The Marital Rape Exemption: Time for Legal Reform

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THE MARITAL RAPE EXEMPTION: TIME FOR LEGAL REFORM

I. INTRODUCTION

While shelters for battered women spring up around the country, secrecy still hides the horror of marital rape from the public eye. The grim reality remains. Rape within a marriage has been legally endorsed for more than one hundred years in America.

1. D. Martin, Battered Wives 226 (1983). In 1981, Martin updated her book and noted that in 1976 there appeared to be "less than a dozen refuges in the United States." Within five short years, however, Martin could identify nearly 500 shelters for battered women. Even so, Martin pointed out, there remains a great need for more shelters for battered women, because shelters are overcrowded. Id. at 261. Martin stressed the importance of these shelters as refuges for women and children to escape brutality at home and argued that shelters are the "only direct, immediate, and satisfactory solution to the problem of wife-abuse. Victims and their children need refuge from further abuse; any other consideration—such as the need for counseling or legal advice—is of secondary importance." Id. at 197.

The shelters for battered women offer women protection and provide them with a haven where they can recuperate and evaluate their situation as well as their options for the future. Victims of domestic violence are in dire need of the support, food, shelter, encouragement, and freedom from violence the shelters offer, but more shelters are needed today to meet these needs despite the fact that shelters have sprung up around the country. Id. at 254.

Subsequently, a recount of the number of shelters for battered women estimated that there were about 800 in the United States in 1984, only twenty years after the first shelter for battered women opened in Pasadena, California. O'Reilly, Wife Beating: The Silent Crime, TIME, Sept. 5, 1983, at 23, 24. O'Reilly stated that even with 800 shelters there was a waiting list at all of them and the demand for the services shelters provide remains high. Id.

The reality is evidenced in the statistics. "Nearly [six] million wives will be abused by their husbands in any one year." Id. at 23 (footnote omitted). Moreover, the National Center on Women and Family Law estimates that one-third of the women who retreat to shelters have been sexually assaulted by their husbands. Id. at 26. The statistics, however, fail to persuade some who refuse to believe there is such a thing as marital rape. For example, in 1979, California State Senator Bob Wilson protested a California law allowing prosecution for marital rape and stated: "If you can't rape your wife, who can you rape?" Id. at 26.

2. See D. Martin, supra note 1, at 181. "To date our society has refused to acknowledge even the possibility that a wife can be raped by her husband." Id. Increased awareness about rape has come about as women have gained more equality and as women's groups have strived to bring the public's attention to the fact that rape is not caused by the woman herself, but is the result of violence committed upon her by a violent person. Dowd, Rape: The Sexual Weapon, TIME, Sept. 5, 1983, at 27, 29. According to Dowd, the United States now has over 700 rape crisis centers. In addition, the rape laws in many states have become more harsh, convictions for rape are increasing, and judges are now more likely to give tougher sentences. Id. at 27.

Even though rape is less likely to be hidden from the public today, rape is still often misunderstood and unreported. Id. at 27. "Only 3.5% to 10% of rapes are reported, according to an aggregate of surveys done by the U.S. Census Bureau, the FBI, and the National Opinion Research Center. Using conservative estimates, experts calculate that a woman's chance of being raped at some point during her life is an appalling [one] in [ten]." Id.

3. The first United States case to accept the presumption that at common law a husband could
The original rationale for exempting marital rape from punishment has long since ebbed, but the exemption still remains. The marital rape exemption which prevents a husband from being convicted of raping his wife is still the rule rather than the exception in the United States despite the twentieth century's enlightened views of marriage and female equality.

not rape his wife was Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489, 490 (1857). This presumption has remained in America for a long time. During the middle 1970's, the marital rape exemption was still accepted by every state and contained in their respective statutes. Bienen, Rape III—National Developments in Rape Reform Legislation, 6 WOMEN'S RTS. L. REP. 170, 185 (1980). Accord Schwartz, The Spousal Exemption for Criminal Rape Prosecution, 7 YT. L. REV. 33, 33-35 (1982) (explaining that lack of legal criticism of presumption for marital rape exemption indicates unity of legal thought). See J. SCHWENDINGER & H. SCHWENDINGER, RAPE AND INEQUALITY (1983), in which the authors analyze the relationship of socioeconomic factors and the causes of rape. They argue the incidence of rape is tied to sexual inequality and, therefore, capitalist societies have more incidence of rape.

4. An exemption preventing a husband from being convicted of raping his wife is still the rule rather than the exception. Only seven states have explicitly nullified the marital rape exemption. See infra notes 185-99 and accompanying text for a description of what other states have done with the marital rape exemption in their statutes.

5. "Rape is a symptom, an effect of sexist society." B. DECKARD, THE WOMEN'S MOVEMENT: POLITICAL, SOCIOECONOMIC, AND PSYCHOLOGICAL ISSUES 409 (1975). According to Deckard, rape became a major women's issue in the early 1970's which led to an increased consciousness of rape. Id. at 402. This recent increased awareness of rape is likely attributable to the slow progress of the women's rights movement.

At least one author theorizes that the women's rights movement in America began when Frances Wright, a Scottish woman, visited the United States in 1820 and spurned men and women to reconsider the suppressed rights of women. E. HECKER, A SHORT HISTORY OF WOMEN'S RIGHTS 157 (2d ed. 1972). "[T]he first Women's Rights Convention was held at Seneca Falls, New York, July 19-20, 1848." Id. at 158. Other conventions were held across the country, but in 1872, Susan B. Anthony attempted to register to vote and was denied such a right. Id. at 165-66.

The movement in the early 1900's to give women the right to vote was predominated by a struggle to have the nineteenth amendment added to the United States Constitution. R. LEE, A LAWYER LOOKS AT THE EQUAL RIGHTS AMENDMENT 33-38 (1980). The National American Women's Suffrage Association (which later became the League of Women Voters), a conservative women's movement, originally believed the nineteenth amendment established equality for women. The National Women's Party, a radical women's organization, saw the nineteenth amendment as only the beginning of the equal rights struggle for women. History has proved The National Women's Party's theory, because in 1923, three years after the nineteenth amendment was added to the United States Constitution, the Equal Rights Amendment (ERA) was introduced in Congress. Id. at 33.

The ERA was not seriously considered by Congress until after World War II. Id. at 34. Both in 1950 and in 1953 the Senate approved the ERA, but both times the amendment was altered to effectively do away with the proposed amendment. Id. Finally, however, in 1972, the ERA was passed by Congress and sent to the states for ratification. Id. at 36-37. The states were given seven years to ratify the amendment, but by March 22, 1979, the states had failed to ratify the ERA. Subsequently, in 1978, Congress extended the time for ratification to June 30, 1982. Id. at 37-38.

Since 1977, however, the ERA has faced continued opposition in regard to ratification. THE WOMEN'S MOVEMENT 179-95 (H. Gimlin ed. 1981). "Organized resistance remains strong in all [fifteen] of the remaining states—some of which have defeated the amendment over and over—and no consensus exists on which three states, if any, might raise the total to the required 38." Id. at 179.

The ERA movement was defeated again when it failed to receive a two-thirds vote when it was considered by the House of Representatives in November, 1984: "Equality of rights under the law
This Comment will analyze: (1) common law authority for the marital rape exemption; (2) realization that marital rape is a social crisis in America; (3) traditional policy arguments for the marital rape exemption; (4) constitutional considerations; (5) statutory responses; (6) Oklahoma law; and (7) possible statutory reform.

II. COMMON LAW AUTHORITY

The English common law provided authority for complete spousal immunity, but the origin of this common law is open to debate. The basis for the marital rape exemption originated from an English jurist's pronouncement that a husband could not be convicted for raping his wife.6 Despite the fact that the marital rape exemption was an assertion with no foundational judicial authority for support, this became the authority for the spousal immunity in both England and the United States.7

Hale's statement was examined in State v. Smith;8 the court concluded it was "a bare, extra-judicial declaration made some 300 years ago,"9 and found no authority to support it.10 This conclusion is plausi-
ble since Hale’s statement was made in an era when marriages were permanent and wives implicitly gave their irrevocable consent to intercourse when they exchanged marriage vows. At least one author theorized that Hale may have created the principle in light of his demeaning conception of women.

Furthermore, it is doubtful that Hale’s statement ever became absolute law in England. In fact, in Regina v. Clarence, the first English case to discuss Hale’s principle, several justices questioned Hale’s rationale. This indicated that Hale’s principle had not been sanctioned as part of the English common law. The court, however, because the case was not a rape case, did not rule on the validity of Hale’s statement. Indeed, Hale’s principle was not relied upon until 1949 in Rex v. Clarke. The holding in Clarke was subsequently followed in Regina v. Miller, a 1953 case. In Miller, the couple had been living apart and the wife had filed for divorce, but because no court order nor mutual separation agreement existed at the time, the Court found that the wife’s consent had not been revoked. A more recent English decision, Regina v. O’Brien, also impliedly accepted Hale’s authority when it held that a provisional divorce decree cancelled the wife’s consent.

