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LEGAL RAPE: THE MARITAL RAPE EXEMPTION

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Rape is a crime by which a male has sexual intercourse forcibly and without the consent of the female.[1] From a woman's perspective, if she chooses not to have intercourse with a specific man and the man chooses to proceed against her will, he has perpetrated a criminal act of rape.[2] Marital rape, the rape of a wife by her husband, is a topic which most people do not seriously consider. California Senator Bob Wilson, expressing the views of many on the topic, inquired, "[i]f you can't rape your wife, who can you rape?"[3] Although society recognizes that family violence is a serious and pervasive problem, often requiring intervention by the criminal justice system, marital rape has not raised the public eyebrow, despite its alarming frequency.[4] Statistics indicate that one out of every seven women "who has ever been married, has been raped by a husband at least once, and sometimes many times over many years."[5] Despite its apparent pervasiveness,[6] common law formulations of the offense of rape traditionally have excluded nonconsensual acts of sexual intercourse between married persons.[7] This legal immunity, provided to a man who forcibly sexually assaults his wife, is

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1. BLACK'S LAW DICTIONARY 1134 (5th ed. 1979).

2. S. BROWNMILLER, AGAINST OUR WILL 18 (1975).

3. S. ESTRICH, REAL RAPE 74 (1987).

4. Note, *Marital Rape*, 9 NOVA L.J. 351 (1985); *see also* Griffin, *In 44 States, It's Legal to Rape Your Wife*, 9 STUDENT LAW. 57 (1980).

5. D. RUSSELL, RAPE IN MARRIAGE 2 (1982). The conclusion is based upon a random sampling of 930 women which Russell generalized to the population at large.

6. *Id; see also* R. TONG, WOMEN, SEX AND THE LAW (1984); Griffin, *supra* note 4, at 57 (suggesting that as many as two million women may be raped annually by their husbands).

7. The husband cannot be prosecuted for rape despite the elements of the crime of rape: lack of consent, use of force, and sexual penetration. *See generally* 3 WHARTON'S CRIMINAL LAW, §§ 283-290, 1-43 (C. Torcia 14th ed. 1978). For various state statutes which incorporate the marital rape exemption, see *infra* notes 174, 176-188 and accompanying text.

called the marital rape exemption.[8] Despite its anachronistic viewpoint toward women, marriage, and society today, the marital rape exemption still exists in many states, depriving a woman of bodily integrity vis-a-vis her husband, subjecting her to harsh physical and emotional penalties[9] as victim of her husband's forcible sexual assaults, and denying her the right of a single woman to legal recourse against her attacker.

This article first examines the historical origins of the exemption. Next, it critically scrutinizes the justifications, both legal and historical, for the marital rape exemption, its possible constitutional implications, and recent cases and statutes moving toward its abrogation.

HISTORICAL

Rape laws developed to protect the interests of men, not the victimized women, whom men viewed as property. Men designed laws to prevent abduction of propertied virgins, a crime they viewed as akin to damaging another man's property.[10] From this perspective, prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property.[11] After being abducted and ravished, a propertied woman who was a virgin could save her rapist by marrying him.[12] The primary issue was the consolidation of the property interests of the two, not vindication for the victim's injury.[13]

The actual legal genesis of the marital rape exemption is a statement made three hundred years ago by Sir Matthew Hale: "[b]ut the husband can not be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband

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8. *See* Comment, *The Marital Rape Exemption*, 27 LOY. L. REV. 597 (1981); *see also* Note, *Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 306-09 (1977).

9. *See* Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 GOLDEN GATE U.L. REV. 717, 718 (1981); *see, e.g.*, Burgess & Holstrom, *Rape Trauma Syndrome*, in FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER (D. Chappell, R. Geis, G. Geis eds. 1977). One study of rape found that of 646 rapes studies, 85% involved physical violence, including beating, choking, successive attacks and use of weapons. M. AMIR, FORCIBLE RAPE, RAPE VICTIMOLOGY 51 (L. Schultz ed. 1975); *see also infra* notes 134-149, 151, for a discussion of the effects of violence on the married victim.

10. For a chronology of historical developments in rape, see S. BROWNMILLER, *supra* note 2, at 11-22; B. TONER, THE FACTS OF RAPE 112-30 (1977).

11. Freeman, *"But if you can't Rape Your Wife, Who[m] Can You Rape": The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 8 (1981).

12. This practice came to be known as the "subsequent marriage doctrine." *See* S. BROWNMILLER, *supra* note 2, at 16.

13. *Id.*

which she can not retract."[14] Since the "subsequent marriage" doctrine[15] allowed a rapist to escape prosecution by marrying his victim, it could be argued as a corollary that rape within the marriage would result in the same immunity.[16]

Contrary to his usual practice, Lord Hale cited no legal authority for this proposition.[17] He also intimated that women could easily fabricate rape charges, a concern which has evolved today into the "cry-rape" syndrome.[18] Given his background as a judge at the 1662 witchcraft trial in Bury St. Edmunds and "systematic biases against women,"[19] he may have created the marital rape exemption.[20] Whatever its inception, the fact remains that with little or no independent analysis,[21] authorities have relied upon and cited Hale, and his unsupported pronouncement became the flimsy fulcrum upon which the marital rape exemption rested.[22] The issue was not considered by a court until 1888 in *Regina v. Clarence*, when the judges addressed the issue in dicta.[23] Even then the judges divided on the issue. Two judges, Wills and Field, were opposed to Hale's pronouncement. Wills argued:

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14. 1 M. HALE, HISTORIA PLACITORUM CORONAS 628, 629 (Emelyn ed. 1847); *see also* 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (P. Glazenbrook ed. 1971).

15. It has been suggested that an anomaly exists between the "subsequent marriage" doctrine and Hale's "contractual consent" doctrine in which he expressed his theory. *See* Comment, *supra* note 8, at 597; *see also* Gonring, *Spousal Exemption to Rape*, 65 MARQ. L. REV. 120, 122 (1981).

16. Warren v. State, 255 Ga. 151, 153, 336 S.E.2d 221, 223 (1985).

17. State v. Smith, 85 N.J. 193, 196, 426 A.2d 38, 41 (1981); *see also* Comment, *The Common Law Does Not Support a Marital Exception for Forcible Rape*, 5 WOMEN'S RTS. L. REP. 181, 182-183 (1979) (discussing *State v. Smith*); Gonring, *supra* note 15, at 122.

18. The "cry-rape" argument alleges that if women are allowed to criminally charge their husbands with rape, they will fabricate charges. *See* Comment, *supra* note 8, at 600; *see also* Note, *supra* note 8, at 314-15; and *infra* notes 108, 111, and accompanying text.

19. Freeman, *supra* note 11, at 10-11 (citing J. Campbell, *Life of Chief Justice Hale* in *The Lives of the Chief Justices* 584 (1849); *see* 1 M. Hale, HISTORY OF THE PLEAS OF THE CROWN, 629 (P. Glazenbrook ed. 1971); *see also* Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088 (1980); Geis, *Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden*, 6 ADEL. L. REV 284, 285-86 n.11 (1978). The Barry and Geis articles both discuss Hale's reputed misogyny and his presiding over the witch trials. *See generally* Gonring, *supra* note 15, at 121.

20. Freeman, *supra* note 11, at 10-11. This article notes that Hale's abstention from citation of authority may be twofold: absence of authority that supported his position and authority which opposed his viewpoint. It further cites Hale as saying, concerning women, that "there is no wisdom below the girdle." *Id.* at 11.

21. Comment, *supra* note 17, at 182.

22. *See* Pracher, *supra* note 9, at 728.

23. Regina v. Clarence, 22 Q.B. 23 (1888). *See* Freeman, *supra* note 11, at 11 for discussion of Hale's marital rape exemption; Comment, *supra* note 17, at 182.

> If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. . . I cannot understand why, as a general rule, if intercourse be an assault, it should not be rape.[24]

Judge Field, criticizing the lack of authority, also noted "[t]he authority of Hale C.J. on such matter is undoubtedly as high as any can be but no other authority is cited by him for this proposition and I should hesitate before I adopt it."[25]

Only four cases in Britain have considered the spousal exemption; only one actually held, following Hale, that a husband could not be charged with raping his wife;[26] that case was heard in 1949.[27] Is our authority, then, only forty years old? "That a rule like the marital rape exemption could date from a time when the status of women was supposed to be improved says a lot about that supposition,"[28] and that jurisprudence for three hundred years has clung to Lord Hale's "Contractual Consent" theory[29] "says much about contemporary society and the role of ideology in it."[30]

On the strength of Hale's unsupported statement, the judiciary in the United States formally recognized the husband's immunity as early as 1857,[31] but perhaps judicial acknowledgement occurred even earlier.[32] Few cases have dealt with the issue directly[33] be-

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24. *Clarence*, 22 Q.B. at 33 (Field, J., dissenting).

25. *Id.* at 57.

26. *See* Regina v. O'Brien, 3 All E.R. 663 (1974); Regina v. Miller, 2 All E.R. 529 (1954); Regina v. Clarke, 2 All E.R. 448 (1948); Regina v. Clarence, 22 Q.B. 23 (1888); *see also* Comment, *supra* note 17, at 182-83 (the court, in *Miller*, observed that "[t]he curious fact is that in the years since Hale's *Pleas of The Crown* there is no recorded case of a man being prosecuted for the rape of his wife until *R. v. Clarke* . . . in 1949.").

27. Regina v. Clarke, 2 All E.R. 448 (1949).

28. Freeman, *supra* note 11, at 12-13.

29. *See* Note, *supra* note 8, at 309, n.20; *see also* Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905)(application of the contractual consent theory); Annotation, *Criminal Responsibility of a Husband For the Rape of His Wife*, 84 A.L.R.2d 1017 (1962)(with cases at 1022).

30. Freeman, *supra* note 11, at 13.

31. Commonwealth v. Fogarty, 74 Mass. (8 Gray) 489 (1857). In dicta, the court stated that a man alone cannot commit a rape upon his own wife. *Id.* at 490. The issue was not directly before the court, however, so the statement could not be used to support the common law theory.

