOOD & WOLFE, *supra* note 6, at 3. These economic ties are not as vital in modern marriage because women now are more able to financially support themselves. *Id.* Marital roles now rest more on emotional ties and therefore seem less secure. TRANSFORMATION, *supra* note 51, at 293.

119. *See, e.g.*, Bjorksten & Stewart, *supra* note 109, at 52 (noting that in modern marriages, decisions tend to be based on negotiation).

120. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981). As late as 1981, a Louisiana statute named the husband as the head and master of property jointly owned with his wife. *Id.* This statute, which allowed the husband to mortgage the property without his wife's consent or notice, was struck down by the Court on equal protection grounds. *Id.*

In 1983, a California municipal court still asked female, but not male, potential jurors about their marital status and their husbands' occupation. Bobb v. Municipal Court, 143 Cal. App. 3d 860 (1983). In striking down this line of questioning, the reviewing court stated that these questions were a "relic of a bygone age when women were presumed incapable of independent thought." *Id.* at 866.

121. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court stated that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Id.* at 453. This statement is misleading in that it fails to acknowledge that the "mind and heart" traditionally recognized by marriage law was not that of the couple but that of the husband. Despite this oversight, however, the Court seemed to validate a more equal conception of marriage and marital roles in that the husband's as well as the wife's independence is recognized and accepted. *But see* John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U.L. REV. 255 (1973) (criticizing the Court's conception of marriage in *Eisenstadt*).

United States v. Dege, 364 U.S. 51 (1960) officially invalidated the "one legal person" conception of marriage when the Court ruled that a husband and wife are legally capable of the crime of conspiracy. To maintain the fiction of one legal person would be to accept "medieval views regarding the legal status of woman." *Id.* at 52. The Court deemed these "view[s] of American womanhood offensive to the ethos of our society." *Id.* at 53. In addition, while some laws still require that the wife maintain the home, take her husband's name, or live where he chooses to establish domicile, these laws would fail to survive judicial scrutiny. BAER, *supra* note 78, at 128.

122. "As people grow up under a husband-dominant system, they come to take that balance of power for granted - and even to feel that it is right." BLOOD & WOLFE, *supra* note 6, at 14; *see also* BLUMSTEIN & SCHWARTZ, *supra* note 113, at 56 (finding that the tradition of granting husbands more authority within marriage continues to skew the balance of power in marriages in favor of husbands). One reason these

demonstrate that the common law's prejudice toward married women continues. Part II analyzes the confidential communication privilege in evidence law and Part III discusses the Supreme Court's recent decision in *Planned Parenthood v. Casey*[123] concerning the husband notification requirements, in order to illustrate the ongoing problem of courts' and legislatures' antipathy toward allowing women an equal role in marriage.

II. The Confidential Communication Privilege and Common Law Conceptions of Marital Roles

"[I]t hath beene resolved by the Justices that a wife cannot be produced either against or for her husband, quia sunt duae animae in carne una (for they are two souls in one flesh), and it might be a cause of implacable discord and dissention betweene the husband and the wife, and a meane of great inconvenience."[124]

Just as American common law adopted England's common law on marriage, American common law also adopted two types of marital privileges commonly recognized by English courts: the adverse testimony privilege and the confidential communication privilege.[125] Federal courts continue to recognize both privileges.[126]

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roles have been viewed as proper is due to the general conception of married women as less capable and untrustworthy. *See supra* parts I.A and B generally. This distrust toward women continues, as evidenced in the confidential communication privilege and the dissenting opinion in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (plurality opinion). *See infra* parts II and III.B.

Many women continue to accept the correctness of these unequal marital roles. In 1977, for example, a majority of both men and women polled believed that a woman's place was in the home. Rita J. Simon & Jean M. Landis, *Women's and Men's Attitudes about a Woman's Place*, 53 PUB. OPINION Q. 265, 268 (1989). In the mid-1980's, a majority of women polled believed that a married woman may have a career so long as her career "remains within the boundaries imposed by the career of her husband." *Id.*

A more equal distribution of marital power is an idea that has only taken root in the last thirty years. *See, e.g.*, TRANSFORMATION, *supra* note 51, at 88 (noting that until the 1960's, almost all legislative attempts to regulate family decision-making granted husbands the dominant role). As recently as 1974, husbands continued to be recognized as head of the household and wives continued to be held responsible for domestic and child care services in many states. Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1173 (1974).

Modern teenage dating roles may be changing from traditional dating roles, however. *See, e.g.*, Anne C. Roark, *New Rules for Teen Love*, L.A. TIMES, Jan. 2, 1993, at B1 (reporting that at one Los Angeles high school, teenage women are much more likely than their mothers and grandmothers were to ask teenage men out on dates and are also more likely to share dating expenses). This change in premarital behavior may have a later equalizing effect on marital roles.

123. 112 S. Ct. 2791 (1992).

124. 8 WIGMORE, *supra* note 29, § 2227 (quoting Lord Coke from *A Commentarie Upon Littleton* 6b 1628).

125. Stein v. Bowman, 38 U.S. 209 (1839) was the earliest Supreme Court case to recognize the privileges.

Although virtually all states recognize the confidential communication privilege, only a slight majority of the states recognize the adverse testimony privilege.[127] Both privileges are thought to foster marital unity.[128] The privileges historically have been vested in the defendant, who generally was the husband,[129] meaning that he decided whether his wife could speak or if she must be silent. Both privileges thus traditionally premised marital unity on the husband's authority to silence his wife.

In 1980, in *Trammel v. United States*,[130] the Supreme Court modified the adverse testimony privilege, as applied in federal courts, to allow the witness-wife[131] to decide whether she would testify against her husband.[132] *Trammel* signalled a shift away from the married woman's subordinate role and accepted that married women may competently and independently exercise decision-making authority. However, the *Trammel* Court expressly noted that its alteration of the adverse testimony privilege did not affect

126. *Emerging Problems under the Rules*, (2nd ed., 1991) reprinted in Federal Rules of Evidence for United States Courts and Magistrates 217, 296 (1991) [hereinafter *Emerging Problems*].

127. *Id.* at 296 n.50.

128. *See supra* notes 36-37 and accompanying text.

129. For authorities stating that the holders of the adverse testimony privilege historically have been defendant-husbands, see *supra* part I.A, note 37 and accompanying text. For confirmation of the same regarding holders of the confidential communication privilege, see 8 WIGMORE, *supra* note 29, § 2333.

The overwhelming prevalence of male defendants has continued into the present era. For example, in 1930, there were 150,000 male inmates and 5,000 female inmates in state and federal prisons. 1990 DEPT. JUST. SOURCEBOOK CRIM. JUST. STAT. 602. In 1970, there were 200,000 male inmates and 7,000 female inmates. *Id.* In 1990, there were approximately 365,000 male inmates and 37,000 female inmates in locally administered jails. *Id.* at 578.