These English cases demonstrate that the marital rape exemption was not absolute in England. English common law presumed a wife impliedly consents to sexual intercourse with her husband; it also provided the wife with a revocable consent. Revocation of a wife’s consent was

11. Id. at __, 426 A.2d at 42. See generally Harman, Consent, Harm, and Marital Rape, 22 J. Fam. L. 423, 424-29 (1983-1984) (exploring the common law background of marriage contracts). Marriages in Hale’s time were controlled by the church and could only be dissolved by death or voided by an act of Parliament. Regina v. Miller, [1953] 2 Q.B. 282, 286.
12. 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, 10 (1981-1982). Hale did not cite any authority to support the marital rape exemption, which was contrary to his practice, and there was evidence of contrary authority at the time. Id.
15. Weishaupt, 227 Va. at __, 315 S.E.2d at 851.
16. [1949] 2 All E.R. 448 (court found separation order had revoked the implied consent normally found between a husband and wife regarding sexual relations).
17. Id.
18. [1954] 2 All E.R. 529 (court ruled Miller could not be prosecuted for rape because the marriage was not destroyed even though a petition for divorce had been filed). It is interesting to note that both Miller and Clarke presume there is a marital rape exemption and fail to discuss it. As a result, England’s recent case law on the subject is sparse.
19. Id. at 533.
21. Id.
strictly limited and as a prerequisite required a mutual separation agreement or a court-ordered separation. Thus, "under English common law, there never existed an absolute irrevocable marital [rape] exemption that would protect a husband from a charge of rape in all circumstances."

Early American cases did follow the English case law, but did not follow the exceptions which allowed a wife's consent to be revoked. In 1857, a Massachusetts court stated in Commonwealth v. Fogerty, apparently the first American court to consider the Hale doctrine, that marriage was a defense to the charge of rape. In 1905, a Texas case, Frazier v. State, carried Hale's principle further and stated, consent is that "which she gives when she assumes the marriage relation, and which the law will not permit her to retract in order to charge her husband with the offense of rape."

Similarly, both the English and the early American courts followed the Hale doctrine without analyzing or investigating its authority. Moreover, the courts ignored Sir William Blackstone's treatise on common law crimes in which rape was defined as "raptus mulierum, or the carnal knowledge of a woman forcibly and against her will." Clearly, this common law definition did not include an express nor an implied marital rape exemption. More importantly, Blackstone's definition was not examined by the early courts as an alternative to Hale's assertion.

New rationales were used to support Hale's principle after it was discovered that the principle lacked legal foundation. As a result, much of the early courts' logic rested on the presumption that rape was unwanted, unlawful sex, and since intercourse between husband and wife was legal and presumably desired, a husband could not legally rape his wife. Other jurists preferred the theory that a woman was her husband's chattel and he could do whatever he liked with her. As a consequence, these archaic justifications for the marital rape exemption endured in America for decades.

22. Weishaupt, 227 Va. at ___, 315 S.E.2d at 852.
23. Id. at ___, 315 S.E.2d at 852 (emphasis added).
24. 74 Mass. (8 Gray) 489 (1857).
25. Id.
26. 48 Tex. Crim. 142, 86 S.W. 754 (1905). The court refused to grant a divorce to the wife so she remained in the same household, but did not sleep with her husband. Although the couple was separated for all practical purposes, the husband was afforded the privilege of the marital rape exemption. Id. at ___, 86 S.W. at 754-55.
27. Id. at ___, 86 S.W. at 755.
III. THE REALIZATION THAT RAPE IS A SOCIAL CRISIS

These archaic and poorly reasoned rationales supporting the use of Hale's principle by early English and American courts seem anachronistic in the progressive atmosphere of the twentieth century. Indeed, the women's rights movement and the increased awareness of rape in general have roused courts to reexamine marital rape exemptions. In the 1960's the women's movement gained momentum and by the early 1970's an increased consciousness concerning battered women came to the forefront and revealed a dire need for shelters and most importantly compassion for battered women. "No mere accident, this groundswell was the result of the changing political consciousness and organizing activity of women." In contrast, a similar concern for marital rape victims failed to materialize.

At the same time that battles for equal pay, equal opportunity, relief from sexual harassment, and the right to abortion raged—the marital rape issue was surprisingly ignored. This ignorance was fostered, in large part, by both the failure to report marital rape incidents to authorities and the afflicted wives' fear of reprisal. Indeed, marital rape was not a crime in most states, thus, women had no legal motivation to report it, especially if it would expose their marital problems or if they were unsure whether they could legally prove a rape had occurred. As a result, marital rape was of little concern to those unfamiliar with the violence and still remains to a large extent unpunished because our society ignores the fact that a husband can physically rape his wife even if he cannot legally be convicted for doing so in most states.

Although society ignores the fact a husband can physically rape his wife, the definition of rape does not: "[u]nlawful sexual intercourse with

32. Id. at 29; see Schulman, The Marital Rape Exemption in the Criminal Law, 14 CLEARING-HOUSE REV. 538 (1980). Schulman explains why wife-beating was once accepted in America.
34. Such is not the case in all countries. In Russia authorities are quick to punish a husband for mistreating his wife. A husband can receive a two-week jail term for "gross behavior" toward his wife on her word alone. He can receive a three to seven-year sentence for rape of his wife just on her word also. See D. Martin, supra note 1, at 182. The consensus in Russia and that found in criminal codes of Communist block countries, Sweden, and Denmark is simply—rape is rape no matter who the victim happens to be. Id.

For a discussion of the movement in Britain against marital rape, see R. Hall, S. James & J. Kertez, The Rapist Who Pays the Rent (1981). The book is a response by a women's organization to the working papers of the Criminal Law Revision Committee in Britain.
a female without her consent."\(^{35}\) Moreover, several courts and scholars have determined rape to be sexual intercourse without consent. Also, these courts have rejected the marital rape exemption purported by the Hale principle. Rape, however, is not a crime of sex: rape is a crime of violence. It is the violence, outrage, and injury to the victim, not the sex, which demands criminal punishment.

The essence of rape is its violent nature; the coercion by the forceful penetration and threats against another's will.\(^{36}\) The understanding of rape as violence is tantamount to resolving the central issue of whether the crime of marital rape should be penalized. If rape is not a crime of intercourse but of "injury and outrage to the feelings of the woman by the forceful penetration of her person"\(^{37}\) it is not the intercourse that should be punished, but the violence. Indeed, modern writers on the subject agree that the greatest harm of rape is the psychological injury, in addition to the physical injuries, resulting from the domination and denial of freedom.\(^{38}\)

A married woman certainly relinquishes some autonomy, but she does not consent to any and all acts of sexual intercourse which her husband demands and she most certainly does not exchange her autonomy for a license by her husband to commit violence upon her body.\(^{39}\) It is this violence for which the crime of marital rape should be punished.\(^{40}\) Violence and marriage are strange bedfellows, but several studies have

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35. BLACK'S LAW DICTIONARY 1134 (5th ed. 1979). The first definition of rape contained therein. A second definition is also helpful. "The unlawful carnal knowledge of a woman by a man forcibly and against her will." Id.


38. Id. at 191-92.

39. Id. at 40-41.

40. Florida's sexual battery statute was drafted "to protect both males and females from sexual violence, i.e., a crime of violence and not a crime of sex." Smith, 401 So. 2d at 1128.
revealed that most battered women have also been sexually assaulted, often because the wife conceded to intercourse in order to avoid being beaten. Even though the idea is extremely revolting, violence and marriage do collide behind closed doors in our society.

The elements of the crime of rape also demonstrate that rape is violence because the elements require both force and lack of consent. There are three essential elements of rape and a fourth which is often included in the marital rape exemption. The traditional elements of the common law crime of rape include: (1) carnal knowledge, penetration, or intercourse; (2) force; and (3) nonconsent. The fourth element some courts included was that the victim could not be the wife of the perpetrator. Later cases, however, have held nonmarriage to the perpetrator was not a separate element, but an evidentiary matter bearing on the relevancy of the woman’s lack of consent.

This change in the elements of the common law crime of rape indicate that America’s marital rape exemption is eroding because new rationales have been considered. For example, in 1904, the Oklahoma Supreme Court originally held that it must be proved that the prosecutrix was not the defendant’s wife. Subsequently, the circumstantial evidence burden was eased. For many years, however, the fact that prosecutrix and defendant were not married was very important, even if later this fact was only necessary as evidence to prove there was consent to the common law crime of rape.

41. See Freeman, supra note 12, at 4-5.
42. The fact that violence in marriage occurs today is not so surprising when the high divorce rate in America is considered. There are 84 divorced persons for every 1,000 persons who are married and unseparated. Women’s Rts. Task Force of the U.S. Dept. of Justice, Women’s Rts. in the U.S. of Am., 3-13 (March 1979) [hereinafter cited as Women’s Rts. Task Force]. “In the seven years since 1970, the divorce ratio has increased 79 percent, compared with an increase of 34 percent during the entire period from 1960 to 1970. Women are more likely to be divorced than men—101 per 1,000 as compared to 66 per 1,000 men.” Id. at 3.
43. State v. Bell, 90 N.M. 134, ___, 560 P.2d 925, 931 (1977); see also State v. Smith, 85 N.J. 193, ___, 426 A.2d 38, 40 (1981) (husband’s forcible intercourse with wife not rape since all three elements were not satisfied).
44. E.g., People v. Henry, 142 Cal. App. 2d 114, ___, 298 P.2d 80, 84 (1956).
45. See Bell, 90 N.M. at ___, 560 P.2d at 931-33 (court stated at common law it was never necessary to prove victim was not the wife of the perpetrator); see also State v. Brown, 100 N.M. 726, ___, 676 P.2d 253, 255 (1984) (test is whether substantial evidence exists to support a guilty verdict as to every element essential to a conviction).
46. Brenton v. Territory, 15 Okla. 6, 78 P. 83 (1904); accord Emyahtubby v. State, 14 Okla. Crim. 213, 216, 169 P. 1124, 1125 (1918) (“one of the material averments . . . is that the prosecutrix was not the wife of the defendant.”) (quoting Brenton).
47. Ellis v. State, 87 Okla. Crim. 108, 110-11, 194 P.2d 229, 230-31 (1948); Jarrard v. State, 87 Okla. Crim. 89, 92, 194 P.2d 227, 229 (1948). In Ellis, the fact of nonmarriage was proved by the prosecutrix’s admission that she was “Miss Sena Taylor.” Ellis, 87 Okla. Crim. at 110, 194 P.2d at 230.
Thus, the marital rape exemption for the crime of rape went virtually unchallenged for years. In the late 1970's, however, America's common law marital rape exemption began to erode. In State v. Smith, the New Jersey Supreme Court leveled an unprecedented attack on the common law marital rape exemption. The court stated: "[T]he rule, formulated under vastly different conditions, need not prevail when those conditions have changed." Although the court expressed a strong disapproval of the common law exemption, it correctly relegated its abolition to the state legislature.