32. *See* State v. Scott, 11 Conn. App. 102, 525 A.2d 1364 (1987). The *Scott* court, citing Z. SWIFT, DIGEST 295 (1823), quoted Chief Justice Zephaniah Swift: "[A] husband cannot by law be guilty of ravishing his wife, on account of the matrimonial consent which she cannot retract." *Scott*, 11 Conn. App. at 108, 525 A.2d at 1370. Apparently this theory of constructive consent is derived from Lord Hale's statement and was incorporated into the common law of Connecticut. *But see* Note, *Sexual Assault: The Case for Removing the Spousal Exemption from Texas Law*, 38 BAYLOR L. REV. 1041, 1046 (1986)(explaining that although the marital rape exemption may have been a part of the Texas com-

cause most statutory codifications and the common law required, as an element of rape, that the victim not be the spouse or wife of the perpetrator.[34]

Generally, the various states incorporated the British common law in force after the Revolutionary War in so far as it did not conflict with the Constitution and state statutes.[35] For example, in *Weishaupt v. Commonwealth*,[36] the court said that English law doctrines which "are repugnant to the nature and character of our political system" are not adopted; the states are free to examine the English common law principles to find those which "fit our way of life and to reject those which do not."[37] Since the English courts only accepted a portion of Hale's statement, the court reasoned that even under English common law, there never existed an absolute irrevocable marital exemption that would, under all circumstances, protect a husband from a charge of rape.[38] Confronting the same issue, the court in *Warren v. State*[39] argued that there had never been an expressly stated marital exemption; the statute had never

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mon law, it did not appear in the Texas Penal Code until 1974. TEX. PENAL CODE ANN. § 21.01(a) (Vernon 1974)).

33. *See* Frazier v. State, 48 Tex.Crim. 142, 86 S.W. 754 (1905). In *Frazier*, a wife tried to obtain a divorce but was refused by the court. She stayed in the same house as her husband, but slept in a separate room. *Id.* at 142-43, 86 S.W. at 754-55. When her husband forcibly raped her, she sought redress in the courts. The court adopted the common law, reversing the lower court conviction, holding that "a man cannot be guilty of raping his wife." *Id.* at 143, 86 S.W. at 755. This was the first American case in which the spouses were married and living together at the time of the incident. *But see* Regina v. Miller, 2 Q.B. 282 (1954), where the wife had left her spouse and filed a divorce petition at the time of the incident. Since the divorce was not final, the court held that she still constructively consented to intercourse, and her husband could not be guilty of rape. *Miller*, 2 Q.B. at 285. *See generally* Comment, *For Better or For Worse: Marital Rape*, 15 N. KY. L. REV. 611, 624 (1988) [hereinafter Comment, *For Better or For Worse*]; Comment, *Marital Rape in California: For Better or For Worse*, 8 SAN FERN. V.L. REV. 239, 240-41 (1980) [hereinafter Comment, *Marital Rape in California*].

34. Warren v. State, 255 Ga. 151, 155, 336 S.E.2d 221, 225 (1985); *see* Comment, *Marital Rape in California*, *supra* note 33, at 240 (sexual intercourse with one's spouse was a "marital right", and as such was "lawful"; rape, then, became "unlawful" sexual intercourse, thereby excluding wives).

35. State v. Smith, 85 N.J. 193, 196, 426 A.2d 38, 41 (1981); Warren v. State, 255 Ga. 151, 155, 336 S.E.2d 221, 225 (1985). The *Warren* court said "[i]f a common law implied consent theory had attached to our earlier statutory crime of rape, it could not have survived because it conflicts with our Constitution and statutory laws." *Warren*, 255 Ga. at 155, 336 S.E. at 225.

36. 277 Va. 389, 315 S.E.2d 847 (1984).

37. *Id.* at 393-94, 315 S.E.2d at 850-52.

38. *Id.* at 393, 315 S.E.2d at 850. The court examined English cases in which a husband and wife lived separately. From earliest times, a wife who lived separately from her husband was treated differently, because the separation cut off the husband's "marital right," normally implied as sexual intercourse; however, that implied consent could be revoked by various means. *Id.*

39. 255 Ga. 151, 336 S.E.2d 221 (1985).

included the word "unlawful,"[40] widely recognized as indicating the incorporation of the common law spousal exemption; and in the rape statute, revised in 1968, the legislature omitted the words "not his wife." Instead, they selected "a person," indicating their intent to broaden the statute. The court concluded that Georgia had never intended the common law exception to apply.[41] As the court in *State v. Smith*[42] aptly explained:

> Thus the marital exemption rule expressedly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some 300 years ago. Such a declaration cannot itself be considered a definitive and binding statement of the common law, although legal commentators have often restated the rule since the time of Hale without evaluating its merits . . . extra-judicial discussions should not always be considered accurate expositions of the common law. In the absence of case law in this State or in England before the Revolution, we are more wary than the lower courts here of accepting Hale's rule as part of the common law.[43]

LEGAL JUSTIFICATIONS FOR THE MARITAL RAPE EXEMPTION

The first examination of the validity of the marital rape exemption began in the late 1970's.[44] As more jurisdictions have grappled with similar issues, many have held that a husband *can* be criminally liable for raping his wife.[45] The court in *State v. Smith* summarized by saying, "The fact that many jurisdictions have mechanically applied the rule, without evaluating its merits under

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40. For a discussion of the significance of using the word "unlawful," see Commonwealth v. Chretien, 383 Mass. 123, 127, 417 N.E.2d 1203, 1207 (1981); State v. Willis, 223 Neb. 844, 846, 394 N.W.2d 648, 650 (1986); R. TONG, *supra* note 6, at 95; *see also supra* note 34 for additional sources.

41. *Warren*, 255 Ga. at 155, 336 S.E.2d at 225.

42. 85 N.J. 193, 426 A.2d 38 (1981).

43. *Smith*, 85 N.J. at 196, 426 A.2d at 41-42.

44. *See Comment, Criminal Law - New York Court Abrogates Marital Rape Exemption as a Violation of Equal Protection—People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984)*, 19 SUFFOLK U. L. REV. 1039, 1042 (1985). Until the rape reform legislation in the 1970's, the exemptions in most state statutes barred prosecution for rape for legally married, but separated, persons. *See* People v. deStefano, 121 Misc.2d 113, 120, 467 N.Y.S.2d 506, 512 (N.Y.Crim.Ct. 1983)(no serious challenge arose to the marital rape exemption from the time of Hale's pronouncement until 1977); Schwartz, *The Spousal Exemption for Criminal Rape Prosecutions*, 7 VT. L. REV. 33, 35-36 (1982) (every state barred wife from prosecuting husband for rape until mid-1970s). *See generally* Bienen, *Rape III - National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 185-86 (1980); Note, *supra* note 8, at 308-09.

45. *See* Merton v. State, 500 So.2d 1301 (Ala. Crim. App. 1986); Williams v. State, 494 So.2d 819 (Ala. Crim. App. 1986); State v. Rider, 449 So.2d 903 (Fla. Dist. Ct. App. 1984); State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981); Commonwealth v. Chretien, 383 Mass. 123, 417 N.E.2d 1203 (1981); State v. Smith, 401 So.2d 1126 (Fla. Dist. Ct. App. 1981); People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984); People v. deStefano, 121 Misc. 2d 113, 467 N.Y.S.2d 506 (1983); Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847 (1984).

changed conditions, does not mean that such blind application was part of the 'principles of the common law' adopted in the State."[46]

Three major justifications are usually cited for the marital exemption. The first is that the woman was the property of her father, and after marriage, her husband.[47] The second rationale is the unity of person or unity through marriage theory. Under this concept the legal existence of the woman merged or consolidated with that of her husband during marriage. The two incorporated into one, and that one was the man.[48] The third justification for the exemption asserts that by consenting to marriage, the woman casts an irrevocable assent to sexual intercourse with her husband.[49] "A closer examination of the theories and justifications indicates that they are no longer valid, if they ever had any validity."[50] Examination of the three theories and justifications underpinning the marital rape exemption will reveal that none withstands scrutiny in light of contemporary views of women, marriage and society.

As previously mentioned,[51] rape was proscribed in order to protect the chastity of women and thus their value as property both to their fathers, and to their husbands after marriage.[52] Ironically, laws protected slaves, considered chattel until the mid-nineteenth century, from rape.[53] John Stuart Mill decried the policy, conceding that:

> [A] female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse to her master the last familiarity. Not so the wife: however brutal a tyrant she may unfortunately be chained to—though she may know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it

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46. *Smith*, 85 N.J. at 198, 426 A.2d at 43.

47. *See, e.g.*, Warren v. State, 255 Ga. 151, 153, 336 S.E.2d 221, 223 (1985); Smith v. State, 85 N.J. 193, 198, 426 A.2d 38, 44 (1981); People v. Liberta, 64 N.Y.2d 152, 158, 474 N.E.2d 567, 573 (1984); Weishaupt v. Commonwealth, 227 Va. 389, 394, 315 S.E. 2d 847, 852 (1984).

48. *See, e.g., Warren*, 255 Ga. at 153, 336 S.E.2d at 223; *Smith*, 85 N.J. at 198, 425 A.2d at 44; *Liberta*, 64 N.Y.2d at 158, 474 N.E.2d at 573; *see also* Freeman, *supra* note 11, at 16-17.

49. *See* Warren v. State, 255 Ga. 151, 153, 336 S.E.2d 221, 223 (1985); Smith v. State, 85 N.J. 193, 197, 426 A.2d 38, 42 (1981); Weishaupt v. Commonwealth, 227 Va. 389, 393-94, 315 S.E.2d 847, 850-852 (1984); *see also* R. TONG, *supra* note 6, at 95; M. VETTERLING-BRAGGIN, FEMINISM AND PHILOSOPHY 335 (1977).

50. Warren v. State, 255 Ga. 151, 153-54, 336 S.E.2d 221, 223-24 (1985).

51. *See supra* notes 10-12 and accompanying text.

52. *See* S. BROWNMILLER *supra* note 2, at 8-22; *see also* Comment, *Rape Laws, Equal Protection and Privacy Rights* 54 TULANE L. REV. 456, 457 (1980); 2 W. BURDICK, LAW OF CRIMES 218-225 (1946); State v. Smith, 85 N.J. at 204, 426 A.2d at 38.

53. *See* Warren v. State, 255 Ga. 151 at 155, 336 S.E.2d at 225; Duffy, *Abrogation of a Common Law Sanctuary for Husband Rapists: Warren v. State*, 2 DET. C. L. REV. 559, 606 (1986)(citing Ga. Code § 4248 (1863) which defined rape as carnal knowledge of a female forcibly and against her will, whether free or slave).

