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NOTES AND COMMENTS

THE INJUSTICE OF THE MARITAL RAPE EXEMPTION: A SURVEY OF COMMON LAW COUNTRIES

Sonya A. Adamo*

INTRODUCTION

A woman is raped by her husband the day after undergoing gynecological surgery, which causes her to hemorrhage and return to the hospital.¹ Another woman is forced to have sex at knifepoint by her estranged husband.² Conscience and justice dictate that the perpetrators of such crimes must suffer some punishment. Many common law countries, however, still sustain the misbelief that a husband is incapable of raping his wife, due to the presumption of a wife's absolute, irrevocable consent to any sexual acts during the course of marriage.³ These laws provide a husband with immunity from prosecution for marital rape simply because of his status as husband.⁴ Yet, this prospect is unsound. Rape violates a woman's bodily integrity, freedom, and self-determination; the harm is not mitigated because the rape occurred in her mar-

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1. See D. FINKELHOR & K. YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 18 (1985) (documenting brutal marital rapes from interviews, including a husband jumping his wife in the dark and anally raping her over a woodpile, and a husband and his friend gang-raping his wife after luring her to a vacant apartment).

2. *Id.*

3. See M. HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 629 (S. Emlyn ed. 1778) (proclaiming that through mutual matrimonial consent and contract a wife has given her nonretractable consent to her husband's sexual demands).

4. See Mitra, ". . . For She Has no Right of Power to Refuse Her Consent," 1979 CRIM. L. REV. 558, 558 (stating that in England, a husband may evade prosecution for raping his wife, adding that this raises fundamental questions about the law concerning rape and marriage as an institution).

riage bed.⁵ Marital rape can be more traumatic and abusive than stranger rape.⁶ Suffering at the hands of a spouse, who is usually a source of trust and care, produces feelings of betrayal, disillusionment, and isolation in the woman.⁷

The spousal exemption to rape statutes is a grave injustice and adds to the trauma of marital rape. A wife is not able to quickly and unilaterally secure protection; she must wait for the divorce process to take its course to obtain relief, during which time she remains endangered.⁸ The rape law exemption, therefore, removes a wife's right to abstain from sex and subjects her directly to the dangers of sexual violence.⁹

Approximately fourteen percent¹⁰ of married women are victims of marital rape. The law, in essence, refuses to acknowledge these women. The rationale is that if a husband is unable to legally rape his wife (within the definition of a law that includes a spousal exemption), marital rape cannot exist. Such a policy is contrary to modern attitudes

5. See S. BROWNMILLER, *AGAINST OUR WILL* 428 (1975) (adding that the ideal of bodily self-determination for all women should be an unqualified principle if it is to become an invincible rule).

6. See D. RUSSELL, *RAPE IN MARRIAGE* 198 (1982) (stating that marital rape is not less life-threatening or frightening than stranger rape); see also D. FINKELHOR & K. YLLO, *supra* note 1, at 118 (quoting a marital rape victim who stated, "when a stranger does it [rape], he doesn't know me, I don't know him. He's not doing it to me as a person, personally. With your husband, it becomes personal. You say, this man knows me. He knows my feelings. He knows me intimately, and then to do this to me—it's such a personal abuse . . .") Another woman described her rape as attempted murder, after her husband forced her to have sex without birth control when she told him that her doctor informed her pregnancy may be fatal to her. *Id.*

7. *Id.* Friends, relatives, and professionals such as police and social workers treat wife rape victims more poorly than stranger rape victims. *Id.* In addition, the wife usually blames herself for the assault. *Id.*; see also D. FINKELHOR & K. YLLO, *supra* note 1, at 126 (naming the destruction of the ability to trust as the most common long-term effect).

8. D. FINKELHOR & K. YLLO, *supra* note 1, at 141. The authors find that the wife is most at risk during the separation period because the husband senses anger and resentment. *Id.* During a separation period, a husband is likely to retaliate physically against his wife, who has no protection from the rape law until the divorce is final. *Id.*

9. See *id.* (suggesting that the permissive nature of rape law toward marital rape may actually lead enraged husbands to rape their wives).