Two prior court decisions were also instrumental in the movement away from strict adherence to the common law rape elements. First, spousal rape became a legally contested issue in 1978 when Greta Rideout filed criminal charges against her husband for marital rape. The importance of this case was not Rideout's acquittal, but the far-reaching publicity it brought to Oregon's law which had previously abandoned the husband's immunity for spousal rape. Of even greater importance to the legal community, however, was Commonwealth v. Chretien. In Chretien, a husband was convicted of raping his wife while the two were living apart and a final divorce decree was pending. The statute examined by the court did not specifically refer to the marital rape exemption, so the court applied the common law elements. The court held that the common law applied to husbands only when the marriage relationship had been severed by a divorce judgment nisi. Therefore, if the marriage had been severed a husband could be convicted for marital rape.

America's most recent move away from the common law's absolute

49. Id. at ___, 426 A.2d at 42.
50. The court stated it "lack[ed] the authority to simply ignore the settled principles of law that bind [it] and depart from the common law rule, because, in [its] judgment it is unfair and discriminatory . . . ". Id. at ___, 426 A.2d at 43.
51. State v. Rideout, (Or. Cir. Ct., Dec. 27, 1978), 5 Fam. L. Rep. (BNA) 2164 (1978). See generally When a Wife Says No... Beyond the Rideout Case, Ms., Apr. 1982, at 23. "Greta Rideout was the first woman in the United States whose husband was charged with a rape occurring while they were living together." Id. at 23. Naturally, many were sceptical of Greta Rideout's complaint when the couple "reunited" after Rideout was acquitted. A few months later, however, Greta Rideout divorced her husband. Yet, the divorce and later conviction for breaking into her house and harassing her failed to deter John Rideout from further attacks against his former wife. Id. The Rideout case graphically portrays the need for conviction and punishment of spouses who rape. See Starr & King, Rape and the Law, NewswEEK, May 20, 1985, at 60.
52. See Freeman, supra note 12, at 23.
54. Id. at ___, 417 N.E.2d at 1205-06.
55. Id. at ___, 417 N.E.2d at 1210.
marital rape exemption occurred in 1983 when a New York court struck down New York’s statutory marital rape exemption because it violated equal protection rights guaranteed in both the state and federal constitutions.66 Similarly, in People v. Liberta,57 the New York Court of Appeals held that New York’s rape statute violated equal protection.58

The reasoning of these recent cases demonstrate that the common law marital rape exemption is slowly beginning to erode. The traditional policy justifications are being recognized as archaic in our enlightened society. Thus, a further breakdown is likely to occur as the traditional policy arguments for retaining the marital rape exemption are rejected.

IV. TRADITIONAL POLICY ARGUMENTS

Several traditional policy arguments have been advanced to support the common law marital rape exemption. However, no formal capsulization of the justifications exists and as a result courts have asserted various arguments to support the exemption.59 While the Model Penal Code (MPC)60 drafters reasoned that a husband’s immunity rests in the historic concept of the wife being the father’s or husband’s chattel, the MPC illustrates that this rationale has recently come under attack.61 Of course, there are also many other rationales underlying the marital rape exemption.62 This Comment analyzes the traditional rationales which

57. 64 N.Y.2d 152, 485 N.Y.S.2d 207, 474 N.E.2d 567 (1984). Liberta was the first man to be convicted of raping his wife in the state of New York. N.Y. Times, Aug. 6, 1983, at 24, col. 6. Liberta received a sentence of three to nine years in prison. Id.
58. Liberta, 64 N.Y.2d at ___, 485 N.Y.S.2d at 211-12, 474 N.E.2d at 571-72.
59. Smith, 85 N.J. at ___, 426 A.2d at 43-44 (court surmised the common law was likely based on three justifications: (1) woman was chattel of husband; (2) husband and wife were one person; and (3) upon marriage the wife impliedly consented to sexual intercourse with her husband); see also Rider, 449 So. 2d at 906 (attempts to rationalize the exemption include: (1) wife is chattel of husband; (2) wife and husband are one; and (3) with marriage a woman consents to sexual intercourse); People v. Brown, 632 P.2d 1025, 1027 (Colo. 1981) (statute's marital rape exemption justified because marital exemption may promote resumption of normal marital relations and because marital rape exemption prevents problems of proof inherent in marital rape).
61. Id. In early times the wife was to be submissive to her husband because she vowed “under oath to love, honor, and obey and therefore obliged to do the husband’s bidding.” Id.
62. See generally M. Rickenberg & J. Schulman, Florida, New York, and Virginia Courts Declare Marital Rape a Crime, 18 CLEARINGHOUSE REV. 745, 746 (1984) (analyzes policy arguments asserted in De Stefano, 121 Misc. 2d at 117, 467 N.Y.S.2d at 510). See Barry, supra note 33, at 1089 (restraining vengeful wives is primary justification); Harman, supra note 11, at 425-27 (the concept of a woman as her husband’s property was abolished with the Married Women’s Property Acts; notion that women impliedly consent to sexual intercourse upon demand is no longer meaningful); Comment, Abolishing the Marital Exemption for Rape: A Statutory Proposal, 1983 U. I L. L. REV. 201, 205-12 (courts have recognized four theories, none of which are viable today: (1) when a woman marries she consents to sexual relations; (2) wife has alternative remedies; (3) state should not
various courts and commentators have asserted in the last century.

A. The Marriage Contract Implies Permanent Consent

The rationale that the marriage contract implies permanent consent to sexual relations is the most commonly used justification.\(^\text{63}\) Surprisingly, even in light of the movement for women's equality, a 1984 Virginia Supreme Court decision\(^\text{64}\) invoked the theory that a wife impliedly consents to sexual intercourse when she marries her husband.\(^\text{65}\) The court held that a wife must prove beyond a reasonable doubt that she revoked her implied consent through a "manifest intent 'to terminate the marital relationship.'"\(^\text{66}\) Several other courts have also specifically upheld the common law elements of rape on the grounds that a husband cannot rape his wife because she is "irrebuttably presumed to consent to sexual relations with her husband, even if forcible and without her consent."\(^\text{67}\)

A fundamental observation should be noted when examining the holdings which found an implied consent doctrine—all of the holdings were in rape cases. None of these cases asserting a husband cannot rape his wife because a wife consents to sexual intercourse with her husband upon marriage cite any decisions outside the rape context which hold that marriage is a contract for sexual intercourse upon demand.\(^\text{68}\) This contradicts the fact that excessive sexual demands have been sufficient grounds for granting divorce,\(^\text{69}\) and more contradictory are holdings which grant a divorce because the husband abused his right to sexual intercourse with his wife.\(^\text{70}\)

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intervene in marriage relationships; and (4) fabricated charges would result); Comment, Spousal
Exemption, supra note 7, at 113-18 (marriage is permanent consent to sexual relations; state should
not intervene; problems with proof insurmountable; fabricated charges would result; other remedies
are available; equal punishment for husbands and strangers convicted of rape is unfair).

63. Liberta, 64 N.Y.2d at 104, 485 N.Y.S.2d at 233, 474 N.E.2d at 573; Glancy, Equal
Protection Considerations of the Spousal Sexual Assault Exclusion, 16 N. Eng. L. Rev. 1, 2-4 n.4 (1980).


65. Id. at __, 321 S.E.2d at 293.

66. Id. at __, 321 S.E.2d at 293-94 (court held a wife can revoke her implied consent to marital
sex where such revocation was shown by living separately and manifestation by the wife that she
believed the marriage had ended).

Crim. 168, 135 P.2d 347 (1943); Frazier, 48 Tex. Crim. at __, 86 S.W. at 755 (wife gives husband
matrimonial consent to sexual intercourse which the law will not permit her to retract).


69. Diehl v. Diehl, 188 Pa. Super. 491, 149 A.2d 133 (1959); see also Comment, Spousal
Exemption, supra note 7, at 124.

70. Hines v. Hines, 192 Iowa 569, 571, 185 N.W. 91, 92 (1921) ("ungoverned lust" equalled
"personal violence . . . and cannot be justified under the claim of the exercise of his marital rights").
Logically, even if one accepts the implied consent theory, it is unreasonable to assume the wife also consents to both violence and injury.\textsuperscript{71} And, even if this argument were accepted, it is quite probable that implied consent to sexual relations in marriage violates the individual right of liberty.\textsuperscript{72}

Thus, for many varied reasons scholars have rejected the implied consent rationale. Most writers emphasize the unreasonableness of inferring from the consent doctrine that a wife impliedly agrees to sexual intercourse with her husband upon demand.\textsuperscript{73} Granted, both the wife and husband agree to have intercourse as part of the marriage consummation, but their personal sexual autonomy is not completely extinguished.\textsuperscript{74}

Likewise, a well-reasoned opinion by Justice Wachtler of the New York Court of Appeals in \textit{Liberta}\textsuperscript{75} found the implied consent doctrine which emanates from Hale's principle to be "unteachable."\textsuperscript{76} Rape is not merely intercourse, but a "degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm."\textsuperscript{77} Thus, to imply that a wife impliedly consents to such a violent act is unreasonable.\textsuperscript{78} Moreover, the consent doctrine effectively gives a husband the opportunity to take the law into his own hands with violence and force in order to make his wife comply with her alleged "implied consent" when he should peacefully seek a divorce or other similar relief in domestic courts.\textsuperscript{79}

The argument that a husband should seek judicial remedies is also consistent with contract law. A contract, as a marriage is in some respects,\textsuperscript{80} requires "mutual expressions of assent to the exchange."\textsuperscript{81} A

\textsuperscript{71} See Note, supra note 68, at 312. A state has an interest in protecting the personal safety of its citizens and generally will reject any suggestion of implied consent to serious bodily harm. \textit{Id.} at 312-13.