> impossible not to loathe him—he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations[54]. . .[m]arriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.[55]

The concept of woman as chattel has been abandoned in our society. In *Trammel v. United States*,[56] the Court decided that "[n]o where in the common-law world—[or] in any modern society—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."[57] Thus, the rationale of woman as property of her husband is outmoded, invalid, and fails to support the marital rape exemption.

The related justification whereby the wife's identity merges with that of her husband is anachronous today. Blackstone in 1765 wrote that the wife's being or legal existence is suspended during marriage, merged into her husband's, "under whose wing, protection, and cover she performs every thing."[58] If the husband and wife consolidated into one being, rape in marriage then became paradoxically impossible, since a man cannot rape "himself."[59] Vestiges of this policy remain, for example, when a wife is referred to as her husband's "better half."

In many areas of the law, the hand-tying disabilities of wives were abandoned with the legal fictions upon which they rested. The Married Women's Property Acts adopted by the states allowed a married woman to sue and be sued, own and convey property, enter and enforce contracts, and otherwise enjoy the rights of unmarried women.[60] Many jurisdictions have abolished the interspousal tort immunity; women can testify against their husbands as well as sue for various torts.[61] The changes in both the legal status of married

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54. J.S. MILL, *The Subjection of Women*, in THREE ESSAYS 463 (1912).

55. *Id.* at 522.

56. 455 U.S. 40 (1980).

57. *Id.* at 52.

58. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Vol. I, 442 (1978). Although Blackstone commented on nearly all aspects of the marital relations, it is significant that he does not mention Hale's "contractual consent" theory. *See* Note, *supra* note 8, at 310-12; H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 219 (1968).

59. This is similar to the rationale underlying interspousal immunity, wherein a husband cannot sue "himself." *See generally* Note, *Interspousal Immunity—A Policy Oriented Approach*, 21 RUTGERS L. REV. 491, 492-3 (1967); M. VETTERLING-BRAGGIN, *supra* note 49, at 326-327.

60. *See* H. Clark, *supra* note 58, at 219; *see also* Note, *supra* note 8, at 310-12.

61. *See* Comment, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251 (1975); many of the same justifications are offered to support interspousal immunities as for retaining the husband's rape immunity. *Cf.* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, 863 (4th ed. 1971), but note changes at 641-43 (6th ed. 1976). *See also infra* note 120.

women and social attitudes have otherwise made the husband's immunity outdated. First, marriage is viewed as an equitable partnership.[62] In addition, with abandonment of the viewpoint that women are property, rape laws now protect a woman's personal safety and freedom of choice.[63] The antiquated, common law rationales subjugating the status of women in marriage are logically inadequate to justify statutes which subject married women to forcible, undesirable sexual attacks by their husbands.

The third and most cited[64] justification for the marital rape exemption lies in contract theory arising from the marriage vows; it is known as Lord Hale's contractual theory.[65] According to Hale, the wife, by consenting to marry, also consented irrevocably to her husband's exercising his "marital right of intercourse"[66] whenever he desired.[67] Hale's ruling made rape, forcible sexual intercourse without consent, between spouses definitively impossible. One of the elements of rape is lack of consent, and consent was irrevocably and constructively implied during the tenure of the marriage by virtue of the marriage vows.[68] This construction of implied consent held, "even if the woman did not *in fact* consent at the time of intercourse."[69]

An analysis of Hale's theory using contract law indicates that the marital vows do not constitute a valid contract. For example, the joining of two lives in marriage is not analogous to a business deal. Additionally, all of the elements of a contract which are normally delineated are not present. Ordinarily the parties agree to the terms of a contract and spell them out. Such is not the case with traditional marriage vows; in contrast,"[i]ts provisions are unwrit-

62. Note, *supra* note 8, at 311.

63. *Id. See, e.g.*, FLA. STAT. ANN. § 794.011 (West 1976 and Supp. 1989); ILL. REV. STAT. ch.38, para. 12-13(a)(1) and 14 (1981 and Supp. 1989).

64. *See, e.g.*, Warren v. State, 255 Ga. 151, 153, 336 S.E.2d 221, 223 (1985); *see also* Note, *supra* note 29, at 311.

65. The contract theory is discussed in the text accompanying notes 14 and 43. *See also Warren*, 255 Ga. at 151, 336 S.E.2d at 222. The *Warren* court posed the question: "When a woman says I do, does she give up her right to say I won't?" 336 S.E.2d at 223 (1985); Griffin, *supra* note 4, at 21-23, 57-61 (1980). Additional discussion of contract theory appears in Freeman, *supra* note 11, at 10; *see also* Comment, *Sexism and the Common Law: Spousal Rape in Virginia*, 8 GEO. MASON U. L. REV. 369 (1986).

66. R. v. Clarke, 2 All E.R. 448, 448 (1949); *see also* Note, *Abolishing the Marital Exemption for Rape: A Statutory Proposal*, 1983 U. ILL. L. REV. 201, 202.

67. *See, e.g.*, People v. Damen, 28 Ill. 2d 464, 466, 193 N.E.2d 25, 27 (1963); People v. Pizzura, 211 Mich. 71, 73, 178 N.W. 235, 236 (1920); Frazier v. State, 48 Tex. Crim. 142, 143, 86 S.W. 754, 755 (1905); *see also* S. BROWNMILLER, *supra* note 2, at 6-22; Note, *supra* note 29, at 311; Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 641 (1976).

68. *See* Note, *supra* note 32, at 1042; Harman, *Consent, Harm, and Marital Rape*, 22 J. FAM. L. 423, 424 (1983-84).

69. Comment, *supra* note 17, at 183.

ten, its penalties are unspecified, and the terms of the contract are typically unknown to the 'contracting' parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any options about these terms."[70] All that a marriage obligates the parties to do is love and honor each other until death,[71] which are very vague terms for a contract. To form a valid contract, "an objective manifestation of intent to agree" is needed,[72] and it is doubtful that modern women would knowingly agree that marriage means irrevocably consenting to sexual intercourse upon demand.[73] It is also questionable whether Hale's theory meets the prerequisites of either an express or implied contract[74] and marriage is not purely a business activity; contract law should not be applied to it as such.

Feminists offer an alternative solution to the contract issue. They aver that by acquiescing to marry, a woman does not also agree to a life of sexual slavery by which she unconditionally surrenders her body to her husband without requiring the same irrational behavior of him.[75] Next, if a woman explicitly irrevocably consented to sexual intercourse upon demand of her husband, enforcement would pose a hardship to law enforcement agents. Feminists conclude that "even if unconditional intercourse contracts exist," they are unenforceable, and therefore void.[76] Thus, reading marriage vows as bestowing irrevocable consent is ludicrous. Moreover, even if marriage is viewed as a personal service contract, the remedies for breach do not generally include specific performance or forced enforcement.[77] Instead, husbands who felt their wives had breached the marriage "contract" by declining consent could seek redress through divorce, annulment, separate maintenance, or

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70. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1170 (1974).

71. In Lord Hale's time, marriage was, in fact, until death, since divorce was virtually unknown. Today, however, such is not the case. *See infra* notes 176-79 for statutes pertaining to rape and marital status.

72. *See* Comment, *supra* note 8, at 598 (quoting Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088 (1980).

73. *See Scott*, 11 Conn. App. at 224, 525 A.2d at 65; *see also* Hines v. Hines, 192 Iowa 569, 571, 185 N.W. 91, 92 (1921).

74. *See, e.g.*, Prosser, *Delay in Acting on an Application for Insurance*, 3 U. CHI. L. REV. 39 (1935). Prosser explains that both implied and express contracts rest upon the intent of the parties, requiring agreement, meeting of minds, and intent to promise and be bound. *Id* at 49.

75. R. TONG, *supra* note 6, at 95; M. VETTERLING-BRAGGIN, *supra* note 49, at 335; *see also* Note, *supra* note 29, at 311 (noting that "none of the cases that rely on the consent rationale to exempt a husband from rape charges has cited any holding outside the rape context that marriage implies consent to copulation at all times.").

76. R. TONG, *supra* note 6, at 95.

77. *Id; see also* Comment, *supra* note 8, at 598.

suit for damages, alienation of affection, or criminal conversion.[78] A wife's action of marrying her husband does not *in fact* mean that she expressly or implicitly consents to sexual relations under any and all conditions; thus, "[i]n light of the distinguishable factors of a marriage contract, the only rationale for Lord Hale's contract theory is that 'the consent given is implied by law, regardless of either party's expectation to the contrary.' "[79] The New Jersey Supreme Court stated that:

> this implied consent rationale, besides being offensive to our valued ideals of personal liberty is not sound where the marriage itself is not irrevocable. If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract,' may she not also revoke a 'term' of that contract, namely, consent to intercourse? Just as a husband has no right to imprison his wife because of her marriage vow to him. . . he has no right to force sexual relations upon her against her will. If her refusals are a 'breach' of the marriage 'contract', his remedy is in a matrimonial court, not in violent or forceful self-help.[80]

Hale's theory fails for other reasons as well. If the argument ever had credence, it became obsolete with the arrival of divorce laws.[81] Second, it creates a double standard; the courts apply an implied consent theory when rape is involved, but not to other violent, domestic crimes. A wife is not presumed to irrevocably consent to assault, battery, or other violence, but the courts make this presumption when rape is involved.[82] Additionally, the underlying, yet unreasonable, tenet of the exemption is that the wife intends to make her body constantly sexually available to her husband.[83] Marriage law has never required a wife to unconditionally consent to her husband's demands for sexual intercourse. She can refuse sexual demands that are unreasonable or inordinate,[84] or if he has a venereal disease.[85] In fact, U.S. courts have held that a husband has a duty of forebearance at the reasonable request of his wife.[86] Overall, the irrevocable consent theory is not accepted as adequate justification for the marital rape exemption; in fact, one commentator has noted that "[t]he doctrine of permanent consent recently has

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78. *See id.*

79. *Id.* at 598-99 (quoting from Comment, *The Marital Exception to Rape: Past, Present & Future*, 1978 DET. C.L. REV. 261, 263 n.13 (1978) (citing S. STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 72-73 (E. Jenks 14th ed. 1903)).

80. State v. Smith, 85 N.J. 193, 205, 426 A.2d 38, 44 (1981).

81. Note, *supra* note 66, at 206; *see also* R. v. Clark, 2 All E.R. 448 (1949).

82. *See* Gonring, *supra* note 15, at 123-24; Note, *supra* note 8, at 312-13.

83. Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 722 (1954).

84. *See* Holborn v. Holborn, All E.R. 32, 32-33 (1947).