130. 445 U.S. 40 (1980).

131. Because this article argues that in the overwhelming majority of cases both privileges have allowed husbands, as defendants, to silence wives, as witnesses, the non-neutral gender terms of defendant-husband and witness-wife are used.

132. *Trammel* presented the issue of whether Mrs. Trammel, an unindicted co-conspirator, could voluntarily present adverse testimony against her husband in a drug case. The Court dismissed the notion that preventing a wife from testifying would promote marital unity. *Trammel*, 445 U.S. at 52. The Court also noted the historical impact of the privilege on married women, stating that "[n]owhere . . . is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." *Id.* This decision has received some criticism. *See, e.g.*, Lempert, *supra* note 31, at 736 (stating that the adverse testimony privilege "is an important symbolic statement of our attitude toward marriage").

The *Trammel* decision changed the adverse testimony privilege only with respect to federal courts. In certain actions, such as diversity suits, federal courts apply the pertinent state's rules on the privilege. At the time of *Trammel*, sixteen states vested this privilege in both spouses or in the defendant-husband alone. *Trammel*, 445 U.S. at 49 n.9. Nine states vested the privilege in the witness-wife. *Id.* Some states in the former group have altered the privilege to conform to *Trammel*. *See, e.g.*, HAW. REV. STAT. § 626-1, Evid. Rule 505(a) (1985).

the confidential communications privilege,[133] which either the defendant-husband or the witness-wife may invoke.[134] The Court failed to recognize that the confidential communication privilege required a similar modification.

Trammel evidenced the judiciary's current schizophrenic approach to marital roles.[135] On the one hand, the *Trammel* Court's modification of the adverse testimony privilege represented the judiciary's move toward more balanced marital roles;[136] on the other hand, the Court's failure to also remedy the confidential communication privilege illustrates the judiciary's failure to forcefully pursue and excise all vestiges of common law marital roles. Courts and legislatures should complete the advances that *Trammel* began by modifying the confidential communication privilege to ensure that marital unity is no longer premised on a married woman's silence.

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133. *Trammel*, 445 U.S. at 45 n.5. The Supreme Court has consistently upheld the confidential communication privilege. *See, e.g.*, Blau v. United States, 340 U.S. 332 (1951); Wolfle v. United States, 291 U.S. 7 (1934).

The privilege, which applies in both civil and criminal cases, currently is recognized by statute or by common law in most states. James H. Feldman & Carolyn S. Reed, *Silences in the Storm: Testimonial Privileges in Marital Disputes*, 21 FAM L.Q. 189, 236 (1987). For examples of some representative statutes, see N.C. GEN. STAT. § 8-56, 57(C) (1991); MICH. COMP. LAWS § 600-2162 (1986); W. VA. CODE § 57-3-4 (1966). The Federal Rules of Evidence do not expressly recognize this privilege. Rather, the Federal Rules provide that federal courts interpret common law-based privileges in light of the courts' "reason and experience." FED. R. EVID. 501. Federal courts generally recognize the privilege. MCCORMICK, *supra* note 30, at § 78.

134. *Emerging Problems*, *supra* note 126, at 298. Although currently either spouse may invoke the privilege in many states, it is important to recognize how this arrangement actually affects the parties. The witness-wife's desire to testify against her husband regarding their confidential communications can be entirely frustrated by the defendant-husband's excercise of the privilege. Despite the attempt to give the witness-wife more control over her testimony by allowing her to invoke the privilege, the fact remains that so long as the defendant-husband also holds the privilege he will be able to control and silence her.

135. This same type of schizophrenic or fractured approach exists in the Court's five to four decision regarding the husband notification requirement in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). *See infra* part III.

136. Much of the criticism of the *Trammel* decision focused on whether married women's testimony could actually be voluntary or whether these women were vulnerable to being manipulated by the prosecution into testifying. *See, e.g.*, Lempert, *supra* note 31, at 734 implying that married women would be too weak-willed to resist being manipulated. For another example of this ongoing perception of married women as being inherently less capable and irrational, see generally *infra* part III.B.

A. *A Different Critique of the Privilege — A Privilege to Remain Silenced?*

"No man would be willing to have his wife called on in a court of justice to detail the facts of which she gains a knowledge by reason of the fact that she is the companion of his privacy[.]"[137]

Courts, legislatures, and commentators routinely recite that the confidential communication privilege[138] encourages marital confidences which in turn foster unity between husband and wife.[139] The privilege is justified on utilitarian grounds, meaning that the benefits derived from protecting the marriage outweigh the privilege's detrimental effect on fact-finding.[140] This justification explicitly recognizes two interests: protection of the marital relationship and the need for accurate fact-finding. The husband's interest is implicitly respected because the current application of the privilege, as well as its historical roots, indicate that the privilege's role in protecting marital unity is traditionally synonymous with protecting the husband's authority.[141]

Criticism of this privilege has focused on the limited interests included in the utilitarian equation. For example, no proof exists to show that the privilege fosters marital confidences and marital

137. 8 WIGMORE, *supra* note 29, § 2332, (citing State *ex rel* Barker v. McAuley, 51 Tenn. 424, 432 (1871)).

138. Three requirements must be met in order for the privilege to apply. First, the marriage must be legal. JACK B. WEINSTEIN & MARGARET A. BERGER, 2 WEINSTEIN'S EVIDENCE § 505[04] (1992). Some jurisdictions extend the privilege to common law marriages. *See, e.g.*, Johnson v. United States, 616 A.2d 1216 (D.C. 1992). Other jurisdictions require a more formal marriage. *See, e.g.*, People v. Suarez, 560 N.Y.S.2d 68 (N.Y. Sup. Ct. 1992). Second, there must be a communication, such as a written or verbal expression or a communicative act. WEINSTEIN & BERGER, *supra* § 505[04]; *see also* Brown v. State, 404 S.E.2d 469 (Ga. Ct. App. 1991) (finding that defendant-husband who removed cocaine from district attorney's office while defendant's wife was present had not made an expressive communication). Third, the communication must have been made in private, outside the presence of any third party. WEINSTEIN & BERGER,*supra* § 505[04]. For an interesting case concerning this last requirement, see State v. Holmes, 398 S.E.2d 873 (N.C. App. 1990).

139. 8 WIGMORE, *supra* note 29, § 2332 ("[T]he policy which should lie at the foundation of every rule of privileged communications . . . appears to be satisfied in the privilege for communications between husband and wife."); *see also* State v. Webb, 824 P.2d 1257, 1261 (Wash. Ct. App. 1992); Steven F. Gofman, Note, *"Honey, the Judge Says We're History": Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness*, 77 CORNELL L. REV. 843 (1992) (arguing validity of both marital privileges); *Husband-Wife Privileges*, *supra* note 34 (arguing efficacy of the confidential communication privilege). *But see* MCCORMICK, *supra* note 30, § 86 (questioning the efficacy of the privilege).