\textsuperscript{72} Weishaupt \textit{v.} Commonwealth, 227 Va. 389, __, 315 S.E.2d 847, 854 (1984). Attorney General argued "blanket consent to sexual intercourse implied from marriage runs counter to the Bill of Rights in that it impinges upon individual liberty," but the court did not have to go that far to reach its decision. \textit{Id.} at __, 315 S.E.2d at 854.

\textsuperscript{73} Comment, \textit{Rape and Battery Between Husband and Wife}, 6 \textit{STAN. L. REV.} 719, 722 (1954). "By marrying she indicates that usually she will consent to intercourse, but she also probably believes that she can expressly decline the act at any given time." \textit{Id.}

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Liberta}, 64 N.Y.2d at 152, 485 N.Y.S.2d at 207, 474 N.E.2d at 567.

\textsuperscript{76} \textit{Id.} at 164, 485 N.Y.S.2d at 213, 474 N.E.2d at 573.

\textsuperscript{77} \textit{Id.}, 485 N.Y.S.2d at 213, 474 N.E.2d at 573.

\textsuperscript{78} \textit{Id.}, 485 N.Y.S.2d at 213, 474 N.E.2d at 573.

\textsuperscript{79} \textit{Smith}, 85 N.J. at 206, 426 A.2d at 44.

\textsuperscript{80} See Freeman, supra note 12, at 14.

\textsuperscript{81} \textit{CORBIN ON CONTRACTS} § 107 (one volume ed. 1952).
wife, however, would be astonished to think in agreeing to intercourse she also agreed to any violence or force to which her husband may sub-
ject her. Indeed, it is doubtful there would ever be an objective manifestation of consent to abuse. And, if there is no objective manifestation of consent “the court will not hold a party bound by a contract varying from his own understanding unless his words and conduct were such that he had reason to know that the other party would be and was in fact misled.”

Thus, when there is no objective manifestation of consent, as would be lacking between a husband and wife with respect to violence and rape, there is no enforceable contract. A wife cannot impliedly consent when there is no underlying contract or offer of agreement from which to imply the consent. But, even if she could impliedly consent, the husband’s remedy for a breach of contract would be in the form of damages, not a “forced [specific] performance.”

The implied consent theory is a legal fiction and there is a lack of authority explaining why such consent was necessarily irrevocable. In fact, “it should not follow that consent can never be withdrawn so long as the marriage, in its technical sense, exists.” When the husband and wife are separated the implied consent doctrine becomes irrelevant, because it is groundless to argue that the wife’s implied consent still exists to have sexual intercourse with a man, her husband, with whom she no longer cohabits. Fortunately, many state statutes uphold a wife’s revocation of consent when the couple has severed their union, but the requirements needed to establish revocation of consent and separation vary from state to state.

82. Id. (no agreement exists if both parties did not understand the terms of the agreement). “The whole idea of viewing the marriage agreement in strict contract terms, with consent to on-demand sex as part of it, is ludicrous when taken to the extreme.” Comment, Spousal Exemption, supra note 7, at 125.

83. See Barry, supra note 33, at 1088 (husband should seek legal remedies for a breach of an implied contract, not violent enforcement unilaterally); Comment, The Common Law Does Not Support a Marital Exception for Forcible Rape, 5 WOMEN’S RTS. L. REP. 181, 184-85 (1979) (because people are not allowed to enforce their own contracts, the marital rape exemption cannot be justified even if contract law was applicable).

84. Smith, 401 So. 2d at 1129.

85. See Note, supra note 68, at 313.

86. Glasgow, The Marital Rape Exemption: Legal Sanction of Spouse Abuse, 18 J. FAM. L. 565, 569 (1979-1980) (because law now allows separation and divorce it “also recognizes that a wife’s consent may be effectively revoked”); see also infra notes 193-96 and accompanying text (listing states that require revocation of consent and separation before a wife can bring rape charges against her husband).
B. A Wife is the Property of Her Husband

The theory that a wife is the property of her husband was another justification used to support the common law marital rape exemption.87 The common law concept that a wife is the property of her husband with which he can do as he pleases is no longer accepted by our society.88 Today women can own and control property separately from their husbands.89 Ironically, "[p]ublic policy seeking to uphold the marital relationship does not see as detrimental to that relationship the recognition of rights in married women over their property."90 Thus, it would logically follow that public policy which supports the marriage relationship must necessarily extend to the woman’s right to control her body.

Fortunately, the Supreme Court affirmed the enlightened principle that women are no longer property and/or chattels of men in Trammel v. United States.91 In Trammel, the defendant asserted that he was privileged to prevent his wife from testifying against him.92 Trammel further contended that the lower court erred in allowing his wife to testify over his objection.93 In so arguing, the defendant relied on the Hawkins rule.94

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87. Smith, 85 N.J. at __, 426 A.2d at 43-44; see Note, supra note 68, at 309. When rape laws originated a woman was property of her father or husband, and some commentators assert that rape laws were designed to ensure her value as a sexual object for her husband or future mate. Note, supra note 68, at 309.

88. Welsbaur, 227 Va. at __, 315 S.E.2d at 852-53 (court deemed this idea so archaic that it did not require citation to authority to prove “that these views of the dependence of women have long been cast aside.”).

89. Initially America adopted the English common law system which provided that a wife’s property became the property of her husband upon marriage and thereafter he had absolute control over her property. Women’s Rts. Task Force, supra note 42, at 4. In 1809, Connecticut was the first state to give married women the right to dispose of their property by will. Later, all of the states adopted “Married Women’s Property Acts” or “Married Women’s Emancipation Acts” giving married women equal rights to control their property. Id. at 4.


91. 445 U.S. 40, 52 (1980) (“in the common-law world—indeed 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”); see also Model Penal Code § 213.1 (Proposed Official Draft 1962) (the erosion of this older view of women may explain why rape is coming under attack).

92. Trammel, 445 U.S. at 42.

93. Id. at 43.

94. Id.
which permitted a defendant “to exclude” all adverse spousal testimony. The Court, however, rejected the archaic notion that the wife was a husband’s chattel and modified the Hawkins rule so that it was in the sole discretion of the witness to decide whether or not to testify against their spouse.

Thus, the theory that a wife is the property of her husband is no longer accepted in American jurisprudence. Logically, it should also cease to be a justification for the marital rape exemption. This is especially true since the corresponding interspousal immunity in tort law is also eroding. Moreover, because the view of women as the chattel of men has been relegated to history in American case law and in much of America’s tort law, it follows that rape laws should also change from protecting a man’s property interests to guarding a woman’s safety and privacy interests.

C. Husband and Wife United as One

Another traditional justification for the marital rape exemption is that when a husband and wife marry they become one. Therefore, a husband cannot be guilty of rape because he cannot be guilty of raping himself. This is fallacious on its face. In 1765, Blackstone explained the principle: “The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . .” This concept, however, has been abolished in

95. Id. at 51-52.
96. Id. at 53. The purpose of modifying the Hawkins rule was “so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled nor foreclosed from testifying.” Id.
97. W. Frosser, The Law of Torts 863-64 (4th ed. 1971). In sixteen states the general rule of complete interspousal immunity has been rejected. Id. at 863. “Thus recovery has been permitted for intentional physical attacks, on the ground that ‘the peace and harmony of the home has been so damaged that there is no danger that it will be further impaired.’ . . . This is fully borne out by the fact that several jurisdictions, with the unanimous approval of legal writers, have followed the lead of a noted dissenting opinion of Mr. Justice Harlan, have rejected all arguments in justification of the immunity as specious, have thrown it completely overboard, and have construed the Married Women’s Acts to authorize an action by either spouse for a personal tort committed by the other, whether it be intentional or negligent in character.” Id. at 863-64 (footnotes omitted); see also Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970). “But we ought not continue to maintain a doctrine for fear of an unhappy consequence when what knowledge we have tells us our fear may not be justified.” Risko, 56 N.J. at __, 267 A.2d at 487.
98. See Smith, 401 So. 2d at 1128; Note, supra note 68, at 310.
most states.\textsuperscript{100}

D. \textit{The Marital Rape Exemption Promotes Spousal Reconciliation}

Among the more recent justifications suggested for the marital rape exemption is that allowing a wife to bring criminal charges against her husband for rape would impede any possibility of reconciling the marriage.\textsuperscript{101} This argument, too, is fallacious on its face because it is the violence resulting from the rape, not the wife’s attempt to find protection under the law, which unravels a marriage.\textsuperscript{102} Moreover, sexual intercourse has become a violent nightmare for the wife it is likely that there is but a shred of the marriage left to reconcile anyway.\textsuperscript{103} If the wife has resigned herself to bringing criminal charges against her husband despite the humiliation she will undoubtedly suffer, then it is unlikely that a reconciliation could occur.\textsuperscript{104}

The converse rationale offered by those asserting that the marital rape exemption promotes reconciliation rests on the tenet that “the wife will be soothed by denying her the protection of the criminal laws . . . .”\textsuperscript{105} More importantly, this tenuous theory ignores the probability that the wife might be fearful of her husband and not bring criminal rape charges until they were separated.\textsuperscript{106}

The states have an interest in the physical protection of individuals as well as the family. The state’s interest in protecting personal liberty is not furthered by the marital rape exemption. Moreover, while family harmony is the justification for the marital rape exemption, family harmony has never been subordinate to a child’s personal well-being. This is exemplified by the fact that a man could be convicted for raping his daughter.\textsuperscript{107} If the state’s interest in the family was held more highly than its interest in personal autonomy, then rape of any family member would be a crime, but it is not.