85. Foster v. Foster, 152 T.L.R. 70 (1921).

86. Hines v. Hines, 192 Iowa 569, 571, 185 N.W. 91, 92 (1921).

been characterized as legal fiction, since it appears unrealistic to assume that modern women give unqualified consent to sexual relations with their husbands during marriage."[87] Also, a consent theory based solely upon marital status is unrealistic. Couples, although married, may live apart with mutual agreement as to non-intimacy. The exemption would apply and protect a transgressing husband from prosecution, but ironically, not a male involved in a cohabiting, non-marital relationship.[88] In summary, "[e]ven if the consent rationale was justified when first articulated, it is entirely inconsistent with today's concept of egalitarian sexual relationships. . . . [S]exual intercourse must be mutually desired and not viewed as a wifely 'duty' "[89] and should not be used to thwart justice. Courts recognize that women have a right to sexual privacy, and "policy considerations should propel us to insist that such lawless evasions not be condoned under the guise of nice applications of contract law."[90]

The final objection to Hale's consent doctrine lies in the definition of rape itself. Since rape is a crime of violence,[91] not of sex, the consent theory is meaningless. Even if a wife could consent to all sexual relationships with her husband, the presumption is that each time her husband forces her to engage in intercourse, his compulsion is sexual; obviously, since rape is a violent, aggressive crime rather than a sexual act, the wife cannot consent to being raped by her husband. The Georgia Supreme Court held that:

> no normal woman. . .would knowingly include an irrevocable term to her revocable marriage contract that would allow her husband to rape her. . .It is incredible to think that any state would sanction such behavior by adding an implied consent term *to all marriage contracts* that would leave *all* wives with no protection under the law from the 'ultimate violation of self'. . .simply because they choose to enter into a relationship that is respected and protected by law. The implied consent theory to spousal rape is without logical meaning, and *obviously conflicts* with our Constitutional and statutory laws and our regard for all citizens of this State.[92]

It is therefore unreasonable to assume that a woman who recites a marriage vow also consents to acts of violence against her will. Under both contract theory and in light of changes in the status of

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87. Note, *supra* note 32 at 114 (1980).

88. Note, *supra* note 66, at 206-07; *see also* Comment, *Marital Rape in California*, *supra* note 33, at 242-43.

89. Note, *supra* note 29, at 313.

90. State v. Smith, 148 N.J. Super. 219, 228, 372 A.2d 386, 390 (1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981).

91. *See, e.g.*, People v. Liberta, 64 N.Y.2d 152, 164, 474 N.E.2d 567, 573, 485 N.Y.S.2d 207, 213 (1984), *cert. denied*, 471 U.S. 1020 (1985); *see also* Comment, *Marital Rape in California*, *supra* note 33, at 243-44.

92. Warren v. State, 255 Ga. 151, 155, 336 S.E.2d 221, 224-25 (1985) (emphasis added); *see also* Note, *supra* note 8, at 312-13.

women and marriage in contemporary society, Lord Hale's consent theory fails.

OTHER JUSTIFICATIONS

While the traditional theories supporting the marital rape exemption no longer have validity, other arguments have been used by its proponents to justify its existence. These include: difficulty of proving rape; marital rape as less serious than stranger rape;[93] "[p]revention of fabricated charges; [p]reventing wives from using rape charges for revenge; [and] [p]reventing state intervention into marriage so that possible reconciliation will not be thwarted."[94]

Proving rape has always been difficult,[95] but supporters of the marital rape exemption argue that husbands are extremely vulnerable, since most rapes occur when the rapist and victim had a prior relationship.[96] However, the criminal justice system has safeguards to handle false complaints. As the court in *People v. Liberta*[97] pointed out, if the possibility of fabricated complaints were a basis for not criminalizing behavior that otherwise would be sanctioned, almost all crimes other than homicide would go unpunished.[98] The *Warren* court concurred, stating that,

> There is no other crime we can think of in which all of the victims are denied protection simply because someone might fabricate a charge; there is no evidence that wives have flooded the district attorneys with revenge filled trumped-up charges, and once a marital relationship is at the point where a husband rapes his wife, state intervention is needed for the wife's protection.[99]

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93. *Liberta*, 64 N.Y.2d at 164, 474 N.E.2d at 573-74, 485 N.Y.S.2d at 214.

94. *Warren*, 255 Ga. at 153-54, 336 S.E.2d at 223. For a general discussion of continued support for the marital rape exemption, see Comment, *supra* note 65, at 369-76.

95. *Liberta*, 64 N.Y.2d at 164, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.

96. *Id. See* Note, *supra* note 8, at 314 n.5. *See also* Griffin, *supra* note 4, at 57. *See generally* Zamora, *Warren v. State: One Attempt to Modernize the Marital Rape Exemption*, 10 AMER. J. TR. ADV. 157, 164 (1986).

97. 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.2d 207 (1984).

98. *Id.* at 164, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.

99. *Warren*, 255 Ga. at 155, 336 S.E.2d 221 at 225. Actually the reverse is true. Victims are reluctant to report being raped. The court cited statistics to show that the average person ranks alleged husband-wife rapes the lowest in credibility, and juries convict only 3 of 42 suspects in simple rape cases where one assailant knew the victim and there is no extrinsic violence. In addition, the state intervenes in assault, battery and other domestic violence, and assault and battery are involved in rape. *Id. See* Note, *supra* note 8, at 314-15 ("rape prosecutions are often more shameful for the victim than the defendant"); *see also* Comment, *supra* note 8, at 601. Fabrication of rape charges is unsubstantiated. *Id.*

> While men successfully convinced each other and us that women cry rape with ease and glee, the reality of rape is that the victimized women have always been reluctant to report the crime and seek legal justice—because of the shame of public exposure, because of that complex double standard

Another, related, reason for abolishing the exemption is that the law operates as a deterrent and educator. Theoretically and perhaps actually, some husbands will be deterred from spousal rape by abolition of the exemption. Others will come to recognize marital rape as a criminal act, and that they are responsible for behavior that violates a woman's bodily integrity.[100]

One rationale for asserting the marital rape exemption is reluctance of law enforcement agencies to interfere in the marital relationship.[101] The basis of the argument as delineated in *Griswold v. Connecticut* is that interfering in the affairs of the husband and wife violates the penumbral right of privacy guaranteed by the U.S. Constitution.[102] The marital right to privacy recognized in *Griswold* was designed to recognize the "freedom of married persons" to make choices about their married life without state intrusion.[103] This freedom, however, does not grant to husbands the right to violently and nonconsensually rape their wives.[104] In a spousal rape case, "the right to privacy is claimed by one spouse over the objection of the other. Flowing from this, the second erroneous and rather cavalier assumption is that the assaulting spouse's right to privacy is superior to the injured spouse's right to protection."[105] The eventual philosophical problem becomes a balancing between the right to marital privacy versus the privacy right of the individual. The Court addressed this problem in *Eisenstadt v. Baird*.[106] Recognizing the individual's right of privacy as superceding that of the marital right to privacy, the court stated:

> 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

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> that makes a female feel culpable, even responsible, for any act of sexual aggression committed against her. . .and because women have been presented with sufficient evidence to come to the realistic conclusion that their accounts are received with a harsh cynicism that forms the first line of male defense.

S. BROWNMILLER, *supra* note 2, at 1091.

100. Comment, *For Better of For Worse*, *supra* note 33, at 616. *See generally* Schwartz, *supra* note 44, at 51. For an opposing viewpoint, see Griffin, *supra* note 4, at 57 (Ronald Sklar quoted as saying that the criminal justice system will lose credibility if marital rape becomes criminalized).

101. Comment, *For Better of For Worse*, *supra* note 33, at 614-15; Comment, *Marital Rape in California*, *supra* note 33, at 246 (citing LeGrande, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 939 (1973)).

102. 381 U.S. 479 (1965). For further discussion on privacy interests, see *infra* note 104 and accompanying text.

103. 381 U.S. at 507 (White, J., concurring).

104. Marital rape is *not* consensual sexual conduct. *Griswold* did not prohibit state intrusion in regulating *nonconsensual* sexual behavior. *See generally* Note, *supra* note 66, at 215-16.

105. Note, *supra* note 8, at 333 (citing Trammel v. United States, 445 U.S. 40 (1980)). Aside from confidential communications, the witness spouse alone holds the privilege to testify, which the accused cannot assert for her. *Id.*

106. 405 U.S. 438 (1972).

> intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[107]

Just as the *Baird* decision emphasizes personal, as opposed to marital privacy rights, other later decisions reinforced those rights.[108] Allowing a husband to legally and forcibly rape his wife against her will robs that woman of her right to make fundamental decisions about her bodily integrity, separate and distinct from any marital or family relationship, purportedly guaranteed by the Supreme Court.

Applying the privacy right to marital rape sets in motion a chain of intrafamilial violence.[109] Law enforcement agencies are skeptical of the complainant in domestic violence situations; domestic disputes are often violent and result in few prosecutions.[110] Proponents of this argument hold that it is inappropriate for the state to interfere in the institution of marriage and family; however, the state already intercedes into intrafamilial matters. For example, laws prohibit incest, child abuse and wife abuse. Should we decriminalize incest because it is a "family matter?"[111] Applying the reasoning of marital rape exemption proponents, by analogy it

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107. *Id.* at 453 (emphasis added).

108. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Cent. Miss. v. Danforth, 428 U.S. 52 (1976). It has been argued that the marital exemption violates *Roe* by allowing a husband to impregnate his wife against her will, which denies her reproductive freedom guaranteed in that case. Comment, *For Better or For Worse*, *supra* note 33, at 628-30; *see also* Bellotti v. Baird, 443 U.S. 622, 652 (1979), where Justice Stevens argued that inherent in the right of privacy is the right to make decisions "without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties," because for anyone to interfere with a person's decision "is fundamentally at odds with privacy interests underlying the constitutional protection afforded to [that person's] decision." *Id.* at 655-56. If the protected right of privacy is an individual's fundamental right to choose about matters concerning his/her integrity as a person, the implication is that interference with that right is unconstitutional. *See also* Commonwealth v. Shoemaker, 518 A.2d 591, 94 (Pa. Super. 1986) where the court held, "[t]he right to privacy within the marital relationship is not absolute and, in this case, must be balanced against the state's interest in protecting an individual's right to the integrity of his or her own body."

109. *See* Note, *supra* note 8, at 333 (applying privacy rights to marital rape encourages chain of violence within the family that becomes a way of life).