140. *Cf.* MCCORMICK, *supra* note 30, § 86 (arguing that the benefits of the confidential communication are doubtful, and the injustice of suppressing relevant evidence is clear and certain).

141. "The utilitarian rationale suggests that privileges were created to protect men. . . ." Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 440.

unity.[142] Critics also question why the privilege endures beyond the life of the marriage if the privilege's purpose is to promote marital unity.[143] However, the standard critique of the privilege remains oblivious to an especially pressing criticism: the interest of the married woman, the party most often silenced by the privilege, has not been considered.[144]

The privilege recalls the common law's unequal marital roles in two important respects. First, the privilege is reminiscent of the law's tradition of noninterference in domestic matters. Noninterference historically allowed wife abuse,[145] and the privilege continues to tacitly allow this abuse today. For example, while the privilege extends only to expressive acts or communications, threats made by the husband to the wife fall within the privilege in some states.[146] In addition, while violent acts generally are not covered by the privilege,[147] the husband's statements to the wife regarding those actions generally are covered.[148] Therefore, because the privilege is vested in the defendant-husband, the wife sometimes will be prevented from testifying about her husband's

142. McCormick, *supra* note 30, § 86 (noting the doubtful assumption that spouses will know of this privilege and take it into account when communicating privately); *see also* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675, 682 (1929) ("Marital harmony among lawyers who know about the privileged communications is not vastly superior to that of other professional groups.").

143. McCormick, *supra* note 30, § 86. For a case illustrating the peculiarity of extending the privilege even after the marriage has ended, see People v. Vermeulen, 438 N.W.2d 36 (Mich. 1989). *Vermeulen* concerned a husband's statement made to his first wife after he had filed for divorce and already remarried. *Id.* at 37 n.4. Because the husband and first wife officially were still married at the time of the communication, the first wife was prevented from testifying in the husband's murder trial.

144. "[I]t is remarkable that so far the law of evidence has been relatively untouched by recent ideological fashions. . . . Feminists . . . have generally ignored the law of evidence." Kenneth W. Graham, Jr., *What's the Matter with Evidence?*, 25 Loy. L.A. L. Rev. 773, 779 (1992).

As with the notification requirement discussed *infra* part III, this privilege treats married women differently from single women. Again, the law imposes a burden on some women simply because they are married.

145. *See supra* parts I.A and B, notes 26-27 and 83-84 and accompanying text.

146. *See, e.g.*, Wash. Rev. Code § 5.60.060(1) (1963) (privilege fails to make an exception for threats of violence); *see also* Cavert v. State, 14 S.W.2d 735, 739 (Tenn. 1929). *But see* State v. Richards, 391 S.E.2d 354, 358-59 (W. Va. 1990) (privilege does not extend to husband's threatening statements to wife); State v. Zabijak, 280 N.W. 149 (Mich. 1938) (same).

147. *See, e.g.*, Wash. Rev. Code § 5.60.060(1) (1963) (privilege makes an exception for acts of violence in the marriage but not for threats of violence); Md. Code Ann., [Cts. & Jud. Proc.] § 9-105 (1989) (no exceptions included in the statutory language); W. Va. Code § 57-3-4 (1966) (same).

148. *See, e.g.*, State v. Enriquez, 609 A.2d 343 (Md. 1992). For a discussion of *Enriquez*, see *infra* note 150 and accompanying text.

violence toward her.[149] Any marital unity achieved in these situations is directly premised on a wife's physical subordination to her husband.

Further, the privilege acts as one factor in creating a legal landscape in which a husband's violence against his wife is permitted. The privilege is usually inapplicable to threats in the course of or in furtherance of crimes against the wife. However, by granting the husband the right to prevent his wife from testifying about statements made outside the actual violence, but which relate to the violence, the privilege makes it less likely that the husband will be punished, and thus more likely that he will continue to threaten and abuse his wife.

For example, in a 1992 Maryland case, *State v. Enriquez*, a husband was convicted of second-degree sexual offense and battery for an attack he allegedly committed against his wife.[150] Mike Mercado Enriquez forced his wife to engage in nonconsensual vaginal and anal intercourse for approximately three hours.[151] Levina Enriquez required medical attention the next day due to lacerations and bleeding.[152] She moved out of their home and obtained assistance from a Crisis Center.[153] Ten days later, her husband called to apologize for the attack, ask for a reconciliation, and tell her that he was receiving treatment.[154] Levina Enriquez testified about the content of the telephone conversation. The Court of Special Appeals, and the Court of Appeals reversed his conviction and ordered a new trial on the grounds that it was not harmless error to allow the wife to include "privileged marital communications" in her testimony.[155]

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149. The privilege also can harm other family members. *See, e.g.*, People v. Hamacher, 438 N.W.2d 43 (Mich. 1989) (privilege used to prevent wife from testifying concerning husband's statement to her regarding his sexual abuse of wife's eight-year-old daughter). *But see* State v. Sanders, 833 P.2d 452 (Wash. Ct. App. 1992) (privilege cannot be used to prevent wife's testimony concerning husband's statements encouraging her to leave jurisdiction before he was tried on charges of sexual abuse of her daughter; public policy of preventing child abuse found to outweigh use of the privilege).

150. 609 A.2d 343. The defendant was sentenced to seven years imprisonment, but all of it, save eighteen months, was suspended. *Id.* at 344. Ultimately, the conviction was reversed. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. The court based the *Enriquez* decision on *Coleman v. State*, 380 A.2d 49 (Md. 1977), in which a wife testified that her husband told her where stolen goods were hidden from the police. *Enriquez*, 609 A.2d at 345. That case, however, did not involve domestic abuse.

The confidential communication privilege also recalls the common law marital role in another important respect. Historically, married women have been denied decision-making authority in the marriage and have been equated with populations perceived to be less capable.[156] Common law granted authority to husbands, who were regarded as trustworthy guardians.[157] The confidential communication privilege remains vested in the defendant-husband at least partly because courts and legislatures continue implicitly to regard husbands as inherently more responsible and rational. Married women, therefore, continue to be denied decision-making authority because of beliefs regarding their competence.[158] Denial of this authority is harmful in two ways. First, on a day-to-day level, the refusal to permit married women to decide whether to testify affects the course of women's lives and their children's lives. Second, the denial of decision-making authority to women publicly proclaims that courts and legislatures consider married women inherently and hopelessly incompetent.