10. D. RUSSELL, *supra* note 6, at 57. In the most extensive and respected study to date, Russell used a random sample of nine hundred thirty women in San Francisco for her research. *Id.* Thirty-three female interviewers were selected to conduct the interviews. *Id.* Usually only one interview was necessary, with an average length of one hour and twenty minutes per interview. *Id.* Anonymity and confidentiality were given great importance by all the participants. *Id.* at 29-41; see also D. FINKELHOR & K. YLLO, *supra* note 1, at 205 (studying sex by physical force or threat correlated with type of assailant). The study concluded that ten percent of six hundred women living in the Boston metropolitan area, who had children aged six to fourteen, reported that a spouse or cohabitating partner was the abuser. *Id.*

toward marriage.¹¹

Contemporary family law attempts to make spouses equal partners.¹² Women now have rights exclusive of those of their husbands; one example is the right to choose to have an abortion without spousal consent.¹³ Before common law countries will be able to reflect the present notions of wives as equal, independent human beings, however, they must modernize their laws regarding marital rape.

This Comment argues that to harmonize modern concepts of womanhood and marriage with the law, all common law countries should statutorily abolish the spousal exemption for marital rape. Although some countries have eliminated the spousal exemption, other countries retain the archaic law. Part I of this Comment examines the history and rationale of the common law relating to the spousal exemption. Part II presents and analyzes United States marital rape law, including a state-by-state summary. Part III examines the marital rape laws of other common law countries such as England, Scotland, New Zealand, South Africa, Australia, and Canada.¹⁴ Discussion in this section centers on both the benefits and the problems with these laws. Part IV recommends the abolishment of the marital rape exemption in all common law countries, concluding that the exemption rationale is unsound in modern times.

I. HISTORY AND RATIONALE OF THE COMMON LAW

A. IMPLIED CONSENT THEORY AND PROPERTY THEORIES

The common law theory behind a spousal exemption for rape is most frequently attributed to Sir Matthew Hale, who asserted "but the husband cannot be guilty of a rape committed by himself upon his lawful

11. Kaganas & Murray, *Rape in Marriage—Conjugal Right or Criminal Wrong?* 1983 ACTA JURIDICA 125, 127 (1983).

12. *Id.*

13. *See id.* (stating that the husband's right to moderate chastisement has disappeared and he is no longer able to restrict his wife's freedom of movement); *see also* *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976) (holding that requiring spousal consent to a woman's choice to have an abortion violated her constitutional rights); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (extending the right of privacy to a woman's choice to terminate her pregnancy with abortion); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding within the Bill of Rights a penumbra or zone of privacy rights that includes the right of all people to use contraception).

14. *See infra* notes 77-194 and accompanying text (discussing the marital rape exemption in the specified common law countries). The selection of the specific countries and states is based on the similarities of the legal systems in common law countries. Such a comparison provides stronger lessons for homogeneous countries desiring a change in their rape laws. The availability of information on sexual offense laws limited the choice of foreign countries.

wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."¹⁵ Although Hale did not invent this concept, he subscribed to it as it had been accepted throughout history.¹⁶ He focused on the contractual terms of the marriage agreement,¹⁷ advocating that the marriage contract presumed irrevocable consent to sexual relations.¹⁸

A series of English cases refined Hale's rigid implied consent theory.¹⁹ The cases provided glimpses into the beginning of the trend toward exceptions in spousal immunity laws. Moreover, they indicated the possible nonabsolute nature of what Hale deemed absolute consent.

*R. v. Clarence*²⁰ initiated the questioning of the soundness of Hale's theory. Although the judges commented *in obiter*, four of the six judges had some misgivings regarding Hale's doctrine. They theorized that

15. M. HALE, *supra* note 3, at 629.

16. 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, 9 (1981). Since no authority was cited and Hale was known as a stringent misogynist, it is quite possible that he did create the marital exemption rule. *Id.* at 10; see also Comment, *The Marital Exemption to Rape: Past, Present and Future*, DET. C.L. REV. 261, 263 n.13 (1978) (stating that a review of earlier English law illustrates similar ideas). For example, from 1066 through 1307 an alleged rapist could go unpunished if the victim accepted the accused as her husband with the consent of her parents and the judiciary. *Id.*

17. Comment, *The Marital Exemption to Rape: Past, Present and Future*, *supra* note 16, at 263. *But see* Mitra, *supra* note 4, at 561 (attacking Hale's view with the argument that spouses-to-be receive no information or options about the contract terms, which makes it irrational to think that a woman gives all access of her body to her husband at any time he wants it). Historically, the state has always held an interest in the creation, termination, and obligations of a marriage as a contract in which the woman transferred her proprietary rights to her husband; yet, in the modern era a woman is not a property right. *Id.*; see also English, *The Husband Who Rapes His Wife*, 126 NEW L.J. 1223, 1223 (1976) (stating that although Hale insisted that he would not let a "legal fiction" corrode his rule, critics say that the whole rule is based on the legal fiction of equating marriage with the wife giving her husband the right to have intercourse with her whenever he desired).