This policy argument, that without the marital rape exemption all possibilities of reconciling the marriage would be destroyed, assumes that

\textsuperscript{100} Smith, 401 So. 2d at 1128; see Gaston v. Pittman, 224 So. 2d 326 (Fla. 1969).
\textsuperscript{101} Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574; Comment, supra note 83, at 185; Note, supra note 68, at 315.
\textsuperscript{102} Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574; Weishaupt, 227 Va. at 836, 31 S.E.2d at 835.
\textsuperscript{103} See Trammel, 445 U.S. at 52; Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574; Note, supra note 68, at 315.
\textsuperscript{104} Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574.
\textsuperscript{105} Note, supra note 68, at 315; Comment, supra note 73, at 725.
\textsuperscript{106} See Note, supra note 68, at 315-16.
there remains a marriage to be reconciled. Furthermore, it assumes that 
the violence of rape is an injury to which a wife can recover and adjust. 
Yet, even if a marriage could be reconciled and the perpetrator forgiven, 
it does not necessarily follow that a wife who declines reconciliation 
should be prevented from charging her husband with rape.108

E. The State Should Not Interfere with Marital Relationships

As noted above, the state has an interest in maintaining family har- 
mmony and another justification set forth for the marital rape exemption is 
that the state should not interfere with the marital relationship. The 
assertion that the state's interest in promoting family harmony comes 
before that of protecting individuals is illogical. Although promoting 
harmony in marriage is a legitimate state interest, "there is no rational 
relation between allowing a husband to forcibly rape his wife and these 
interests."109 It is incredulous to suggest that allowing violence within 
the family furthers marital privacy,110 when in reality allowing marital 
rape probably fosters unhappy marriages.

Logically, because a husband cannot invoke his right to marital pri-

vacy to elude a charge of battery for beating his wife, he should also be 
prevented from escaping liability for raping his wife under the right to 
marital privacy.111 As Justice Harlan stated in his dissenting opinion in 
Poe v. Ullman,112 the family is sacred, but it is not beyond regulation

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108. See Freeman, supra note 12, at 20; Comment, supra note 83, at 185.
109. Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574.
110. The right to privacy within a marriage was designed to protect consensual acts, not vio-

lence. Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married persons to use contraceptives 

fell within the penumbra of the right of privacy emanating from the Bill of Rights); accord, Moore v. 


are within the penumbra of privacy); Baird v. Lynch, 390 F. Supp. 740, 750 (W.D. Wis. 1974) ("the 

decision whether to become pregnant as a result of sexual intercourse is a fundamental right for 


(Court stated Griswold "does not prohibit the state's regulation of sexual promiscuity or misconduct 

between non-married persons.").
111. Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574. "The fact that rape 

statutes exist, however, is a recognition that the harm caused by a forcible rape is different, and more 

severe, than the harm caused by ordinary assault . . . ." Id. at 166, 485 N.Y.S.2d at 214, 474 

N.E.2d at 574.
112. 367 U.S. 497, 552 (1961) (Harlan, J., dissenting). Justice Harlan went on to say: "Thus, I 

would not suggest that adultery, homosexuality, fornication and incest are immune from criminal 

enquiry, however privately practiced." Id.; accord, Prince v. Massachusetts, 321 U.S. 158, 166 

(1944). "But the family itself is not beyond regulation in the public interest, as against a claim of 

religious liberty." Id. at 166; see also Reynolds v. United States, 98 U.S. 145, 154 (1878); Davis v. 

Beason, 133 U.S. 333 (1890). Admittedly, however, the United States Supreme Court has recog-

nized that there is a "private realm of family life which the state cannot enter." Prince, 321 U.S. at
“and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime.”113

F. The Marital Rape ExemptionEliminates Fabricated Charges

Another commonly asserted policy argument is that abolishing the marital rape exemption would encourage fabricated rape charges.114 The fear is that if a divorce is pending, the possibility for bringing a charge of rape against the husband would give women great power and wives would not forego the opportunity to retaliate.115 The evidence against this proposition is overwhelming. First, the possibility that married women will file false charges is no greater than the possibility that unmarried women will do so.116 Second, our judicial system is capable of determining and dismissing fabricated charges.117 Third, false charges can be asserted for any crime. If the possibility of false charges prevents imposition of a crime for marital rape, the possibility of false charges could also be asserted to defeat the imposition of any crime.118 Fourth, rape trials are extremely embarrassing for the victim and the stigma of the rape trial often remains for life.119 Therefore, it logically follows that a revengeful wife would seek a less shameful, embarrassing, and self-incriminating alternative for her retaliation.120 More convincingly, the offense of battery can be exerted against one’s spouse but has not been used for retaliation.121 Finally, abuse of the opportunity to charge husbands with rape has not occurred in jurisdictions that have abrogated the marital rape exemption.122 It should be noted that a gender-neutral rape or

113. Poe, 367 U.S. at 552.
114. See Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574; Smith, 401 So. 2d at 1129; Barry, supra note 33, at 1091.
115. See Barry, supra note 33, at 1091.
116. Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574; Note, supra note 68, at 314.
117. Liberta, 64 N.Y.2d at 166, 485 N.Y.S.2d at 215, 474 N.E.2d at 575.
118. See Comment, supra note 83, at 183; see also Liberta, 64 N.Y.2d at 166, 485 N.Y.S.2d at 215, 474 N.E.2d at 575; Comment, Spousal Exemption, supra note 7, at 126.
119. See Note, supra note 68, at 314-15. Suggestion that wives would bring fabricated charges “demonstrates little understanding of the human psyche, and the natural shame and embarrassment that would attend any revelation of a rape by one’s husband.” Comment, Spousal Exemption, supra note 7, at 126 (citing S. BROWN MILLER, AGAINST OUR WILL (1975)).
120. See Schwartz, supra note 3, at 53-54; Note, supra note 68, at 315.
121. Smith, 401 So. 2d at 1129.
122. See Freeman, supra note 12, at 19.
sex offense statute would eliminate this problem altogether by treating both men and women equally.

G. The Marital Rape Exemption Presents Insurmountable Problems of Proof

A more plausible justification for the marital rape exemption is that problems with proving rape within a marriage are insurmountable.123 Witnesses are unlikely to be found, but this is no justification for disallowing a ravaged wife her constitutional right to seek a remedy at law. Many crimes are difficult to prove beyond a reasonable doubt, but it is not and never has been a sufficient reason to deny anyone the right to bring a charge against their attacker when a crime has been committed.124 Admittedly, problems of proof are greatest when a wife accuses her husband of rape;125 however, this is still insufficient to be the sole justification and criteria for supporting the marital rape exemption.

H. Alternative Remedies Available

Although remedies for other injuries to a woman’s body are available, such as assault and battery, none of these remedies punishes for the oppressive violence of the crime of rape.126 Charges of assault or battery do not reach the real violation of sexual autonomy inherent in rape.127 The alternative remedies argument fails to recognize the fact that rape in a marriage does not diminish the rights violated.128 Moreover, these alternative remedies fail to protect the wife from further abuse. A crime of marital rape, however, would further the wife’s need for protection from her husband by providing for her husband’s incarceration. Finally, the argument ignores the grim reality of the difficulty working-class women

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123. See Comment, supra note 73, at 724-25. For an in-depth discussion see Scutt, supra note 90, at 284-88.
124. See Freeman, supra note 12, at 18-19; Note, supra note 68, at 314. The fact that prosecutions may be difficult is not a justified excuse to exclude wives from bringing charges. The Supreme Court held that infrequent use of a law does not “bear on the continuing validity of the law . . . .” District of Columbia v. John R. Thompson, Co., 346 U.S. 100, 117 (1953).
125. See Comment, supra note 73, at 724-25. The marriage relationship itself gives an inference of consent and consent is admittedly most difficult to disprove when parties have had previous sexual relations. See Comment, Spousal Exemption, supra note 7, at 125.
126. Freeman, supra note 12, at 15, 20-21; Comment, supra note 73, at 720-21; Note, supra note 68, at 316. “Rape is not just matrimonial misconduct. It may leave emotional and psychological scars or lead to the birth of a child. It is an offense of sufficient moment for women to be able to claim the protection of the criminal law.” Freeman, supra note 12, at 21.
127. Freeman, supra note 12, at 15 (rape’s emotional trauma is more than that of the bodily injury of an assault—it is an outrage to the psyche of a woman).
128. See Note, supra note 68, at 316.
encounter in setting up a new home and bringing divorce proceedings against their husbands; notwithstanding the fact that it is also unlikely a divorce would shield the wife from further abuse.129

I. Marital Rape Less Heinous Crime

Another justification offered for the marital rape exemption is that rape when performed by a spouse is less serious than when performed by a stranger.130 This justification, however, rests on an assumption which tends to ignore the fact that either marital rape or rape by an acquaintance “often leads to far more severe adjustment problems than a brutal, back-alley gang rape, irrespective of any socio-demographic differences among victims.”131 In most cases, a marital or acquaintance rape will be more traumatic for the victim than stranger rape.132

Moreover, when one is raped by a stranger one must live with a horrid memory, but when one is raped by a spouse one must live with both the memory and the rapist.133 Furthermore, research has shown that marital rape is often more violent and traumatic for the victim.134 Finally, psychologists agree that a marriage magnifies the traumatic effects on a rape victim.135

Marriage does not mitigate rape’s trauma because rape is a crime of violence—“injury and outrage to the feelings of the woman by the force-

129. Freeman, supra note 12, at 20. The fear of a divorced woman whose rapist ex-husband is free can be likened to the fear of a single woman whose rapist is at large.