The privilege also works to the very real detriment of the woman who is no longer married. For example, if an ex-husband and an ex-wife are both defendants, the ex-wife cannot testify against her ex-husband regarding their confidential communications during the marriage in exchange for a plea bargain. If the confidential communication privilege was only concerned with protecting marital confidences and promoting marital unity, then there would be no reason to forbid an ex-wife from testifying. Rather, the refusal to allow testimony, even after the marriage has terminated indicates judicial and legislative anxiety about allowing ex-wives this amount of authority over themselves and their ex-husbands. Thus, this privilege curtails a woman's range of legal action even after she is no longer married.

B. A New Approach

"Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters . . ., so we must reject the notion that a woman is less capable of deciding matters of gravity."[159]

Courts and legislatures continue to allow defendant-husbands to invoke the privilege, thus depriving married women of their

156. *See generally* Part I.

157. *See generally* Part I.

158. *See supra* notes 135-136 (discussing criticism on *Trammel* based on concern that married women would be manipulated into testifying).

159. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2842 (1992) (Stevens, J., concurring in part and dissenting in part).

choice of whether to testify and in some cases subjecting them to domestic violence and fear.[160] Courts and legislatures should continue to grant the privilege. Without the privilege, both husbands and wives would be compelled to testify regardless of their personal choice and situation. However, the privilege should be modified in two ways to ensure that it does not continue to relegate married women to a low status.

First, and most importantly, the privilege should be vested solely in the witness-wife, rather than vested in the defendant-husband. As in *Trammel*,[161] this modification would allow the wife, the party most often silenced, to exercise her decision-making authority. Married women stand in the best position to assess whether enough marital unity exists to warrant their silence. Defendant-husbands will naturally seek refuge in this privilege, thereby silencing their wives and depriving courts of testimony. Vesting the privilege in the witness-wife is likely to increase the amount of key testimony available to the court. This modification would also signal that courts and legislatures have discarded another archaic notion of married women's silent and subordinate role.

Secondly, the privilege should last only as long as the marriage. Continuing to honor the privilege after the marriage has terminated is both futile and harmful. It is futile because society gains nothing by the use of the privilege in cases where the marriage has ended. Marital unity cannot be preserved in a defunct marriage. The privilege's use after marital termination is harmful because it silences needed testimony and severely curtails the ex-wife's sphere of action. In considering this change, courts and legislatures should also assess whether the privilege should be tolled once divorce proceedings have commenced. Again, in the case of divorce proceedings, there is little marital unity to protect. Further, divorce proceedings may provoke episodes of domestic violence, making it even more necessary that the witness-wife be allowed to testify if she chooses.

Taken together, these two modifications preserve what is valuable in the privilege, and they terminate the malevolence the privilege has wrought and perpetuates. Marriage, based on both parties' equal status, is protected because neither spouse is compelled to testify regarding confidential communications. At the same time, the alterations ensure that courts and legislators can no

160. State v. Enriquez, 609 A.2d 343 (Md. 1992); *see supra* text accompanying notes 150-155.

161. Trammel v. United States, 445 U.S. 40 (1980).

longer use the privilege to pursue a common law conception of marital unity dependent upon severely unequal marital roles.

Part III of the article discusses a very recent example of this same type of attempt by courts and legislatures to premise marital unity on unequal marital roles reminiscent of Blackstone's era. *Planned Parenthood v. Casey*,[162] a 1992 decision, illustrates the very strong disagreement within the Supreme Court over the status of women in marriage. This disagreement again signals that while to some degree courts have freed themselves of antiquated discriminatory views, a disturbingly large and powerful population in the courts remains mired in the common law past.

III. *Planned Parenthood v. Casey* — An Insight into the Court's Fractured Views on Marital Roles

"In order to further the Commonwealth's interest in promoting the integrity of the marital relationship . . ., no physician shall perform an abortion on a married woman, . . . unless he or she has received a signed statement . . . that [the married woman] has notified her spouse that she is about to undergo an abortion."[163]

From *Roe v. Wade*,[164] decided almost twenty years ago, to the present day, a woman's power to make decisions regarding her pregnancy has been an ongoing issue before the Court.[165] In *Roe*, the Court expressly left open the issue of the father's role in his wife's decision to terminate her pregnancy.[166] Three years later, in *Planned Parenthood v. Danforth*,[167] the Court struck down a requirement in Missouri's abortion statute that mandated married women receive their husbands' consent before obtaining an abortion.[168] In *Planned Parenthood v. Casey*,[169] the Court, divided five to four, invalidated Pennsylvania's attempt to compel a wife to no-

162. 112 S. Ct. 2791.

163. 18 PA. CONS. STAT. ANN. § 3209 (1983 & Supp. 1991). For the text of this notification requirement, see *infra* note 174.

164. 410 U.S. 113 (1973).

165. *See infra* notes 168-173 and accompanying text.

166. *Roe*, 410 U.S. at 165 n.67.

167. 428 U.S. 52 (1976).

168. The Court reasoned that because the state could not veto a woman's decision in the first trimester, the state could not grant this veto power to the husband. *Id.* at 69. An additional reason, given by Justices Blackmun, Stewart, and Powell, was that because the view of only one spouse could prevail, the woman's decision should be honored. *Id.* at 90. These justices reached this conclusion on the ground that the woman is the most intimately affected by the pregnancy and birth. *Id.*

169. 112 S. Ct. 2791 (1992). At issue in *Casey* were five provisions of the Pennsylvania abortion statute. This article focuses on the notification requirement of the statute and adds findings from other portions of the decision only as necessary to clarify discussion of the notification requirement.

tify her husband before ending the pregnancy.[170] The sections below analyze the ways in which the majority and dissenting opinions, respectively, differ from and recall traditional common law views of a married woman's subordinate status. This analysis illustrates that the Supreme Court remains closely divided on whether women merit equal status in marriage.[171]

A. *Undue Burdens: The Majority's Divergence from Common Law Marital Roles*

"Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage[.]"[172]

Justice O'Connor, writing for the majority on this issue,[173] determined that Pennsylvania's notification requirement[174] consti-

170. The district court termed the notification requirement "the most problematic" requirement in Pennsylvania's abortion statute, and invalidated it using the strict scrutiny test. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1384 (E.D. Pa. 1990), *confirmed in part and overruled in part*, 947 F.2d 682 (3d Cir. 1991), *confirmed in part and overruled in part*, 112 S. Ct. 2791 (1992). A panel on the court of appeals (divided by a vote of two to one) used the undue burden test in finding that the notification requirement was unconstitutional. Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991).

171. At the time of the Court's decision, three lower federal court decisions had found similar notification requirements unconstitutional. Planned Parenthood v. Bd. of Medical Review, 598 F. Supp. 625 (D.R.I. 1984); Eubanks v. Smith, 604 F. Supp. 141 (W.D. Ky. 1984); Scheinberg v. Smith, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part and vacated and remanded on other grounds in part*, 659 F.2d 476 (5th Cir. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982). The *Scheinberg* case is interesting in that the reviewing court determined that the notification requirement could stand if the state could show that the abortion procedure would hinder a married woman's future ability to bear children and therefore harm the husband's right to procreate within the marriage.