110. *Id. See* Comment, *Marital Rape in California*, *supra* note 33, at 246-247, indicating that law enforcement officials have a "hands-off" attitude toward marital rape that is unacceptable in other areas of domestic violence and has no reasonable basis. *See* LeGrande, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 939 (1973). Police are not willing and/or are unable to make arrests. *Id.* In addition, the family is immune from the law because of a covert tolerance toward domestic violence on the part of police, judges and prosecutors, and the legal system itself. *Id.*

111. Comment, *For Better of For Worse*, *supra* note 33, at 614-15. *See* Comment, *Marital Rape in California*, *supra* note 33, at 246-47; *see also* Comment, *supra* note 65, at 370.

follows that it is not acceptable for a husband to beat his wife, but it is acceptable for him to rape her.

This same argument could be advocated to turn a deaf ear toward other forms of domestic violence, but law enforcement agencies are called upon in cases of child molestation or wife-beating, both of which occur within the "sanctity" of the home. The courts, too, have rejected the argument that the marital rape exemption is supported by the right of marital privacy, citing other intrusions the state makes into domestic situations.[112] This attitude regarding marital rape is not found in other policies concerning marital interference, thus making it unreasonable and inappropriate.[113]

Some authorities have argued that abrogating the marital rape exemption would increase the risk of fabricated accusations[114] or be used by vindictive wives as a weapon against estranged husbands.[115] However, an examination of the criminal justice system renders this argument moot. The system is designed to handle fabricated cases through safeguards of criminal procedures;[116] but as the Florida Court of Appeals noted, it is not likely that women will spitefully fabricate complaints against their husbands "because the offense of battery which can now be exerted by one spouse against another has not been used for such purpose."[117] Actually, women are reluctant, even ashamed, to charge their aggressors with rape, and their inhibition is exascerbated in marital rape, because the act is not viewed as criminal, the shame and cynicism are greater, and the double standard is even more strictly applied when a woman accuses her husband of rape.[118] The *Liberta* court summarized its holding by saying that married women are no more likely to fabricate false rape complaints than are unmarried women.[119]

Overall, it is not in a woman's best interest to fabricate rape charges against her husband, since the law allows her to charge him

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112. *See* State v. Smith, 401 So.2d 1126, 1129 (Fla. Dist. Ct. App. 1981). *See generally* Griffin, *supra* note 4; Comment, *supra* note 65, 370-71.

113. Comment, *For Better or For Worse*, *supra* note 33, at 614-15. *See* Comment, *Marital Rape in California*, *supra* note 33, at 246-47.

114. Note, *supra* note 8, at 314; *see also* Note, *supra* note 4, at 354; Griffin, *supra* note 4, at 57.

115. Note, *supra* note 8, at 314. *See* Schwartz, *supra* note 44, at 33. Schwartz paints an imaginary image, conforming to the fears of the "cry-rape" proponents, of "a horde of spiteful wenches. . .lying in wait for such a change, ready to blackmail their husbands into favorable divorce settlements or get even for some real or imagined wrong." *Id.* at 51; *see also* Griffin, *supra* note 4, at 57.

116. R. TONG, *supra* note 6, at 95-97.

117. State v. Smith, 401 S.2d at 1129.

118. Comment, *supra* note 8, at 601.

119. People v. Liberta, 64 N.Y.2d 152, 165, 474 N.E.2d 567, 574, 485 N.Y.S.2d 207, 214 (1984).

with many other crimes which are easier to prove.[120] In addition, rape is a greatly underreported crime because of the social stigma attached to it;[121] it casts aspersions on victims that other crimes usually do not, making wives less, rather than more, likely to prosecute.[122] "The stigma and other difficulties associated with a woman reporting a rape and pressing charges probably deter most attempts to fabricate an incident; rape remains a grossly under-reported crime."[123] A wife fixed upon revenge would be more likely to pursue an avenue which is both less embarrassing for her and more likely to result in her spouse's conviction. [124]

Another twist to the argument that the exemption preserves the sanctity of marriage is the allegation that its abolition would discourage efforts toward reconciliation[125] and disrupt marriages.[126] In response, the *Liberta* court said:

> While protecting marital privacy and encouraging reconciliation are legitimate State interests, there is no rational relation between allowing a husband to forcibly rape his wife and these interests. The marital rape exemption simply does not further marital privacy because this right of privacy protects consensual acts, not violent assaults.[127]

The stress on reconciliation advances the idea that the family should be kept intact at all cost,[128] but the Supreme Court of Virginia disagreed, stating:

> It is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.[129]

A further argument suggests that using the marital rape exemption to promote reconciliation is really an attempt to promote sexual inequality based upon antiquated notions of indissolvable mar-

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120. Note, *supra* note 8, at 311. A wife could charge her husband with assault, battery, larceny, and fraud. *See Liberta*, 64 N.Y.2d 152, at 164, 474 N.E.2d at 574, 485 N.Y.S.2d at 214; *see also* Warren v. State, 255 Ga. 151, 155, 336 S.E.2d 221, 225 (1985).

121. Comment, *For Better or For Worse*, *supra* note 33, at 617; *see* Freemen; *supra* note 11 at 6-7; Griffin, *supra* note 4, at 57.

122. *See* Note, *supra* note 8, at 314-15.

123. *Liberta*, 64 N.Y.2d at 164, 474 N.E.2d at 574, 485 N.Y.S.2d at 214 n.8.

124. Comment, *For Better or For Worse*, *supra* note 33, at 617.

125. *Liberta*, 64 N.Y.2d at 164, 485 N.E.2d at 574, 474 N.E.2d at 574. *See also* Comment, *For Better or For Worse*, *supra* note 33, at 614-15; Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. 31 (1980).

126. *Liberta*, 64 N.Y.2d at 164, 474 N.E.2d at 567, 474 N.E.2d at 574.

127. *Id.*

128. *See* D. RUSSELL, *supra* note 5, at 255. The notion that the family should be kept intact at all costs, such as the wife's autonomy and acceptance of violent behavior, can only have a negative effect upon the children.

129. Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847 (1984).

riages.[130] One commentator argues that "[w]hile perhaps the concern with reconciliation was appropriate in the 1700s when divorce was nearly unthinkable, such an approach today is harmful to the individual, to women, and to the society purporting to be democratic and protective of freedom."[131] In summary, it is the husband's violent act of rape, not the wife's subsequent attempts to seek protection through the criminal justice system that disrupt a marriage. If the marriage has deteriorated to the point that intercourse is accomplished by forcible, violent assault, what is left to save, especially if the wife is willing to criminally charge her husband, knowing that a lengthy jail sentence could ensue?[132]

A final argument in defense of the marital rape exemption is that marital rape is not as serious an offense as other rape and thus is adequately dealt with by assault statutes, which provide less severe penalties.[133] Under this theory, the claim is that there is both a quantitative and qualitative difference between marital rape and non-spousal rape.[134] Quantitatively, the argument is that marital rape is an infrequent occurrence over which the criminal justice system need not be concerned[135] and qualitatively, that marital rape is really just a "bedroom quarrel", not equivalent to rape by a stranger.[136]

Surprisingly, data suggests that marital rape occcurs in as many as fourteen percent of American households,[137] but, due to underreporting as in other rape cases, actual incidence is probably much higher.[138] "If rape is the most underreported of crimes, then marital rape, which is not even considered a crime, must be the least complained about category of rape. . .since the law does not regard marital rape as a crime."[139] Some wives do not perceive forcible intercourse by their husbands as a criminal act; instead, they "simply

130. Comment, *For Better or For Worse*, *supra* note 33, at 615.

131. *Id.* citing Barshis, *The Question of Marital Rape*, 6 WOMEN'S STUD. INT'L F. 383 (1983).

132. *See Liberta*, 64 N.Y.2d 152, 165, 474 N.E.2d 567, 574, 485 N.Y.S.2d 207, 213 (1984).

133. *Id*; *see also* ILL. ANN. STAT. ch. 38, para. 12-1 (Smith-Hurd 1961 & Supp. 1989).

134. Comment, *For Better or For Worse*, *supra* note 33, at 617 (citing Schwartz, *supra* note 44, at 42-43).

135. *Id.* at 617-18; *see also* Griffin, *supra* note 4, at 57. "It is estimated that more women are raped by their husbands each year than by strangers, acquaintances, or other friends or relatives." *Id.* at 57.

136. *Id.*; *see also* D. FINKELHOR & K. YLLO, THE DARK SIDE OF FAMILIES 126-27 (1983); Griffin, *supra* note 4, at 58-60; Comment, *supra* note 61, at 371-72.

137. *See* D. Russell, *supra* note 5, at 57.

138. Schwartz, *supra* note 44, at 43; *see also* Griffin, *supra* note 4, at 57.

139. Comment, *supra* note 11, at 6-7.

accept their submissive position in the relationship."[140] Likewise, just as the wives failed to see the experience as rape, and the husband-rapists interviewed expressed that they had a right to act as they had.[141] Surveys indicate that at least ten percent of married women reported their husbands had used force or threat of force to gain sexual access.[142]

Additionally, no evidence supports the argument that marital rape is qualitatively less severe than nonmarital rape. Generally, studies show that "marital rape is frequently quite violent and generally has more severe, traumatic effects on the victim than other rape."[143] Often the wife is physically and psychologically destroyed for long periods after the rape, even more so than in nonmarital rape.[144]

Overall, psychologists concur that marital rape victims suffer long-term effects[145] which are not ameliorated, and perhaps are aggravated, by knowing the identity of their rapist.[146] The elements of debasement and degradation present[147] in forcible rape are augmented in marital rape. Victims suffer life-long psychological effects caused by the violence and loss of control of rape, coupled with a betrayal of trust. Often women trapped in abusive marriages are raped on multiple occasions,[148] increasing the lasting injuries. In *Warren v. State*, the Georgia court summarized the damage inflicted upon wives who have been raped by their husbands:

> When you have been intimately violated by a person who is supposed to love and protect you, it can destroy your capacity for intimacy with anyone else. Moreover, many wife victims are trapped in a reign of terror and experience repeated sexual assualts over a period of years. When you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with

140. Comment, *For Better or For Worse*, *supra* note 33, at 618. "There is a tendency for people to associate conduct as immoral if it is defined 'criminal.' Thus, spousal rape victims may fail to perceive the incident as rape and simply accept their submissive position in the relationship." *Id.*

141. *Id. See also* D. FINKELHOR & K. YLLO, LICENSE TO RAPE 117-138 (1985).