Women abused by their husbands often have no remedy at all. Gelles, No Place to Go: The Social Dynamics of Marital Violence, in BATTERED WOMEN 46 (M. Roy ed. 1977). “The conventional wisdom suggests that a woman who is beaten by her husband and stays with him is a masochist or mentally ill. This ‘wisdom’ is based on the assumption that any reasonable person, having been beaten, would avoid being hit again.” Id. at 59. On the contrary, however, women are often less educated, earn less money, and feel responsible for their children. “Thus, in a violent confrontation where the first reaction must be to flee, women realize that they have few places to flee to and few resources to aid in their flight. Moreover, if a woman leaves without her children, she is stigmatized as a neglectful mother (the same is not true for men who leave their families—they are simply ‘deserters’).” Id. at 61.

130. T. McCahill, L. Meyer & A. Fischman, THE AFTERMATH OF RAPE 3, 61 (1979). For example, rape by one's husband is often assumed to be less serious than a brutal rape of a lone woman by a stranger in a deserted alley at night.

131. Id. at 61.

132. Id.; see Rickenberg & Schulman, supra note 62, at 745. But see Harman, supra note 11, at 439-41. Harman suggests that a prior sexual relationship with the rapist may decrease the victim's "situational" distress, but increase the victim's "reactive" distress.

133. See Comment, supra note 62, at 209.


135. See Comment, supra note 62, at 209.
ful penetration of her person.” This theory is supported by the severe penalties associated with rape when contrasted with the lesser penalties for assault and battery. Rape is viewed as more harmful than assault because rape humiliates the victim and may cause the victim to “suffer permanent emotional repercussions . . . [which] are impossible to calculate.” The marital rape victim usually suffers more trauma than other rape victims. Therefore, a rape within the confines of marriage is no less serious or heinous than stranger rape merely because the victim and rapist are married.

V. CONSTITUTIONAL CONSIDERATIONS

Even if one were to accept any single policy argument as sufficient grounds for sustaining the marital rape exemptions, the inquiry would not be complete. The constitutional problems inherent in nearly all rape statutes must also be examined and analyzed before the marital rape exemption could be justified. The constitutional right to equal protection of the laws and the constitutional right to privacy arguably threaten the constitutionality of the marital rape exemption.

A. The Marital Rape Exemption Violates Equal Protection

The equal protection clause of the United States Constitution guarantees that individuals who are similarly situated will be similarly treated. The equal protection clause does not prevent discrimination; it requires that a classification cannot be arbitrary, cannot unfairly restrict fundamental rights, and cannot be founded on discriminatory criteria. Specifically, the equal protection clause of the fourteenth amendment states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.”

The Constitution grants each citizen the right to equal protection of the laws, therefore, statutory schemes which deny identical treatment for

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138. See Comment, supra note 62, at 209.
140. See Clancy, supra note 63, at 8.
identical acts are ripe\footnote{142} for equal protection challenges.\footnote{143} A statute which treats males and females differently violates the equal protection clause unless the statute's classification scheme is substantially related to an important governmental interest.\footnote{144} Classifications based on marital status, those which treat married individuals differently from unmarried individuals for the same crime, are subject to the middle tier scrutiny afforded gender classifications.\footnote{145} In Eisenstadt v. Baird,\footnote{146} the Supreme Court found a classification scheme discriminating against unmarried persons to be unconstitu-
tional.\textsuperscript{147} In \textit{Eisenstadt}, Baird appealed a conviction for giving an unmarried adult woman contraceptive foam.\textsuperscript{148} The Court held that the statute by preventing such distribution to single persons violated the equal protection clause of the fourteenth amendment.\textsuperscript{149} Clearly, the fundamental right of marriage alone was insufficient to sustain a classification scheme differentiating between married and unmarried persons.

More than a decade after \textit{Eisenstadt}\textsuperscript{150} was decided, a lower court held that New York's marital rape exemption violated the rights of married women.\textsuperscript{151} The landmark case, \textit{People v. De Stefano},\textsuperscript{152} was the first to analyze the constitutionality of the marital rape exemption. In \textit{De Stefano}, the court rejected all of the traditional policy arguments for sustaining the marital rape exemption and found there was no governmental interest protected by the marital rape exemption.\textsuperscript{153}

Other courts that have considered equal protection challenges to their marital rape exemptions have steadfastly held to the argument that only females can become pregnant and it is the pregnancy prevention of young, often unwed, women which is the state's primary legitimate interest.\textsuperscript{154} In \textit{Olson v. State},\textsuperscript{155} the court emphasized the obvious, that females can become pregnant while males cannot, in order to show the gender-based classification was substantially related to the achievement of the governmental objective and therefore within constitutional limits.\textsuperscript{156} The courts following this rationale, however, failed to analyze the definition for the crime of rape. If rape is defined only as intercourse, then arguably the prevention of pregnancy would be substantially related

\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} at 440.
\textsuperscript{149} \textit{Id.} at 443. The Court quoted \textit{Reed}, 404 U.S. at 76: "A classification must be 'reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' " \textit{Eisenstadt}, 405 U.S. at 447 (citation omitted); see generally Comment, Rape Laws, Equal Protection, and Privacy Rights, 54 Tul. L. Rev. 456 (1980).
\textsuperscript{150} \textit{Eisenstadt}, 405 U.S. at 438.
\textsuperscript{151} \textit{People v. De Stefano}, 121 Misc. 2d 113, 467 N.Y.S.2d 506 (1983). In this case, defendant husband moved out of the home but later violated a temporary order of protection by raping his wife at knifepoint. The defendant then tried to show his constitutional right to be exempt from the crime of rape upon his wife under the marital exemption. \textit{Id.} at ___ , 467 N.Y.S.2d at 509.
\textsuperscript{152} 121 Misc. 2d 113, 467 N.Y.S.2d 506 (1983).
\textsuperscript{153} See Rickenberg & Schulman, supra note 62, at 745.
\textsuperscript{155} 95 Nev. 1, 588 P.2d 1018 (1979). In \textit{Olson}, the defendant appealed a statutory rape conviction on the theory "that the statute invidiously discriminates against males by proscribing consensual rape of a female by a male while failing to proscribe consensual rape of a male by a female." \textit{Id.} at ___, 588 P.2d at 1019.
\textsuperscript{156} \textit{Olson}, 95 Nev. at ___, 588 P.2d at 1019; \textit{cf. Meloon}, 564 F.2d at 604.
to the achievement of the governmental objective of preventing intercourse. However, because rape is not merely intercourse, but a crime of violence by one against another, the statute’s purpose should arguably be to prevent the violent intrusion of a person’s body. Thus, prevention of pregnancy is not a governmental interest substantially related, nor rationally related, to the achievement of preventing violence and intrusion.

Another argument used in equal protection challenges of marital rape exemptions is that women cannot rape men. While the majority of sexual attacks have been by men upon women, if rape is defined as any penetration, however slight, a man can be raped by force without his consent.

Many courts have upheld gender-based rape statutes upon finding an important governmental interest that is substantially related to the gender-based classification scheme. Ultimately, however, courts have realized that these rationales will no longer withstand equal protection scrutiny. As a result, a trend of holdings that statutes with marital rape exemptions violate the equal protection clause of the fourteenth amendment has emerged. The change, however, will be slow if state legislatures do not respond first, because many courts are extremely hesitant to declare statutes unconstitutional.

B. The Marital Rape Exemption Violates the Right to Privacy

The marital rape exemption violates the constitutional right of privacy as well as equal protection. This second constitutional consideration, the right to privacy, emanates from the Bill of Rights. Although an express right to privacy is not contained in the Bill of Rights, the

157. State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976). “Historically such attacks have been by men upon women.” The court held that some inequality in gender classifications does not render the statute unconstitutional “unless those similarly classified are treated differently or the classifications are arbitrary.” Id. at __, 545 P.2d at 653. The court further noted that even under a gender-based statute, a woman could be convicted for assault. In 1975, Montana amended the statutory language in order to eliminate the gender distinction. Id., 545 P.2d at 653.

158. Id. at __, 545 P.2d at 653.

159. Courts have upheld gender-based statutes which made it a crime for a male to rape a female, but did not similarly protect males from a female rapist. See, e.g., Kelly, 111 Ariz. 181, 526 P.2d 720; Flowers, 644 P.2d 916; Brown, 652 P.2d 1025; Gould, 188 Colo. 113, 532 P.2d 953; Green, 183 Colo. 25, 514 P.2d 769; Rivera, 62 Hawaii 120, 612 P.2d 526; Lamere, 103 Idaho 839, 653 P.2d 46; Greenswieg, 103 Idaho 50, 644 P.2d 372; Mahoney, 664 P.2d 1042.

160. See Meloon, 564 P.2d at 609 (court held specific statute which extended punishment for rape that involved only female victims violated the fourteenth amendment).