172. *Casey*, 112 S. Ct. at 2831.

173. In addition to Justice O'Connor, the majority was made up of Justices Souter, Kennedy, Stevens, and Blackmun. The invalidation of the notification requirement was the only substantive decision to garner a majority.

174. Pennsylvania's notification requirement reads as follows:

> Section 3209. Spousal Notice. (a) Spousal notice required. — In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law. (b) Exceptions. — The statement certifying the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:
>
> (1) Her spouse is not the father of the child.
>
> (2) Her spouse, after diligent effort, could not be located.

tuted an undue burden.[175] In doing so, she considered the interests of the married woman,[176] the husband,[177] and the state.[178] The deciding factor as to which of these competing interests should be vindicated was Justice O'Connor's palpable unease with the common law marital roles which the husband notification requirement[179] sought to impose. Justice O'Connor presented two

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(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.

(4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual. Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law. (c)Medical emergency. — The requirements of subsection (a) shall not apply in case of a medical emergency. (d) Forms. — The department shall cause to be published, forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth. (e) Penalty; civil action. — Any physician who violates the provisions of this section is guilty of 'unprofessional conduct,' and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation . . . . In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of $5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs.

18 PA. CONS. STAT. ANN. § 3209 (1983 & Supp. 1991).

175. In a previous section of the opinion, Justice O'Connor established the undue burden test as the means of determining whether requirements of this abortion statute could withstand constitutional scrutiny. 112 S. Ct. at 2820. An undue burden exists if "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*

176. Justice O'Connor recognized that the Court has "respected the private realm of family life which the state cannot enter." *Id.* at 2807 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). The married woman's interests are at stake because pregnancy-related "choices [are] central to personal dignity and autonomy. . . ." *Id.*

177. The husband's interests are implicated because he has "a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying.'" *Id.* at 2830 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976)). Neither the majority nor the dissent made much of the fact that the husband may not be the father of the fetus. Paternity rights thus were not as much at issue as the rights that marriage grants to husbands. The importance of marital rights and roles becomes even clearer when one considers whom the husband notification requirement does not affect: single pregnant women. These women would not be compelled to notify their partners. While seeking to promote marital unity, the state may instead provide women with a disincentive to marry.

178. The state possesses legitimate interest in maternal health and in the potential life of the fetus. 112 S. Ct. at 2804.

179. This article refers to the "husband notification requirement" rather than the "spousal notification requirement" in order to make clear that the wife, not the wife and the husband, is the party compelled by the requirement. As written by the Pennsylvania Legislature, the notification requirement is a gender-neutral requirement that imposes duties on both wife and husband. For example, read independently of the body of the requirement provision, the title "Spousal notification,"

arguments against the requirement: first, the exceptions were too narrowly tailored; second, that the requirement failed to meet its stated purpose of achieving marital unity.[180] Both arguments were founded on a conception of marital roles that sharply diverged from historical common law.

In the first part of her analysis, Justice O'Connor provided a lengthy list from the district court's findings of fact concerning the incidence and characteristics of domestic violence.[181] In doing so, Justice O'Connor illustrated an awareness of the grave and ongoing problems that stem from husbands' historical power to physically discipline their wives. She noted that the notification requirement failed to evidence this same awareness.[182] Justice O'Connor's discourse on physical violence recognizes that domestic violence has historically allowed husbands an almost limitless amount of authority over their wives.[183] In finding that the notification of pregnancy frequently incites battering and violence within the family,[184] Justice O'Connor sought to prevent the state from furthering this extremely injurious mode of marital decision-making.[185]

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implies situations in which either the wife or husband must notify the other. In pregnancy-related decisions, however, only the wife has the duty of notification. In addition, "spouse," as used in the body of the requirement provision, clearly refers only to the husband. When the wife is referred to, she is named as the married woman or simply as the woman. This neutral language thus belies the fact that the notification requirement compels only the wife.

180. The statute speaks of "integrity of the marital relationship" rather than marital unity. 18 PA. CONS. STAT. ANN. § 3209 (1983 & Supp. 1991). However, marital integrity clearly is synonymous with common law notions of marital unity. Therefore, this article uses the term "marital unity" in order to highlight the statute's close kinship to antiquated ideas.

181. A very conservative estimate of domestic violence is that it occurs in two million families. 112 S. Ct. at 2826. According to one of the amicus briefs submitted on behalf of Planned Parenthood, domestic violence is the most prevalent cause of injury to women and accounts for twenty-two percent to thirty-five percent of all emergency room visits by women. Amicus Curaie Brief by the American Psychological Association in Support of Petitioners at 9 (Nos. 91-744 and 91-902) [hereinafter American Psychological Association Brief].

182. While the notification requirement allowed an exception for battered wives if they had reported the crime within ninety days, Justice O'Connor observed that "secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence." 112 S. Ct. at 2827. In addition, no exception was allowed if the incident was not reported or if the husband battered the children in an attempt to persuade the wife.

183. As discussed in parts I.B and C, *supra*, married women's entry into the paid work force has decreased the husband's overall authority in the marriage. Episodes of domestic violence can be seen as one way that some husbands attempt to "recapture and enforce older kinds of masculine authority." CHRISTINE STANSELL, CITY OF WOMEN 78 (1987).

184. 112 S. Ct. at 2827.

185. It is ironic that while the legal system's principle of noninterference in the home has tacitly permitted domestic violence, here the Pennsylvania State Legisla-

Justice O'Connor also was disturbed that the notification requirement failed to make an exception for nonphysical abuse, especially forced social and economic isolation.[186] This uneasiness evidenced a sensitivity to two factors that historically restricted married women to very confined roles. First, the fact that the notification requirement could allow husbands to socially isolate their wives recalls the unequal marital roles which denied married women any substantial degree of authority.[187] Second, Justice O'Connor's reference to economic isolation reinforces the historical importance financial arrangements have played in determining the allotment of marital authority.[188] The Pennsylvania legislators' failure to craft exceptions that properly addressed cases of physical, psychological, or economic coercion led Justice O'Connor to find that the notification requirement essentially functioned the same as the veto provision found unconstitutional in *Danforth*.[189]

Justice O'Connor also argued that the notification requirement failed to meet its goal of fostering marital unity. She made the "common sense" deduction that the requirement was superfluous in healthy marriages where no legislative prodding was required to promote communication.[190] As noted above, however, in some marriages the notification requirement may engender vio-

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ture is interfering in such a way that may prompt domestic violence. One writer, noting the general tendency of the legal profession to not interfere in marital matters, nonetheless finds that the law sometimes departs from this approach. Stephen J. Morse, *Family Law in Transition: From Traditional Families to Individual Liberty*, *in* CHANGING IMAGES OF THE FAMILY 334 (Virginia Tufte & Barbara Myerhoff eds., 1979). The decision to depart from tradition and interfere in the home generally is prompted by the law's desire to impose "quite traditional and conservative values" on the marriage. *Id.*

186. 112 S. Ct. at 2828. Psychological abuse can include insults, threats, destruction of property in the home, isolation, degradation, surveillance, withholding transportation, and economic reprisal. American Psychological Association Brief, *supra* note 181, at 9.