18. See generally Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 7 CANADA-U.S. L.J. 173, 174 (1984) (noting widespread acceptance of Hale's view until recent times).

19. See Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986) [hereinafter Note, *To Have and To Hold*] (citing Hale as the accepted authority on marital rape in the United States because of his implied consent theory). *But see* Note, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 722 (1954) [hereinafter Note, *Rape and Battery Between Husband and Wife*] (noting that the implied consent doctrine is not factually sound because marriage does not always indicate consent to intercourse and that the doctrine deprives a married woman of criminal law protections when she needs them).

20. *R. v. Clarence*, 22 Q.B.D. 23 (1888). The defendant was charged with assault causing bodily harm after he transmitted gonorrhea to his wife. *Id.* at 34 (Wills, J., dissenting) (commenting that if the husband told his wife about the possibility of infection, she should presumably be correct in refusing to have intercourse with him).

marital rape could be possible in some cases if the wife refuses intercourse and the husband uses violence to force the sexual act upon her.²¹

The case of *R. v. Clarke*²² first dealt directly with the marital rape issue. This case allowed for the indictment of the husband for the rape of his wife when they were living apart under a court-issued separation order. The court reasoned that the separation order had in effect revoked the wife's consent.²³ In *R. v. Miller*,²⁴ however, the court regressed from its holding in *R. v. Clark*²⁵ and declared that a husband was only guilty of assault, not rape, when he forced his wife to have sex with him after she filed a petition for divorce, but before the court heard the action.²⁶ Consistent with the case law, in *R. v. O'Brien*²⁷ the court found a husband guilty of raping his wife after the wife petitioned for divorce and received a decree nisi.²⁸ Finally, in *R. v. Steele*²⁹ the court found that a wife had revoked her consent where the husband was living separately from his wife and had given an undertaking to the court not to molest or assault her.³⁰

21. *R. v. Clarence*, 22 Q.B.D. at 57. Justice Field stated that "[t]here may, I think, be cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime." *Id.* (Field, J. dissenting). Justice Wills commented that the prospect of marital rape as an impossibility is one "to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority." *Id.* at 33 (Wills, J., dissenting). Justice Smith stated that the consent which was given at marriage must be revoked in order for the husband to be guilty of rape. *Id.* at 37 (Smith, J.). Justice Hawkins advocated the idea of an implied consent theory, but agreed that there were circumstances in which a husband could be punished for rape of his wife (i.e., where the husband is diseased). *Id.* at 51 (Hawkins, J., dissenting). Only two out of the six judges wholly espoused Hale's doctrine of implied consent. *Id.* at 46 (Stephen, J., dissenting), 64 (Pollock, J., dissenting).

22. *R. v. Clarke*, [1949] 2 All E.R. 448 (Leeds Assizes).

23. *Id.* at 448-49. The court held that the woman was presumed to have consented to intercourse with her husband when ordinary relations, a product of the marriage contract, existed between the spouses. *Id.* However, a judicial order providing that the wife was no longer required to cohabit with husband effectively revoked ordinary relations, thereby revoking automatic consent. *Id.*

24. *R. v. Miller*, [1954] 2 Q.B. 282 (Winchester Assizes).

25. *R. v. Clark*, [1949] 2 All E.R. 448 (Leeds Assizes).

26. *R. v. Miller*, 2 Q.B. at 290, 292. The court held that presenting a petition for divorce had no legal effect on the marriage or its dissolution. *Id.* at 292. For example, the court could reject the petition and the marriage would still stand. *Id.* Thus, a simple divorce petition could not lead one to infer that the wife revoked her consent. *Id.* at 290.

27. *R. v. O'Brien*, [1974] 3 All E.R. 663 (Crown Ct. Bristol).

28. *Id.* at 665. The court found that the difference between a pronouncement of a decree nisi and a decree absolute in a marriage was a mere technicality. *Id.* The court felt that the decree nisi clearly revoked the wife's consent. *Id.*

29. *R. v. Steele*, 65 Crim. App. 22 (C.A. 1976).

30. *Id.* at 25. The fact that the couple lived apart was indicative of the wife's non-consent. *Id.* The husband's undertaking relieved the wife of her usual marital obligation. *Id.*

Although the courts limited the Hale doctrine, they based their reasoning on Hale's theory of implied consent.³¹ Matrimonial consent was no longer always absolute, but only the marital contracts and special marital circumstances revoked a married woman's consent;³² a wife retained no ability to freely revoke her consent.