142. Comment, *For Better or For Worse*, *supra* note 33, at 618. *See* D. FINKELHOR & K. YLLO, *supra* note 141, at 117-38; *see also* D. RUSSELL, *supra* note 5, at 18. During interviews, married women denied being raped by their husbands. When the question was rephrased, however, asking if their husbands had used force or threat of force to engage in sex, fourteen percent concurred. *Id.*

143. *Liberta*, 64 N.Y.2d at 165, 474 N.E. 2d at 574, 485 N.Y.S.2d at 213. *See* D. FINKELHOR & K. YLLO, *supra* note 136, at 126-27.

144. D. RUSSELL, *supra* note 5, at 359; *see also* D. FINKELHOR & K. YLLO, *supra*, note 136, at 126-27; D. FINKELHOR & K. YLLO, *supra* note 141, at 117-38.

145. *Liberta*, 64 N.Y.2d at 166, 474 N.E.2d at 575, 485 N.Y.S.2d at 214.

146. D. MARTIN, BATTERED WIVES 181 (1976); *see also* Comment, *The Common Law Does Not Support a Marital Exception For Forcible Rape*, 5 WOMEN'S RTS. L. REP. 181, 185 (1979).

147. *See* Warren v. State, 255 Ga. 151, 152, 336 S.E.2d 221, 222 (1985).

148. D. FINKELHOR & K. YLLO, *supra* note 136, at 127.

your rapist.[149]

Women raped by their husbands lack confidence and have difficulty forming relationships and trusting others, often to a greater degree than women raped by a stranger.[150] The frequency and severe psychological and physical effects of marital rape make it a serious problem warranting abrogation of the marital rape exemption.

As the *Liberta* court noted, the fact that rape statutes exist is recognition that the harm caused by a forcible rape is more severe than that from ordinary assault[151] and that "Short of homicide [rape] is the 'ultimate violation of self.' "[152] Thus, merely allowing a woman who has been raped by her husband to charge him with assault is not an adequate remedy[153] because it does not redress the more serious harms:[154] violence,[155] humiliation, degradation and domination designed to leave scars on the victim.[156]

Not all women raped by their husbands are physically abused, further rendering assault remedies inadequate.[157] One commentator pointed out the paradox raised by the court in *People v. de Stefano*,[158] when a New York county court suggested that an abusive husband, intent upon assault and battery, might choose to rape his wife instead, then hide behind the aegis of the marital rape exemption.[159] The court concluded that allowing any type of exemption gave a husband control of his wife's bodily integrity,[160] leading to

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149. Dr. David Finkelhor's testimony in support of H.B. 516 to remove spousal exemption to sexual assault offenses, befor the Judicial Committee, New Hampshire State Legislature (Mar. 25, 1981), quoted in *Warren*, 255 Ga. at 152 n.4, 336 N.E.2d at 222 n.4.

150. D. FINKELHOR & K. YLLO, *supra* note 141, at 126; Comment, *supra* note 146, at 185; *see also* Griffin, *supra note* 4, at 58-60.

151. *Liberta*, 64 N.Y.2d at 164-65, 474 N.E.2d at 574-75, 485 N.Y.S.2d at 213-14. Assault is usually classified as a misdemeanor, whereas first degree rape or its equivalent, *e.g.*, sexual battery, is a felony *See* ILL. ANN. STAT. ch 38, para. 12-1 (Smith-Hurd 1961 & Supp. 1989).

152. *Liberta*, 64 N.Y.2d at 163-64, 474 N.E.2d at 574-75, 485 N.Y.S.2d at 213-14 (citing Coker v. Georgia, 433 U.S. 584, 597 (1976)).

153. *Liberta*, 64 N.Y.2d at 166, 474 N.E.2d at 574, 485 N.Y.S.2d at 214 (the severe harm caused by marital rape distinguishes that crime from assault). *See generally* Comment, *For Better or For Worse*, *supra* note 33, at 619-20.

154. Comment, *For Better or For Worse*, *supra* note 33, at 620.

155. State v. Smith, 401 So.2d 1126, 1129 (Fla. Dist. Ct. App. 1981); State v. Willis, 223 Neb. 844, 848, 394 N.W.2d 648, 651 (1986).

156. S. BROWNMILLER, *supra* note 2, at 377-78.

157. D. RUSSELL, *supra*, note 5. Not all of the fourteen percent of wives who were victims of spousal rape were beaten. Four percent were victimized by spousal rape alone. Russell urges that if spousal rape is viewed as only a type of wife-battering, those wives who are raped only will be without a criminal remedy.

158. 121 Misc. 2d 113, 467 N.Y.S.2d 506 (1983).

159. Comment, *For Better or For Worse*, *supra* note 33, at 620 (citing *de Stefano*, 127 Misc. 2d at 124, 467 N.Y.S.2d at 514).

160. *de Stafano*, 121 Misc. 2d at 124, 467 N.Y.S.2d at 514.

increased violence.[161] Assault remedies are inadequate to redress the grievous injuries caused by spousal rape; furthermore, the marital rape exemption may actually exascerbate, rather than reduce, domestic violence.

Proponents of the exemption argue that wives can always seek relief in divorce court. In this way abolition of the exemption is not necessary and the criminal court system is avoided. However, divorce fails to provide a proper remedy to a woman raped by her spouse.[162] Both commentators[163] and the courts[164] have suggested that a husband who cannot obtain his wife's consent seek *his* remedy through the courts and not by forcibly raping his spouse.[165]

Although marital rape is more, not less, traumatic than rape by strangers,[166] raped wives in states having the marital rape exemption cannot seek police protection, as can their unmarried counterparts,[167] because husbands are immune from prosecution under this archaic doctrine.[168] Recent court cases have found that the marital exemption in rape statutes violates the equal protection clause of the fourteenth amendment[169] by treating married and unmarried women differently without a rational reason.[170] Since the court

161. Comment, *For Better or For Worse*, *supra* note 33, at 620.

162. *Id.* at 621.

163. Schwartz, *supra* note 44, at 54; Comment, *For Better or For Worse*, *supra* note 33, at 621.

164. *Cf.* State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981)

165. State v. Smith, 85 N.J. at 206, 426 A.2d at 44. The New Jersey Supreme Court said "[i]f her repeated refusals are a 'breach' of the marriage 'contract', his remedy is in a matrimonial court, not in violent or forceful self help." *Id.*

166. D. FINKELHOR & K. YLLO, *supra* note 136, at 127 and accompanying text. *See also* Comment, *supra* note 65, at 383.

167. D. FINKELHOR & K. YLLO, *supra* note 136.

168. Freeman, *supra* note 11, at 9, says, "The recognition that a husband commits no crime when he forces his wife to have sexaul intercourse reflects this ideology. Rape is the denial of self-determination, the rejection of the victim's physical autonomy: it symbolizes 'ultimate disrespect. . .the exercise of the power of consent over another person.' "

169. Merton v. State, 500 So.2d 1301, 1305 (Ala. Crim. App. 1986); State v. Willis, 223 Neb. 844, 845, 394 N.W.2d 648, 649 (1986), discussing the marital rape exemption said that it unconstitutionally deprives wives of equal protection and places them in a condition of "involuntary servitude."

170. *See Merton*, 500 So.2d at 1305; People v. Liberta, 64 N.Y.2d 152, 164, 474 N.E.2d 567, 573, 485 N.Y.S.2d 207, 213 (1984); *see also* State v. Willis, 223 Neb. 844, 845, 394 N.W.2d 648, 649 (1986)(discussing the impact of the marital rape exemption, and noting that it "unconstitutionally deprives spouses of equal protection of the law and places wives in a condition of involuntary servitude."); 2 J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 317 (1986) Generally, the equal protection clause of the fourteenth amendment of the U.S. Constitution guarantees that those who are similarly situated should be similarly treated. Most laws make some sort of classification, so at issue is whether the classification is reasonable. Looking at the nature of the individual's affected interest, the court employs two tests: the strict scrutiny test is used if a fundamental right or a suspect classification is used. To meet this challenge, the state must show a compelling interest which justifies the need for the classification;

found no rational reason for treating married women differently from unmarried women pursuant to the marital rape exemption, or for distinguishing between marital and nonmarital rape, the marital rape exemption was declared unconstitutional.[171] In *Liberta*, the court stated that "[A] marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity, since a married woman has the same right to control her own body as does an unmarried woman."[172] Among recent decisions which have considered the marital rape exemption, only one has concluded that a rational basis exists for it.[173] Relying on a 1954 law review Comment, the Colorado Supreme Court said that the exemption "may remove a substantial obstacle to the resumption of normal marital relations" and it "[a]verts difficult emotional issues and problems of proof inherent in this sensitive area."[174] This paper has previously examined and rejected both of these arguments.[175]

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if not, the regulation is struck down; the rational basis test requires only that some rational relationship, no matter how remote, to a conceivable state objective exists between the regulation and the classification. *Id.* at 517-27. The court in *People v. Liberta* held that the marital rape exemption cannot even meet the rational relation test. 64 N.Y.2d, at 165, 474 N.E.2d at 575, 485 N.Y.S.2d at 214.

171. *Liberta*, 64 N.Y.2d at 163, 474 N.E.2d at 573, 485 N.Y.S.2d at 213; *see also* Shunn v. State, 742 P.2d 775, 778 (Wyo. 1987) (exemption removed from Wyoming Statute because of statutory and societal changes).

172. *Liberta*, 64 N.Y.2d at 164, 474 N.E.2d at 573, 485 N.Y.S.2d at 213. Surprisingly, in this case the defendant attempted to use the equal protection argument by contending that the rape statute burdened some, but not all males; *i.e.*, all but those within the 'marital exemption'. The court rejected this contention. *Id.*

173. *See* People v. Brown, 632 P.2d 1025 (Colo. 1981). For an opposite viewpoint, see Shunn v. State, 742 P.2d 775 (Wyo. 1987), where the court said, "Statutory and societal changes have significantly affected the appropriateness of a marital rape exception. Today, Hale's theory is both unrealistic and unreasonable. We agree with the court's analysis in. . *Liberta*, that no rational basis exists for distinguishing between marital and nonmarital rape. The degree of violence is no less when the victim of a rape is the spouse of the actor." *Id.* at 778.