161. U.S. CONST. amends. I-X.
Supreme Court stated in *Griswold v. Connecticut*[^162] that many of the Bill of Rights guarantees protect an individual’s interest in privacy and thereby create a “penumbra” of privacy.[^163]

Seven years after *Griswold*, the Supreme Court expanded the meaning of the *Griswold* holding in *Eisenstadt*.[^164] In *Eisenstadt*, the Court extended the right of privacy to include an unmarried person’s right to use contraceptives. The Court stated that if a ban on the distribution of contraceptives to married persons was unconstitutional, then a ban on distribution to unmarried persons would also be unconstitutional.[^165] More importantly, the Court acknowledged that the right of privacy includes the right of individuals, married or single, to be free from governmental intervention in an individual’s decision to procreate.[^166]

Finally, the landmark case of *Roe v. Wade*[^167] expanded the right of privacy to include the right of a woman to terminate her pregnancy. This right, however, “is not unqualified and must be considered against important state interests.”[^168] When the health of the mother or the fetus “becomes significantly involved,”[^169] the woman’s right to privacy can be subject to state intervention. Hence, although a woman’s right to privacy does not preclude all state intervention, in *Planned Parenthood v. Danforth*,[^170] the Supreme Court barred states from giving a pregnant woman’s husband an absolute right to veto her decision to have an abortion.[^171] Both the *Roe* and *Planned Parenthood* decisions rest upon the premise that women are individuals and are therefore entitled to their

[^162]: 381 U.S. 479 (1965). At issue were two Connecticut statutes which prohibited the sale of contraceptives and counseling of persons in their use and application. *Id.* at 480.

[^163]: *Id.* at 484-85. The court struck down the statutes with a majority of seven and held that the right of married persons to use contraceptives fell within the “penumbra” of privacy. *Id.* at 485.

[^164]: *Eisenstadt*, 405 U.S. at 438.

[^165]: *Id.* at 453.

[^166]: *Id.*

[^167]: It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet, the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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.

[^168]: *Id.* at 453 (emphasis in original); accord Cleveland Bd. of Educ. v. LaFluer, 414 U.S. 632 (1974). “This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” 414 U.S. at 639-40.


[^170]: *Id.* at 154.

[^171]: *Id.* at 159.
own individual right to privacy, separate and apart from their husband’s rights. Hence, it is the individual, not the marital relationship, that possesses the overriding right to privacy.\textsuperscript{172}

An individual’s right to bodily privacy was set forth by the Supreme Court as early as 1891: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his [or her] own person, free from all restraint or interference of others.”\textsuperscript{173} Further support for an individual's right to bodily privacy was provided in \textit{Carey v. Population Services International}.\textsuperscript{174} In \textit{Carey}, the Supreme Court held that the right of privacy also included the decision to conceive a child.\textsuperscript{175}

The marital rape exemption, like the statute in \textit{Carey} which prohibited distribution of nonmedical contraceptives to persons under sixteen years of age, impinges upon a woman’s individual decision whether or not to conceive a child. Therefore, statutes affording marital rape exemptions must serve a compelling state interest.\textsuperscript{176} Yet, even if a compelling state interest could be asserted to justify the marital rape exemption, it is unlikely that any legitimate state interest could be fostered by allowing sexual violence in a marriage. Moreover, since each individual has a right to privacy, the state would have a conflict of interest in protecting a spouse's individual rights to privacy and at the same time a marital right to privacy.\textsuperscript{177}

Nonetheless, the Supreme Court has set forth both an individual right to privacy and a marital right to privacy. The state's interest in protecting the individuals’ right to privacy and its interest in protecting the right of marital privacy established in \textit{Griswold}\textsuperscript{178} do not conflict, but are coextensive interests. This is because the right to marital privacy confirmed in \textit{Griswold} encompassed the right to consensual sexual con-

\begin{itemize}
  \item \textsuperscript{172} \textit{Eisenstadt}, 405 U.S. at 453.
  \item \textsuperscript{173} \textit{Union Pac. Ry. Co. v. Botsford}, 141 U.S. 250, 251 (1891).
  \item \textsuperscript{174} 431 U.S. 678 (1977).
  \item \textsuperscript{175} \textit{Id.} at 688-89. Because the right to privacy included the right to decide whether to bear a child, access to contraceptives could not be prevented by the state. \textit{Id.; see also Skinner v. Oklahoma}, 316 U.S. 525 (1942) (court struck down an Oklahoma statute providing for the sterilization of certain prisoners because it interfered with the fundamental right to procreate).
  \item \textsuperscript{176} \textit{Carey}, 431 U.S. at 686. “[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.” \textit{Id.}
  \item \textsuperscript{177} \textit{See Comment, supra} note 149, at 478.
  \item \textsuperscript{178} \textit{Griswold}, 381 U.S. at 479. The purpose of marital privacy is to promote marital harmony. \textit{Id.} at 485-86. \textit{Griswold} did not hold nonconsensual sexual assault to be free from state interference.
\end{itemize}
duct in marriage without state intrusion. Consensual sexual conduct in a marriage does not encompass the right to violent sexual assaults. Therefore, marital rape, a nonconsensual sexual assault, is not free from state interference. Thus, the Griswold holding taken in conjunction with the Court's definition of an individual's privacy right, demonstrates "that an individual's privacy interests outweigh marital privacy interests when the two conflict." Clearly, the marital privacy interest cannot outweigh the individual's interest.

When a husband rapes his wife, he invades the wife's personal right to privacy. In states that retain a marital rape exemption, the wife has no remedy for the violation of her privacy. Therefore, statutes which afford the marital rape exemption violate a wife's right to privacy and are unconstitutional unless the statute serves a compelling governmental interest. As noted earlier, however, none of the traditional policy arguments used to retain the marital rape exemption are plausible. In short, because the state has no compelling governmental interest in permitting marital rape, only statutes which eliminate the marital rape exemption can withstand constitutional scrutiny based on the right to privacy.

VI. STATUTORY RESPONSES

Although statutes with marital rape exemptions are likely unconstitutional, marital rape law reform has been slow and legislators remain indifferent. Unfortunately, even when legislatures have attempted some reform, most have failed to achieve total abolition of the marital rape exemption.

Presently, three states still provide a complete exclusion for the

179. See Griswold, 381 U.S. at 485-86; Hilf, supra note 36, at 35-40; Comment, supra note 62, at 215.
181. See Comment, supra note 62, at 216; see also Planned Parenthood, 428 U.S. at 67-72 (state cannot require a husband's written consent before his wife can receive an abortion); Roe, 410 U.S. at 113 (a woman has the right to decide whether to terminate her pregnancy); Eisenstadt, 405 U.S. at 453 (the right of privacy is an individual right whether the individual is married or single).
182. "Just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy." Liberta, 64 N.Y.2d at 165, 485 N.Y.S.2d at 214, 474 N.E.2d at 574.
183. The author asserts that the remedies provided through criminal assault and battery statutes are insufficient to compensate for the more violent and harmful crime of rape.
184. See Comment, supra note 62, at 220.
185. Id. at 221.
186. See Comment, supra note 149, at 478-79.
187. See Bienen, supra note 3, at 209-13; Freeman, supra note 12, at 24. (Bienen argues that rape law reform also has significant social implications because it educates the public about the horror of rape).
spouse from all types of spousal sexual assault crimes until the marriage formally ends.\(^{188}\) Seven states, however, have completely reformed their rape or sexual assault statutes to explicitly exclude the marital rape exemption.\(^{189}\) In comparison, thirteen states and the District of Columbia have statutes which are silent on the issue.\(^{190}\)

The sign of some statutory reform is evidenced by the fact that only two states retain a simple codification of the common law offense of rape\(^{191}\) which defined rape as the carnal knowledge of a woman by force or threat of force.\(^{192}\) Two additional statutes also fail to reflect the trend of more comprehensive sexual assault statutes, referring only to rape rather than to several categories of graded sexual offenses.\(^{193}\)

A number of states have partially reformed their rape or sexual assault statutes. The partially reformed marital rape exemptions provide that the marriage ceases to give a spouse an immunity from the crime of rape when various factors indicate the marriage has dissolved. For example, five state statutes provide that the spousal privilege is inoperative when spouses are judicially separated.\(^{194}\) Another four states void the marital rape exemption when the spouses are living apart and have filed for divorce and separate maintenance.\(^{195}\) Furthermore, five states disal-

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\(^{188}\) A complete exclusion for any sexual assault can be found in CONN. GEN. STAT. ANN. § 53(a)-67(b) (West Supp. 1985); OHIO REV. CODE ANN. § 2907.02(A) (Baldwin Supp. 1984); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1985).


\(^{191}\) Codification of the common law crime of rape appears in GA. CODE ANN. § 26-2001 (Harrison 1983) and MISS. CODE ANN. § 97-3-65 (Supp. 1984).

\(^{192}\) 4 W. BLACKSTONE, supra note 28, at 209.

\(^{193}\) Two statutes exclude spousal liability and refer only to rape, not other sexual assaults. ALA. CODE §§ 13A-6-60(4), 13A-6-61 to 13A-6-62 (1982); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1984).

\(^{194}\) Some statutes disallow the marital rape exemption when the spouses are judicially separated. See, e.g., LA. REV. STAT. ANN. § 14:41 (West Supp. 1985); Md. ANN. CODE art. 27, § 464D (1982); MO. ANN. STAT. § 566.010 (Vernon 1979); S.C. CODE ANN. § 16-3-658 (Law. Co-op. 1985); UTAH CODE ANN. § 76-5-407 (Supp. 1985).