In addition to Hale's implied consent theory, the unities of persons theory³³ provided a basis for the marital rape exemption. This theory was premised on how marriage merged the identities of the husband and wife into one—the husband.³⁴ Thus, under the unities theory, rape was impossible since a husband was incapable of raping himself.³⁵ Furthermore, society viewed a wife as her husband's property or chattel.³⁶ Consequently, forced sexual intercourse was just a husband making appropriate use of his property.³⁷

B. SEPARATE SPHERES IDEOLOGY

Toward the end of the nineteenth century, every state in the United States adopted the Married Women's Property Acts, which allowed women to make contracts, to hold and convey property, and to sue and be sued as if they were unmarried.³⁸ The property arguments discussed

31. See Williams, *Marital Rape—Time for Reform*, 134 NEW L.J. 26, 26 (1984) (stating that the cases modified Hale's absolutist approach by allowing prosecution of a husband where the wife had obtained a legally enforceable order or undertaking, which would effectively revoke the consent inherent in marriage).

32. See Backhouse & Schoenroth, *supra* note 18, at 175 (noting that Hale's irrevocable consent had become revocable in limited situations such as when the wife had obtained court orders or when both spouses agreed to separate). Other withdrawals of consent, however, were not valid. *Id.*

33. See Note, *To Have and To Hold*, *supra* note 19, at 1256 (defining the unities of persons theory as the wife being incorporated into the husband). The unities of persons theory originated in the feudal doctrine of coverture, thus, legitimizing the view of a married woman becoming her husband's chattel through marriage. *Id.*

34. Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 310 (1977) [hereinafter Note, *The Marital Rape Exemption*]. The author labels as a legal fiction the rationale underlying the spousal exemption which makes a woman her husband's property or other half. *Id.*

35. *Id.*; see Note, *Sexual Assault: The Case for Removing the Spousal Exemption from Texas Law*, 38 BAYLOR L. REV. 1041, 1043 (1986) [hereinafter Note, *Removing the Spousal Exemption from Texas Law*] (stating that a woman merging into her husband's identity literally made rape impossible).

36. See Note, *To Have and To Hold*, *supra* note 19, at 1256 (stating that through marriage, the unities of persons theory legitimized the propertization of women and that women's status as chattel deprived married women of all civil identities).

37. See Freeman, *supra* note 16, at 16-17 (remarking that such an idea does not support current ideological sentiments).

38. Note, *The Marital Rape Exemption*, *supra* note 34, at 310; see also Note, *Removing the Spousal Exemption from Texas Law*, *supra* note 35, at 1044 (commenting that after the adoption of the acts, women had separate legal identities and the law recognized them as assault victims).

as a basis for the marital rape exemption lost their persuasiveness because women were no longer classified as property; rather, they could own property. The separate spheres ideology replaced the unities theory as the basis for women's inequality.³⁹ This ideology effectively separated the sexes by maintaining a woman's place in the home.⁴⁰ Laws traditionally did not infringe upon one's private home, thus, legal interference into a woman's sphere became an unlawful public intrusion.⁴¹ Even though married women supposedly gained freedoms similar to those of unmarried women through the Married Women's Property Acts,⁴² the home was still a sanctum in which they were not entitled to the protections of rules or regulations.⁴³

C. SPOUSAL EXEMPTION RATIONALES

A number of principles support the common law spousal rape exemption based on implied consent and the unities theory. The arguments set forth below defend the common law spousal rape exemption. Evidentiary problems make marital rape difficult to prove.⁴⁴ Without the marital rape exemption, a vindictive wife may accuse her innocent husband of rape to blackmail him into giving her a favorable property settlement or custody arrangement in divorce proceedings.⁴⁵ The criminal

39. Note, *To Have and To Hold*, *supra* note 19, at 1257-58. Under the separate spheres ideology women were not naturally inferior, but naturally different. *Id.* Their role was that of worthy wife and mother. *Id.*

40. *Id.* at 1257. Under this ideology, men occupy the public realms of politics and the marketplace. *Id.*

41. *Id.* at 1258. No laws existed to control male power in the private arena. *Id.* This resulted in the private subordination of women. *Id.*

42. See Note, *Removing the Spousal Exemption From Texas Law*, *supra* note 35, at 1044 (commenting that after the adoption of the act, women had separate legal identities).