174. *Brown*, 632 P.2d at 1027. The holding of the court in *Brown* was used again in People v. Flowers, 644 P.2d 916, 918 (Colo. 1982), when the court again held that the rape exemption had a rational basis. In an unusual application, the court in State v. Taylor, 726 S.W.2d 335 (Mo. 1987) (en banc), relying upon the *Flowers* holding, found that the marital exceptions to the *non-forcible* sexual offenses in the statutory rape statute did not violate the equal protection clause of the fourteenth amendment to the United States Constitution. *Id.* at 337. The confusing issue lies in the classification of any type of rape as "non-forcible," since force is an element of rape. (See MO. REV. STAT. § 566.100 (1989) defining statutory rape); *see also* People v. Prudent, 143 Misc. 2d 50, 539 N.Y.S.2d 651, (1989) where the court held that there is no 'marital exception' for any sexual offenses where the victim's lack of consent is the result of force since both are elements of the crime of rape. (At the time of writing this atricle, *People v. Prudent* is the most recent case on the issue).

175. *See supra* notes 92-98, 111-130 and accompanying text for discussion of the effects of the exemption on the marital relationship and the problems of proof.

Five states' response to the equal protection challenge upon the marital rape exemption has been to expand the immunity to cover cohabitors, too. It is an affirmative defense to a charge of first degree sexual assault that the aggressor and victim were married *or* cohabitors at the time of the incident.[176] In this way, it is possible "to treat parties not legally married to each other but living together as man and wife the same as married persons",[177] and avoid equal protection challenges.

Legislatures have responded to the marital rape issue by enacting state statutes which provide immunity to husbands in a variety of ways. The statute may define rape as intercourse with a female not the spouse of the actor,[178] or nonconsensual sexual intercourse by a man with a female not his wife.[179] In these states a husband may rape his wife with impunity.[180] The statute may define rape as any act of sexual gratification between persons not married, where persons living apart pursuant to a judicial order are not married.[181] Most other state statutes contain partial exemptions. For example, the exemption applies unless the parties are living apart *and* one spouse has filed a petition for separation, divorce, annulment, or separate maintenance.[182] In other states the exemption applies unless the parties are separated under a court order.[183] Statutes may

176. According to the National Center on Women and Family Law, Connecticut, Delaware, Kentucky, Montana and West Virginia have a rape exemption that applies to cohabitors. *See* NATIONAL CENTER ON WOMEN AND FAMILY LAW, MARITAL RAPE EXEMPTION PACKET, *Item Nos.* 6, 17, and 47 (1987) [hereinafter MARITAL RAPE EXEMPTION PACKET].

177. *See* State v. Scott, 11 Conn.App. 102, 525 A.2d 1364 (1987); State v. Suggs, 209 Conn. 733, 553 A.2d 1110 (1989). *See also* State v. Paolella, 210 Conn. 110, 554 A.2d 702 (1989) (statute providing that defendant legally married to victim at time of alleged offense cannot be convicted of sexual assault does not merely operate as the procedural bar to prosecution, but establishes a defense which *completely negates criminal culpability required to convict)* (emphasis added).

178. *See, e.g.*, LA. REV. STAT. ANN. § 14:41 (West 1986 & Supp. 1990); N.M. STAT. ANN. § 30-9-11 (1983 & Supp. 1989).

179. *See, e.g.*, ILL. ANN. STAT. ch. 38, para. 11-1 (Smith-Hurd 1981), *repealed by* P.A. 83-1067 1984)

180. *See, e.g.*, People v. McGuire, 751 P.2d 1011 (Colo. Ct. App. 1987). The McGuire court held that the marriage confers certain "marital rights", so the marital rape exemption applies to criminal sexual assault. For cases in which the statute may list marriage as an affirmative defense to a charge of rape, see Ash v. State, 511 N.E.2d 448 (Ind. 1987); State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

181. *See, e.g.*, S.C. CODE ANN. § 16-3-658 (Law Co-op. 1976 & Supp. 1989); UTAH CODE ANN. § 76-5-407 (1978 & Supp. 1989).

182. *See* MARITAL RAPE EXEMPTION PACKET, *supra* note 176, at Item Nos. 1-50 (1987) and accompanying state-by-state chart.

183. *See, e.g.*, LA. REV. STAT. ANN. § 14:41(c) (West 1986 & Supp. 1990); MD. ANN. CODE art. 27, § 464D (1988 & Supp. 1989)(subject to limited divorce decree); MO. ANN. STAT. § 566.010. (2) (Vernon Supp. 1990); N. DAK. CODE ANN. § 12.01-20.01 (West 1983 & Supp. 1989); 18 PA. CONS. STAT. ANN. § 3103 (Purdon 1983 & Supp. 1990). *See also* Commonwealth v. Shoemaker, 518 A.2d 591 (Pa. Super. 1987) (upholding the spousal sexual assault statute); S.C. CODE ANN.

require the parties to be living apart *or* one spouse to have begun legal proceedings at the time of the rape.[184] Others require merely that the spouses be living apart when the rape occurs;[185] no separation agreement or court order is required for the husband to be prosecuted. Still other states allow the husband to be prosecuted for different degrees of rape,[186] or only in certain, circumscribed circumstances.[187] Several states additionally require a showing of

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§ 16-3-658 (Law. Co-op. 1976 & Supp. 1989); S.D. CODIFIED LAWS ANN. § 22-22-1.1 (1988 & Supp. 1989) (parties must be legally separated, same amount of evidence required as if wife and spouse were strangers, and complaint must be filed within ninety days); UTAH CODE ANN. § 76-5-407 (Supp. 1989).

184. *See, e.g.*, KAN. STAT. ANN. § 21-35-3 (West 1983 & Supp.); LA. REV. STAT. § 14.41 (West 1986 & Supp. 1990); N.M. STAT. ANN. § 30-9-10(E) (1983 & Supp. 1989); OH. REV. CODE ANN. § 2907.01 (L) (Baldwin 1986); OKLA. STAT. ANN. tit. 21, § 1111(B) (West Supp. 1990) (recognizes spousal rape if force or violence was used or threatened with power to execute *and* divorce or separation pending or granted, under a protective order, or living apart); TEX. PENAL CODE ANN. § 22.011 (C) (Vernon 1989); *see also* OAG. Op. Att'y Gen 86-82 (1986).

185. *See, e.g.*, ARIZ. REV. STAT. §§ 13-1401.4, 13-1404 to 13-1406 (1989); MISS. CODE ANN. § 97-3-99 (Supp. 1988); MONT. CODE ANN. § 45-5-511.(2) (1989); N. MEX. STAT. ANN. §§ 30-9-10E, 30-9-11 (1983 & Sup. 1989); N.C. GEN. STAT. § 14-27.8. (1989); OHIO REV. CODE ANN. § 2907.02(G) (Anderson Supp. 1989) (exemption applies unless spouses are living separately); OH. REV. CODE ANN. §§ 2907.02 (A)(1) and 2907.12 (A)(1) (Baldwin 1986); OKLA. STAT. ANN., tit. 21, § 1111 (B)(4) (West Supp. 1990); 18 PA. CONS. STAT. ANN. 3103 (Purdon Supp. 1989); S. D. CODIFIED LAWS ANN. § 22-22-1.1 (1988 & Supp. 1989) (requires use of force, threat of great bodily harm and power of execution *and* same evidence of rape as if victim and spouse were strangers); TEX. PENAL CODE ANN. § 22.011 (Vernon 1989) (marriage is defense to rape charge unless spouses are not living together or an action is pending for separation or divorce); VA. CODE ANN. § 18.2-61(B) (Supp. 1989) (exemption does not apply if spouses are living apart or spouse causes serious injury by force or violence). *But cf.* Kizer v. Com, 228 Va. 256, 258, 321 S.E.2d 291, 295 (1984) (Court held wife had not made clear her intent to live separately, so rape conviction was overturned. Judge Thomas, dissenting, noted that "the majority concedes that had the victim not been married to the assailant, the assailant would have been guilty of rape. Nevertheless, in an opinion which fails to give due precedential weight to the Court's recent decision in *Weishaupt*. . .the majority concludes, in essence, that [defendent] had a right to do what he did. The majority opinion marks a retreat from the principles announced in *Weishaupt*"); Brecheisen v. Mondragon, 833 F.2d 238 (10th Cir. 1987).

186. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-70 (West 1989) under which there is no exemption for first degree forcible rape, but the exemption exists as a defense to lesser degrees of both sexual assault and rape. *See also* ILL. REV. STAT. ANN., ch. 38, para. 12-18(C) and 12-14 (Supp. 1990) (the exemption is abolished only in cases of "aggravated criminal assault" only if assault is reported within thirty days). For an overall discussion, see THE MARITAL RAPE EXEMPTION PACKET, *supra* note 176, at Item Nos. 1-50 and state-by-state chart listing status of laws regarding the marital rape exemption as of 1987.

187. *See, e.g.*, DEL. CODE ANN. tit. 11, 774, 775 (1987 & Supp. 1988) (exemption applies to voluntary social companions if victim permitted sexual intercourse within the previous twelve months); ILL. ANN. STAT. ch.38, para. 12-18(c) (Smith-Hurd Supp. 1989) (exemption applies to criminal sexual assault, aggravated criminal sexual abuse, and limits aggravated criminal sexual assault, under para. 12-14, to filings made within thirty days only); for a complete listing, see THE MARITAL RAPE EXEMPTION PACKET, *supra* note 176, at Item Nos. 1-50 and accompanying chart.

physical injury, use or threat of deadly or dangerous force.[188] Other states have created separate spousal rape statutes,[189] showing an awareness of the problem.

Paradoxically, some statutes have expanded the exemption to include cohabiting couples[190] and even social companions![191]The trend toward expanding the exemption seem to be diminishing; in fact, two states have recently abolished the cohabitors rape exemption, and two have abolished the exemption as it applied to voluntary social companions.[192] To date, nineteen states have abolished the marital rape exemption, seventeen by legislative and two by judicial action.[193]

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188. *See* VA. CODE 18.2-61(B) (Supp. 1989)(Act must be against the will of spouse by force, threat or intimidation. For conviction, spouses must be living separately, or defendant must have caused serious physical injury by use of force or violence; further, crime must be reported within ten days); *see also* Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847 (1984); Kizer v. Commonwealth, 228 Va. 256 (1984) (wherein Virginia courts agreed that the rape statutes are to be construed as excluding the marital exemption).

189. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-1406.01 (1989) (requires use or threat of force); CAL. PENAL CODE 262 (West 1988); W. VA. CODE § 61-8B-1.(2) (1989) (sexual assault of a spouse requires lack of consent *and* force or serious bodily injury or a deadly weapon).

190. *See, e.g.*, CONN. GEN STAT. ANN. 53-67(b) (West Supp. 1989)(can file charges against spouse or cohabitor; cohabitation is an affirmative defense to all but first degree rape); *see also* KY. REV. STAT. ANN. § 510.010(3) (Michie/Bobbis-Merrill Supp.1988) (applies to cohabitors "not married to each other", or "persons living together as man and wife regardless of the legal status of their relationship."). Other states expanding the exemption to cohabitors include: Delaware (D.C.A. 772 (b)(1987 & Supp. 1989)); Montana (MONT. CODE ANN. 45-5-511(2) (1990)); and West Virginia (W. V. CODE, 61-813-1(2) (1989).

191. *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 764, 773, 774, 775 (1987 & Supp. 1988) (There are two degrees of rape; first degree exempts voluntary social companions who had been permitted sex within the previous twelve months. Taking this to its logical extreme, a woman could have sexual intercourse on January 1st, not see the man for over eleven months, be attacked by him on December 31 of that year, and he would be exempt); MONT. CODE ANN. § 45-511(3) (1988); 18 PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1989).

192. Iowa and Minnesota abolished the cohabitors rape exemption: IOWA CODE ANN. § 709.4 (Supp, 1989) (A cohabitor's exemption exists in third degree, but not first or second degree, sexual abuse); MINN. STAT. ANN. § 609.342 (West 1987 & Supp. 1989). Hawaii and Maine abrogated the exemption for voluntary social companions: HAW. PEN CODE § 707-730(a)(1) was abolished (HAW. REV. STAT. § 707-731 (1990)); ME. REV. STAT. ANN., tit. 17-A, § 252(3) (1989).

193. *See, e.g.*, ALASKA STAT. 13A-6-61—62 (1975); CAL. PENAL CODE 262 (West 1988); COL. REV. STAT. § 18-3-409 (1986 & Supp. 1990); FLA. STAT. ANN. § 794.011 (Supp. 1988); IOWA CODE ANN. § 709.4 (West 1979 & Supp. 1990); KAN. STAT. ANN. § 21-3502 (Supp. 1986); MASS. GEN. LAWS ANN. ch. 265 § 22 (West Supp. 1988); MICH. COMP. LAWS § 750.5201 (Supp. 1989-90); NEB. REV. STAT. § 28-319, 320 (1985) (*See* State v. Willis, 223 Neb. 884, 394 N.W.2d 648 (1986); N.J. STAT. ANN. § 2C:14-5(b) (West 1982); OHIO REV. CODE ANN. § 2907.02(G) (Baldwin 1986); OR. REV. STAT. § 163.355—.375 (1985); S.D. CODIFIED LAWS ANN. § 22-22-1.1 (1988 & Supp. 1989); VA. CODE § 18.2-61(B) (Supp. 1989) ; VT. STAT. ANN. tit.13 § 3252 (Supp. 1987); WIS. STAT. ANN. § 940.225.(6) (West Supp. 1987); WYO. STAT. § 6-2-307 (1977 & Supp. 1989). New York and Georgia have removed their marital rape exemptions through judicial action. *See* Warren v. State, 255

Illinois lags sadly behind the pack. The National Center on Women and Family Law identifies Illinois as having a complete marital rape exemption,[194] despite the 1984 reforms to the Criminal Code via House Bill 606. When that legislation was debated in the Illinois House and Senate, legislators voiced the same, overworked objections that have been previously discussed and rejected in this paper. Representative Jaffe explained that the statute was designed, based upon years of study and input from attorneys and other knowledgeable groups, to "consolidate all types of sexual assault into four gender neutral crimes. . .and to define sexual assault in the terms of the defendants (sic) behavior, rather then (sic) the state of mind of the victim."[195] Jaffe further explained that the bill was intended to remove the requirement of a showing that the victim resisted the attack.[196] If passed, the bill would virtually extinguish the marital rape exemption.

Other legislators were concerned that a husband would have to prove his innocence if charged with spousal rape by his wife,[197] or that a husband could be charged with sexual assault for hugging his wife.[198] Representative Friedrich said,"I think forcible rape is [the] most despicable crime that could be committed, but I would not like to make the solution so open that all somebody has to do is point their finger at somebody and ruin their life. And I think you've opened it up to the point where there is absolutely no defense. . ."[199] Even more alarming were the comments of Congresswoman Wojcik, who reluctantly voted for House Bill 606, but,

> would certainly of liked to have seen an Amendment or to see the spouse face a battery charge. If a man is accused of raping his wife, he's going to be behind bars for six years. If he had battery, it would not be as severe. I do not believe that once you take the marriage bond that a wife can claim rape.[200]

In the Illinois Senate, House Bill 606 faced further restric-

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Ga. 151, 336 S.E.2d 221 (1985); People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), *cert. denied*, 471 U.S. 1020 (1985). *See also* Merton v. State, 500 So.2d 1301 (Ala.Crim.App. 1986), where the court held that the marital exemption for rape found in the Alabama rape statute violated the equal protection clause of the fourteenth amendment and severed the section from the statute.

194. THE MARITAL RAPE EXEMPTION PACKET, *supra* note 176 at Item No. 13 ("[t]he exemption is abolished only in 'aggravated criminal sexual assault' if the assault is reported within 30 days.").

195. State of Illinois, 83rd General Assembly, House of Representatives, Transcription Debate, May 10, 1983, at 162.

196. *Id.* at 163-64.

197. *Id.* at 164.

198. *Id.* at 169.

199. *Id.* at 169.

200. *Id.* at 170-71.

tions,[201] yet the fears persisted. Senator Philip questioned whether one spouse might use the law as a weapon in a divorce case,[202] and, despite Senator Netsch's assurances about the small number of past prosecutions and the bill's safeguards, remarked, "[i]f this doesn't leave a man at a disadvantage, I don't know what does. . .any man that votes for this ought. . .ought to take a second think and look."[203]

Overall, the 1984 changes to the Criminal Code did little to improve the plight of Illinois women exposed to the violence of marital rape. House Bill 606, in its final, amended form, is merely a bandage on an open, gangrenous wound. Illinois is one of the most industrial and populous states, yet it is one of only two states which has yet to grapple earnestly with the problem of marital rape.[204]

Conclusion

States which allow the marital rape exemption to exist as viable law in any form are accomplices to a crime which "degrades women in the eyes of the law and society. . .helps perpetuate myths and generalizations as to the husband's dominance in the marriage. . .[and] facilitates a cycle of violence and humiliation unheard of in any other context."[205] If as many as two million women annually are being raped with impunity by their husbands,[206] it is difficult to imagine why legislators have failed to respond. "It has been suggested that the frequency of the crime may even account for the sluggishness of male legislators to repeal the marital exemption statutes."[207] Aryeh Neier, former executive director of the American Civil Liberties Union, suggests another reason why the exemption, in some form, remains law in a majority of states. He says, "[t]he law serves a symbolic purpose as well as an enforcement purpose. The law cannot be neutral on this issue. It either protects the victims of rape or it protects the rapist. If the law exempts husbands from rape charges, the implication is that it condones husbands raping wives."[208]

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201. State of Illinois, 83rd General Assembly, Senate Transcription Debate, July 1, 1983, at 92.

202. *Id.* at 93.

203. *Id.* at 94-95.

204. Mississippi is the other state which has addressed the issue. *See* MISS. CODE ANN. § 97-3-65 (Supp. 1988). The statute does not directly address the issue of spousal immunity, so the common law exemption is presumed to apply; however, at least one court has held that the common law exemption does not exist. *See, e.g.*, State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981); *see also* THE MARITAL RAPE EXEMPTION PACKET, *supra* note 176, at Issue No. 24.

205. Comment, *supra* note 65, at 383-84.

206. Griffin, *supra* note 4, at 57.

207. *Id.* at 57.

208. Griffin, *supra*, note 4, at 57.

The laws seem to bear out this alarming proposition. Nearly all states presently recognize a wife's right to bring criminal charges against her husband for forcible, nonconsensual rape, but only under certain circumstances.[209] This seems to be an improvement; however, the fact that wives must be living apart and/or seeking separation or dissolution implies that the marital rape exemption still has validity today.[210] Even though courts in states without a statutory spousal exemption in their laws may be sympathetic, they may not have the power to modify the common law.[211] Ultimately, the job rests with the state legislatures to abrogate the shields which protect transgressing husbands from prosecution for behavior, which, if done to a stranger, would be criminal.

The origins of the marital rape exemption are tenuous, resting as they do upon Hale's extra-judicial[212] statement, which "was not law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in 17th century England."[213] It retains within the law the archaic, sexist notion that the wife is property of her husband, a concept long ago discarded in civilized countries. Yet vestiges of the marital rape exemption still exist in the state statutes, reminders of that abandoned notion of women as property. As the court said in *State v. Rider*, referring to Hale's assertion, "[t]hat this single sentence, which stands alone, naked of citation to any authority, judicial or otherwise, could be considered sufficient precedent to allow a husband to rape with impunity his wife baffles all sense of logic."[214] Although progress has been made in some states in the form of legislative reform or judicial action abolishing the exemption, the issue is far from decided. Studies reveal that marital rape is a widespread problem, causing serious, long-lasting harm to victims. All justifications and practical considerations for the exemptions have been considered and rejected; yet in a majority of states, the rights of married women to make fundamental decisions about their bodily integrity are being denied by virtue of the exemption. Perhaps Hale's reasoning might have been persuasive when marriages were non-retractable, but in light of changes in society and the status of women, the exemption is an archaic relic. As Justice Holmes noted almost one hundred years ago:

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209. *See supra* note 189 and accompanying text.

210. *See* Note, *supra* note 8, at 306-23.

211. *See* Comment, *supra* note 17, at 198; *see also* MISS. CODE ANN. § 97-3-99 (Supp. 1987).

212. Comment, *supra* note 65, at 369.

213. Weishaupt v. Commonwealth, 227 Va. 389, 392, 315 S.E.2d 847, 850 (1984).

214. State v. Rider, 449 So.2d 903, 904 (Fla. Dist. Ct. App. 1984).

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[215]

Until the issue of the marital rape exemption is addressed by politicians and abrogated from all state statutes, making marital rape a legally punishable crime, married women in states recognizing the exemption will continue to be victimized without redress.

215. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).