187. In one recent study concerning notification requirements, a participant stated that she did not want to tell her husband of her decision "'because he'd want [me] to have the baby' and that 'he would control [me] more than he does now.'" Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41, 46 (1989) (alterations in the original).

188. Justice O'Connor failed to note one economic implication that the notice requirement would have even on a harmonious couple because she assumed that, absent patterns of physical or psychological abuse, couples contribute equally to decisions. However, husbands generally earn more than their wives and therefore tend to hold more decision-making authority within the marriage. *See supra* part I.C, notes 113-115 and accompanying text. Forcing married women to notify their husbands subjects these women to the will of the dominant force in the marriage.

189. 112 S. Ct. at 2831.

190. *Id.* at 2831; *see also* Ryan & Plutzer, *supra* note 187, at 41 (finding that notification requirements only promote marital harmony in marriages that are already harmonious).

lence and other types of abuse. By allowing the state to decide that married women, save for a small subset who fit within the notification requirement's exceptions, must notify their husbands of their decision, the state would actually foster marital upset in a number of marriages. Conversely, by allowing married women to decide whether they can safely notify their husbands, Justice O'Connor validated the fact that married women are capable of making this decision.[191]

The concept that married women can make such decisions runs counter to the role that the legal system traditionally has reserved for them. Justice O'Connor contrasted this relatively recent judicial recognition of married women's decision-making capabilities[192] with the common law's historically derogatory perception of married women in justifying why she disapproved of the husband notification requirement, but approved parental consent and notification requirements. She noted that the Court's approval of the latter requirements rests on the law's assumption that minors benefit from parental consultation.[193] This consultation is beneficial, Justice O'Connor observed, because parents make decisions with the child's best interests in mind.[194] She recognized that husbands may not necessarily consider their wives' best interests and therefore the husband notification requirement fundamentally differs from parental consent and notification requirements.[195]

Justice O'Connor's refusal to validate the husband notification requirement illustrates two ways in which she found married women capable of rational decision making and deserving of equal marital roles. First, unlike historical common law, Justice O'Connor did not group married women with minors.[196] Second, her recognition that husbands' best interests do not automatically mirror their wives' best interests showed that Justice O'Connor had

191. At several points in the opinion, Justice O'Connor pointedly legitimatizes the fear that the husband notification requirement elicited in many women. For example, she refers to these fears as "justifiable" and "reasonable." 112 S. Ct. at 2828-29; *see also* Ryan & Plutzer, *supra* note 187, at 47. "[W]omen in intimate relationships are capable of making educated guesses concerning the effect notification will have on the harmony of these relationships." *Id.*

192. "Only one generation has passed since this Court . . . precluded [married women from] full and independent legal status." 112 S. Ct. at 2831.

193. *Id.* at 2830.

194. *Id.*

195. *Id.*

196. Viewing married women as the equivalent of minors may also contribute to wife abuse. One writer has noted that husbands may view violence against their wives in much the same way that parents view the physical disciplining of their children, "a corrective measure congruent with family loyalties." STANSELL, *supra* note 183, at 79.

abandoned the traditional notion of husbands as guardians for their wives and the notion that interests within marriage are inevitably identical.[197]

B. The Dissent — Echoes of Common Law Views

"In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decision-making, and thereby fosters marital integrity."[198]

In dissent, Chief Justice Rehnquist[199] claimed to have studied the interests of the husband,[200] the state,[201] and the married woman, just as Justice O'Connor did in her opinion.[202] The Chief Justice, however, determined that the husband notification requirement was constitutional.[203] Throughout the dissent, the Chief Justice failed to focus on, or really even acknowledge, that the married woman's interest may legitimately differ from her husband's interest.[204]

Chief Justice Rehnquist distinguished the notification requirement from the husband's consent requirement held unconstitutional in *Planned Parenthood v. Danforth*[205] by casting husbands

197. "The husband's interest . . . does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law." 112 S. Ct. at 2831.

198. 112 S. Ct. at 2871 (Rehnquist, C.J., dissenting).

199. The Chief Justice was joined by Justices White, Scalia, and Thomas. *Id.* at 2855.

200. The husband has an interest in "procreation within the marriage and in the potential life of his unborn child[.]" 112 S. Ct. at 2871.

201. According to the Chief Justice, the State holds a two-fold interest in protecting the husband's interests in the potential life of the fetus, and in fostering the integrity of the marriage. *Id.*

202. The dissent did not detail the nature of the woman's interest but simply stated that her interest is "a form of liberty protected by the Due Process Clause[.]" *Id.* at 2867.

203. In making this determination, the Chief Justice subjected the notification requirement to the rational basis test. *Id.* at 2867. Applied to the statute in *Planned Parenthood v. Casey*, the rational basis test allows states to regulate abortion in ways that are rationally related to legitimate state interests. *Id.* (citing Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955)).

204. In the portion of the opinion concerning the notification requirement, Chief Justice Rehnquist did not mention the woman's interest. The Chief Justice discussed her interest in passing in an earlier part of his opinion. 112 S. Ct. at 2867.

205. 428 U.S. 52 (1976). Then Justice Rehnquist joined Justice White's dissent in favor of the husband's consent requirement in *Danforth*. *Id.*

Danforth's consent requirement is commonly referred to as a spousal consent requirement. As explained *supra* part III.A, note 179, this type of gender neutral language conceals that the requirement only is imposed upon the wife. As with the husband notification requirement, this article uses nongender neutral language in order to highlight whom the requirement actually imposes upon.

into their traditional guardian role and wives into their traditional subordinate role. While the Chief Justice was reticent in expressly communicating his conception of women in marriage, his view nonetheless emerged from his tacit assumptions about married women's capabilities and maturity, and his analogy of married women to minors. Chief Justice Rehnquist's general assumption about married women is not that there are situations in which they require a degree of autonomy, but that they require consultation with their husbands in almost all circumstances.[206]

In Chief Justice Rehnquist's view, married women's defects in maturity and reasoning create the need for consultation. For example, the Chief Justice noted that some married women *"prefer"*[207] not to notify their husbands because of *"perceived"* problems in the marriage.[208] The Chief Justice thus evidenced his belief that married women proceed based on mere preference or that they act on ill-founded assumptions.[209] This type of almost visceral distrust of married women's independent decision-making ability recalls common law notions that married women required guardians to protect them from themselves and that married women were not accountable for their crimes because they were incapable of acting responsibly.[210]

Another example of the traditional common law images of married women is seen in the Chief Justice's oblique analogy of the husband notification requirement to parental consent and notification requirements.[211] He noted that the husband notification re-

206. *See infra* notes 209-10.