\(^{195}\) Statutes which void the marital rape exemption when spouses are living apart and have filed for divorce and separate maintenance include: IND. CODE ANN. § 35-42-4-1(3)(b) (Burns 1985);
low the marital rape exemption even if the spouses are merely living
apart.\textsuperscript{196} Finally, the remaining nine states delineate specific requirements
which must be satisfied before the spousal privilege is disallowed.\textsuperscript{197}

Although a few statutes have been radically revised to explicitly dis-
allow a spousal privilege for rape, there is no plausible explanation for
the lack of total marital rape reform.\textsuperscript{198} In the seven states which spe-
cifically nullified the marital rape exemption there has not been an abuse of
the enlightened law, nor has there been a “flood of prosecutions” or
“fabricated charges.”\textsuperscript{199}

\section*{VII. Oklahoma Law}

Despite the success of reformed marital rape laws in other states and
abroad, Oklahoma’s rape law has been slow to change. Prior to an

\begin{flushright}
MINN. STAT. ANN. § 609.349 (West Supp. 1985); NEV. REV. STAT. § 200.373 (1983); TENN. CODE
\end{flushright}

\textsuperscript{196} In some states the marital rape exemption is inoperative when marital partners are not
cohabiting. See, e.g., COLO. REV. STAT. § 18-3-409 (1973) (marital rape exemption inoperative
when spouses intend to and do live apart); IOWA CODE ANN. § 709.1 to .4 (West 1979 & West Supp.
1985); ME. REV. STAT. ANN. tit. 17-A, §§ 251, 252 (1983) (negative inference can be drawn from
(not considered spouse if living apart or if either has filed for separate maintenance or divorce).

\textsuperscript{197} Several statutes provide for alternative acts before the marital rape exemption is disallowed.
ARK. STAT. ANN. §§ 41-1802 to 1803 (Supp. 1985) (definition of rape does not exclude spouse, but
other sexual offenses do specifically exclude spouse); IDAHO CODE § 18-6107 (1979) (marital rape
exemption applies unless a spouse has initiated either divorce or separation proceedings, or spouses
have lived apart 180 days); N.Y. PENAL LAW § 130.00(4) (McKinney Supp. 1975-1984) (action
allowed if judicial order, decree of separation, or acknowledged written agreement of separation);
N.C. GEN. STAT. § 14-27.8 (1981) (not liable for sexual assault unless parties are living separately
pursuant to a written agreement or judicial decree); N.D. CENT. CODE § 12.1-20-01 (Supp. 1983)
(spousal privilege inoperative if spouses live apart under judicial separation decree, protection order,
or interim order in connection with a divorce or separation action); OKLA. STAT. ANN. tit. 21,
§ 1111 (West Supp. 1984-1985) (marital rape exemption inoperative if petition for divorce is pend-
ing; petition for legal separation is pending or was granted; petition for protective order is pending;
or if spouses are living apart); PA. STAT. ANN. tit. 18, § 3103 (Purdon Supp. 1985) (spousal privilege
inoperative if spouses live apart or if they live together under a separation agreement or judicial
court order); R.I. GEN. LAWS §§ 11-37-2.1 (Supp. 1985) (not liable for first degree sexual assault if
couple is living apart “and a decision for divorce has been granted, whether or not a final decree has
been entered”); TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 1985) (no marital rape exemption
if spouses “do not reside together or if there is an action pending between them for dissolution of
the marriage or for separate maintenance.”).

\textsuperscript{198} Glasgow, supra note 86, at 582.

\textsuperscript{199} Id. Moreover, the case for total abolition of the marital rape exemption is strengthened by
the fact that many foreign jurisdictions do not exempt the spouse from rape prosecution. Further-
more, these countries have not suffered adversely. Husbands can be prosecuted for rape in Czechoslovakia, Poland, and the U.S.S.R. See Freeman, supra note 12, at 26. In Sweden husbands are
liable for marital rape, but receive a less harsh sentence than strangers who rape. Id. at 26-27.
Eleven years after the Swedish law was changed, a report examining the new law found that
although the law was seldom used the reform was necessary. See Glasgow, supra note 86, at 583.
amendment effective November 1, 1984, Oklahoma provided the spouse with a complete marital rape exemption—"a husband could never be prosecuted for rape of his wife, even when the parties were separated pursuant to court order."202

In 1984, Oklahoma's marital rape law took a small, informed step forward by expressly providing that a spouse can be prosecuted for rape if he used or threatened to use force or violence and if there is a pending divorce petition, a pending petition for legal separation, a pending petition for a protective order, or if the victim and spouse are living apart.203 This reform in Oklahoma's law made it possible for a husband to receive criminal punishment for raping his wife if the parties were not cohabiting or if a legal action had been initiated.204

Oklahoma's recent statutory reform is encouraging, but it is not a panacea. Justice demands more reform. The traditional reasons for upholding the marital rape exemption are no longer valid. Even if they were valid, the constitutional right to equal protection and privacy are hurdles the statute would have to overcome. Thus, Oklahoma's rape statute still needs more reform—a reform which would completely abolish the marital rape exemption and also satisfy the inevitable equal protection and privacy challenges.

VIII. A SUGGESTED STATUTORY SCHEME

Clearly, a new statutory scheme which would arguably avoid all of the archaic policy justifications and explicitly provide punishment for marital rape is needed not only in Oklahoma, but throughout the nation. Furthermore, the most enlightened approach would settle equal prote-

200. See Rickenberg & Schulman, supra note 62, at 749.

201. OKLA. STAT. tit. 21, § 1111 (1981). As late as April 15, 1981, the Oklahoma senate rejected an amendment by the house to create the crime of marital rape in Oklahoma. E.g., Richardson, An Analysis of Oklahoma's New Rape Statutes, 52 OKLA. B.J. 2482 (1981) (the article discusses Oklahoma's rape statutes as of 1981 only).


B. Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person and if:
1. A petition for divorce is pending; or
2. A petition for legal separation is pending or has been granted; or
3. A petition for a protective order as provided for by the provisions of Section 60.2 of Title 22 of the Oklahoma Statutes is pending; or
4. The victim and perpetrator are living separate and apart from each other.

Id.

204. Rickenberg & Schulman, supra note 62, at 749.
tion problems with a gender-neutral sexual offense statute which pun-
ishes both men and women for any penetration, however slight, and for 
all other deviant sex crimes.

An example of this enlightened statutory approach can be found in 
New Hampshire's statute which outlines sexual assaults and related 
of- 
fenses. New Hampshire's statute is gender-neutral and specifically dis-
allows the traditional marital rape exemption. This is evident in that the 
perpetrator is defined as a "person," either a man or woman, accused 
of sexual assault. Thus, both male and female victims are afforded equal 
protection under the law.

The statute should also provide for appropriate gradated penalties 
for varying levels of sexual assault. Under the New Hampshire statute 
punishment is heightened for "sexual penetration" under the crime of 
aggravated felonious sexual assault. Punishment is correspondingly 
diminished for an actor who has sexual contact with a young victim, but 
not penetration. The least punishment is afforded an actor who sub-
jects a person merely to sexual contact.

Most importantly, however, the statute explicitly states that "[a]n 
actor commits a crime under this chapter even though the victim is the 
actor's legal spouse." This specific language leaves no doubt that the 
common law marital rape exemption is no longer part of New Hamp-
shire's law. New Hampshire's statute is exemplary. Oklahoma and 
many other states should reform their rape laws to gradated, gender-
neutral sexual assault statutes, like that of New Hampshire.

IX. CONCLUSION

The grim reality of legally-sanctioned marital rape remains in all but 
a few progressive states. Ironically, the legacy of Hale's flippant and un-
founded statement that a husband cannot rape his wife continues to 
ravage American women.


632-A:5 Spouse as Victim; Evidence of Husband and Wife. An actor commits a crime 
under this chapter even though the victim is the actor's legal spouse. Laws attaching a 
privilege against the disclosure of communications between husband and wife are inappli-
cable to proceedings under this chapter.

Id.


207. Id. § 632-A:2.

208. Id. § 632-A:3.

209. Id. § 632-A:4.

210. Id. § 632-A:5.

211. See HALE, supra note 6, at 629.
Unfortunately, however, even though the case for total reform of archaic American rape laws is compelling, most courts are unwilling to take the role of judicial legislators to correct the evils fostered by the marital rape exemption. Thus, the task of statutory reform is relegated to state legislatures.

All legislatures should provide some reform and design a gender-neutral sexual offense statute. The author advocates a statute which:

(1) is gender-neutral;
(2) has gradated punishments by categories of sexual assault and (3) expressly provides that the perpetrator is liable for marital rape.\(^{212}\) In following these three statutory guidelines, a new statutory scheme would punish a crime of violence, not a crime of sex. Furthermore, it would provide that violent sexual assault on an unwilling victim is illegal, and can no longer be protected behind the guise of the marital bond.\(^{213}\) Marital rape is not a less heinous crime:

Rape is rape. The identity of the rapist does not alter the fact of his act, nor lessen its traumatic effects on his victim. The marital status of the parties involved should have no bearing on the definition of the crime of rape any more than it should on the crime of battery . . . . I believe our society is now plagued with violence because it is allowed to run rampant in the family home.\(^{214}\)

Rape within marriage is a violent and heinous crime destined to continue without punishment if state legislatures do not abolish the marital rape exemption and provide for prosecutions of marital rape. Moreover, American legislatures and courts must first acknowledge rape for what it is—a crime of violence to which no individual, married or single, should be subjected.

\(^{212}\) The fact that New Hampshire's statute explicitly provides that an actor can be criminally liable for rape of his spouse is important. This express language will quash arguments that the statute was silent on the issue because it was not intended to punish spouses.

\(^{213}\) See Smith, 401 So. 2d at 1129.

\(^{214}\) D. MARTIN, supra note 1, at 181.

Geri Coen