207. 112 S. Ct at 2870 n.2 (emphasis added).

208. *Id.*

209. The Chief Justice "assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of their decision." 112 S. Ct. at 2853 (Blackmun, J., concurring). One reason that Chief Justice Rehnquist could find that married women *prefer* not to tell their husbands rather than that some women emphatically *need* the option to not inform their husbands is that his dissent generally ignored the impact of domestic violence in these situations. *See infra* notes 221-222 and accompanying text.

210. This current of deep distrust toward married women is even more apparent in some of the briefs offered to the Court in support of the husband notification requirement. *See, e.g.*, Amicus Curaie Brief by the Rutherford Institute in support of Respondents at 15, (Nos. 91-704 and 91-902) (observing that one "type of woman who may not tell her husband . . . about a decision to abort is the woman who makes a hasty, impulsive decision"). This brief characterized married women who have abortions without informing their husbands as women who are "liberated," "highly dominant [and] independent." *Id.* at 13; *see also* Amicus Curaie Brief by the United States in support of Respondents at 24 (Nos. 91-744 and 91-902) (hereinafter United States Brief) (stating that the notification requirement would compel married women to "rethink a hasty decision").

211. The dissenting judge on the court of appeals panel who voted to uphold the husband notification requirement also made this analogy between adult married wo-

quirement "'does not give any third party the legal right to make the [woman's] decision for her, or to prevent her from obtaining an abortion should she choose to have one.'"[212] This statement was meant to support the Chief Justice's finding that the requirement did not act as a veto. However, in quoting from *Hodgson v. Minnesota*,[213] a case in which the Court upheld parental notice requirements, Chief Justice Rehnquist neglected to point out that he had substituted "woman" in place of "minor" in the original. His placid exchange of "minor" for "woman" indicates that he equated the two groups in much the same way that common law and equity historically equated married women with less capable populations such as "infants and lunatics."

The Chief Justice's approval of the husband notification requirement stemmed from the same reasoning employed in validating parental consent and notification requirements: the requirements are acceptable because they offer a less capable party help from an inherently more capable party in making a complex and traumatic decision. Chief Justice Rehnquist's image of married women thus found them in need of consultation and guidance in much the same way that Blackstone's era saw married women in need of their husbands' consultation and guidance.[214]

Chief Justice Rehnquist's image of married women as in need of aid and protection perhaps may be one reason why, in the second half of his opinion, which detailed the application of the rational basis test to the notification requirement, he did not factor the woman's interest into the test.[215] He did consider the interests of the State and the husband, which coincided quite neatly.[216] In assessing the husband's interest, the Chief Justice assumed that the wife's interests mirrored or were subordinate to the husband's interests.[217] Based on this assumption, which clearly was rooted in

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men and minors. Planned Parenthood v. Casey, 947 F.2d 682, 721 (3d Cir. 1991) (Alito, J., dissenting). In addition, a number of the briefs offered in support of the husband notification requirement used this analogy. *See, e.g*, Brief for Respondents at 24 (Nos. 91-744 and 91-902); United States Brief, *supra* note 210, at 22.

212. 112 S. Ct. at 2870 (quoting Hodgson v. Minnesota, 497 U.S. 417, 496 (1990) (Kennedy, J., concurring in judgment in part and dissenting in part) (alteration in the *Casey* original)).

213. 497 U.S. 417 (1990).

214. An amicus brief offered in support of the husband notification requirement put it slightly differently. Compelling married women to notify their husbands prevents "a novel intrusion into a settled matrix of family responsibilities." Amicus Curaie Brief by Focus on the Family *et al.* in support of Respondents at 16 (Nos. 91-744 and 91-902). What was at stake, then, was upholding the husband's traditional position of authority against encroachment by the wife.

215. *Casey*, 112 S. Ct. 2791, at 2866-72.

216. *Id.* at 2867-72.

217. *Id.* at 2869-72.

common law conceptions of unequal husband and wife roles,[218] the Chief Justice saw no need to inquire about the woman's interests independent of her husband.

In assuming that the husband acts in his wife's best interests,[219] the Chief Justice was able to avoid the troubling specter of domestic violence which so disturbed the majority.[220] The only concession he made to the connection between the husband notification requirement and the incidence of domestic violence was his admission that in some circumstances the notification requirement possibly may be harmful.[221] Having dealt with the problem of domestic violence in a way that minimized its danger, the Chief Justice was left free to conclude that the notification requirement served the husband's interest in protecting the life of his unborn child and the State's interest in protecting the husband's interest and the marriage.[222] As with the historical common law on marriage, the Chief Justice relegated married women to a silent and subordinate role.

C. *Who Decides?*

"Her suffering is too intimate and personal for the State to insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[223]

At its root, the husband notification requirement in *Casey* concerned decision-making authority within marriage. The question, to which the majority and dissenting opinions provided diametrically opposed answers, is who is in the best position to make this important and difficult decision. On the one hand, there is the married woman who is in daily contact with her husband and therefore

218. For example, note that the spousal incompetency doctrine in England and America prevented wives from testifying for or against their husbands on the assumption that the interests of husband and wife inevitably were identical, and further, that the interests automatically were those of the husband. The spousal incompetency doctrine is discussed *supra* parts I.A and B.

219. "The pro-notification position is implicitly based on an ideal model of family relations." Ryan & Plutzer, *supra* note 187, at 42.

220. Chief Justice Rehnquist found that the domestic violence statistics recited by the majority did not represent hard evidence. 112 S. Ct. at 2871 n.2.

221. *Id.* at 2871. What becomes clear is that the Chief Justice could not admit any stronger possibility of harm because to do so would be to find that husbands could use the requirement to force their decisions on their wives. This result would too closely resemble the husband's consent requirement invalidated in *Danforth*.

222. *Id.* In the closing lines of his discussion of the notification requirement, Chief Justice Rehnquist attempted to distance his dissent from approving the reasoning behind the husband notification requirement by adding the caveat that the notification requirement only represented a not irrational means of achieving legitimate goals. However, by employing the notoriously forgiving rational basis test, the Chief Justice tacitly showed his approval of the notification. *Id.* at 2872.

223. 112 S. Ct. at 2807 (O'Connor, J., writing for the majority).

possesses the best knowledge as to his probable reaction. On the other hand, there is the Pennsylvania State Legislature, which does not know the husband, but which continues to subscribe to the common law notion that the husband's authority is the paramount factor to consider in fostering marital unity, no matter what the consequences to the wife.[224]

In striking down the husband notification requirement, Justice O'Connor allowed married women to make independent decisions in situations where these women thought it best not to inform their husbands. This decision granted married women a degree of authority over their place in the marriage and in society.[225] In voting to uphold the notification requirement, Chief Justice Rehnquist illustrated his belief that married women should not be afforded independent decision-making authority in marriage.[226] Justice O'Connor's answer to the question of who is in the best position to decide thus recognized an equal set of marital roles while the Chief Justice persistently insisted upon common law roles reminiscent of Blackstone's era. The close decision in *Casey* illustrates that it is too simplistic to state that the American legal system has wholeheartedly progressed away from common law marital roles and toward more balanced roles.[227]

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224. As of 1991, state legislatures were made up of eighty-two percent men and eighteen percent women. THE AMERICAN WOMAN, *supra* note 114, at 409.

225. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." 112 S. Ct. at 2809.

226. The Chief Justice did not explicitly state this conclusion, but in validating the husband's historical authority, he approved the inevitable corollary that the wife's historically subordinate role is the correct one. Unlike the historical, social and legal climate which allowed frank expression of these traditional roles, blatant discrimination is now considered unacceptable. Therefore, the Chief Justice attempted to strike a neutral stance.

227. For example, a number of states retain similar husband consent or notification requirements. *See, e.g.*, COLO. REV. STAT. ANN. § 18-6-101(1) (West 1990) (husband's consent required if woman living with her husband); FLA. STAT. ANN. § 390.001(4)(a) (West Supp. 1993) (same); ILL. ANN. STAT. ch. 40, para. 1015(b) (Smith-Hurd Supp. 1991) (husband not liable for expense of abortion unless he consents); LA. REV. STAT. ANN. § 40.1299.33D (West 1992) (notice required to husband if woman is a minor); MONT. CODE ANN. § 50-20-107 (1991) (written notice to husband required); R.I. GEN. LAWS § 23-4.8-2 to -4 (1989) (physician shall inform husband if reasonably possible); S.C. CODE ANN. § 44-41-20(c) (Law, Co-op, 1985) (husband's consent required in third-trimester abortion); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986) (husband's consent required if woman is a minor); UTAH CODE ANN. § 76-7-304 (physician shall notify husband if possible). These statutes almost invariably link husband notification with parental consent and notification, thus presenting another example of grouping married women with minors.

In light of *Danforth* and *Casey*, some of these statutes, such as Colorado's and Florida's, clearly are no longer enforceable, although they remain in the statute books. The enforceability of other statutes, such as Illinois', remains an open question. Louisiana's and South Dakota's husband notification requirements may be es-

Conclusion

Historically, the law's conception of married women linked them to less capable populations, denied their competence, and relegated them to a subordinate role. This antiquated conception of married women continues to shape and direct legislative action and judicial decisions. The dangers of the ongoing vitality of these derogatory views of married women are clear: married women remain vulnerable to economic sanction and physical and psychological violence by their husbands. As historically has been true, courts and legislatures fail to prevent these dangers, and, in fact, tacitly encourage them.[228] Courts and legislatures also persist in denying married women the authority to make decisions about matters which intimately affect their lives.

This article focused attention on courts' and legislatures' stubborn attachment to dangerously outmoded ideas of marital roles. By highlighting these problems, which are pervasive enough to touch such disparate areas as husband notification requirements in abortion statutes and the confidential communication privilege in evidence law, the article aims to help prevent old common law ideas from shaping further legal action. The four suggestions discussed below, combined with the proposed modifications to the confidential communications privilege in Part II.B, illustrate a few methods by which more equal marital roles may be achieved.

First, courts and legislators should be aware that the law's conception of marital unity historically has been premised on married women's economic, social, and physical subordination to their husbands. Because so much of the judicial and legislative population remains mired in the common law past, marital unity remains a problematic judicial and legislative goal. Therefore, any present or future legislation intended to foster marital unity should be carefully examined to assess whether the wife's decision-making authority is being impaired.

Second, judges and legislators should be especially sensitive to husbands' use of intimidation, threats, and physical violence against their wives. In the past, courts expressly allowed husbands to exercise physical authority over their wives. Today, courts and legislatures tacitly allow husbands to subject their wives to abuse and pain. In giving total authority to husbands, as the confidential communication privilege does and the husband notification require-

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pecially problematic for the Court because it has now invalidated husband consent and notice requirements, but upheld parental consent and notice requirements for minor women.

228. *See supra* parts II and III.

ment attempted to do, courts and legislatures ignore the very real danger of bolstering husbands' physical power over their wives and family members.

Third, the gender neutral language of judicial opinions and legislation should not be allowed to conceal old prejudices. The confidential communications privilege and the husband notification requirement serve as excellent examples of how ostensibly neutral language is used to disguise distinctly gender-specific mandates and burdens. Both the privilege and the notification requirement compel married women to act in the manner that their husbands command. Courts and legislatures must lift the mantle of this nonoffensive language and peer beneath to determine the damaging impact of the legislation.

Fourth, courts and legislatures must earnestly consider their own buried biases concerning husband and wife roles. The common law history on marital roles is a history of blatant inequality. This history continues in the present day to enforce unequal roles, but it does so subtly and quietly. Married women, for example, usually earn less than their husbands, and so decision-making power quietly favors husbands.[229] Married women are under-represented in the judiciary[230] and in the legislative branches of government and again, judicial and legislative action often subtly validates husbands' authority over their wives.[231]

The problem of unequal marital roles, created long ago in England and inherited and embraced by America, continues today.[232] Progress has been made, and yet married women avoided being relegated to their historically subordinate position by only one vote in *Casey*. Moreover, married women still live with the "privilege" of being silenced in order to preserve a common law conception of marital unity. The deeply rooted prejudices which underlie these unequal marital roles must be recognized and excised.

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229. *See supra* part II.C, notes 113-115 and accompanying text.

230. As of 1990, thirteen percent of the federal judiciary were women. This percentage seems likely to increase during President Clinton's term. Paul M. Barrett, *More Minorities, Women Named to U.S. Courts*, WALL ST. J., Dec. 23, 1993, at B1, B5 (noting that approximately thirty three percent of President Clinton's judicial nominees have been women). THE AMERICAN WOMAN, *supra* note 114, at 411. Women make up fifty-two percent of the nation's population. *Id.* at 227.

231. *See supra* part III.C, note 224.

232. Justice Brennan's observation, written in a dissent concerning a death penalty decision, applies equally well to the topic that this article has explored: "[W]e remain imprisoned by the past as long as we deny its influence in the present." McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (Brennan, J., dissenting).