43. See Note, *To Have and To Hold*, *supra* note 19, at 1258 (maintaining that because the private sphere was unregulated, men were allowed to oppress women). Specifically, men were free to rape their wives. *Id.*

44. See Freeman, *supra* note 16, at 18 (noting that one rationale for supporting the exemption is that in marital rape cases, witnesses are unlikely to be found, and lack of consent is often difficult to prove). Because marital rape is difficult to prove, supporters of the immunity argue that it is sound. *Id.*; see also Backhouse and Schoenroth, *supra* note 18, at 179-80 (noting that consent is even more difficult to prove when the parties have been married and previously have engaged in consensual sexual intercourse); Note, *The Marital Rape Exemption*, *supra* note 34, at 314 (noting that the status of marriage often causes jurors to infer a wife's consent); Temkin, *Towards a Modern Law of Rape*, 45 MOD. L. REV. 399, 409 (1982) (noting that time makes proof of the offense difficult to acquire). Moreover, a time lag often occurs between the rape and the reporting of the rape to authorities. *Id.* This lag often adds to the decision not to prosecute. *Id.*

45. See Backhouse & Schoenroth, *supra* note 18, at 178 (commenting that some fear that if a wife could charge her husband with rape, she could get an unfair advan-

charge of rape is not the appropriate or correct way to deal with the marital rape conflict; family law provides a better alternative.⁴⁶ Eliminating spousal immunity invades the sacred family home and promotes discord, thereby, preventing reconciliation.⁴⁷ The common law spousal rape exemption also supports the belief that marital rape is less traumatic than other types of rape, such as stranger rape.⁴⁸ A wife, after deciding to press rape charges against her husband, may change her mind and reconcile with her husband.⁴⁹

II. THE MARITAL RAPE LAWS OF THE UNITED STATES

A. STATE LAW

In the United States, each state treats the marital rape exemption differently. The laws vary from a complete spousal exemption⁵⁰ to elimination of marital exemption.⁵¹ The states are grouped into nine sec-

tage over her ex-husband in a future property settlement); Note, *The Marital Rape Exemption*, *supra* note 34, at 314 (stating that a justification for spousal immunity is that scheming wives will lie about husbands raping them to punish or blackmail their husbands).

46. See Freeman, *supra* note 16, at 20 (noting that supporters of the immunity assert that family law is a better remedy than the criminal law because a woman can bring divorce proceedings against her husband); Temkin, *supra* note 44, at 408-09 (claiming that family law is more adequate than criminal law to protect the family); Note, *The Marital Rape Exemption*, *supra* note 34, at 316 (noting that supporters of the exemption believe that assault and battery laws give effective protection to the wife). This form of protection is often termed the alternative remedy rationale. *Id.*

47. See Backhouse & Schoenroth, *supra* note 18, at 177 (stating that a common rationale for keeping the immunity is that it retains the need for privacy necessary in a marriage, and abolishing such an immunity would lead to marital collapse); Freeman, *supra* note 16, at 17 (arguing that improving the marital relationship should be the goal of the law); Note, *The Marital Rape Exemption*, *supra* note 34, at 315 (discussing the argument that intramarital rape prosecutions would block reconciliation and promote discord); see also Temkin, *supra* note 44, at 409 (discussing how the "impetuous conduct" of the victimized wife may prevent reconciliation); Williams, *supra* note 31, at 26 (claiming that repealing the spousal immunity would interfere with the complex relationship of husband and wife). The rationale for this claim is since all marital breakdowns cause problems, there is no need to bring in the criminal law and make it more painful. *Id.*; Note, *Rape and Battery Between Husband and Wife*, *supra* note 22, at 725 (deciding that rape is "ill-suited to marriage" because rape among married persons is a "loss of control over an explosive but encouraged situation"). The husband is less of a threat to the community than an ordinary rapist because he "exhibits a highly specific reaction" and an ordinary rapist chooses his victim randomly. *Id.*

48. See Backhouse & Schoenroth, *supra* note 18, at 178 (refuting the argument that spousal rape is less traumatic than other forms of rape).

49. See Williams, *supra* note 31, at 27 (expressing sympathy for the police who carry out all of the pre-trial work without suspecting that the wife will refuse to testify).

50. See, e.g., ILL. REV. STAT. ch. 38, para. 12-18(c)(1983) (stating expressly that a spouse cannot be prosecuted for criminal sexual assault by his or her spouse).

51. See, e.g., N.J. STAT. ANN § 2C:14-5(b) (West 1982) (eliminating their previ-

tions according to their positions on marital rape.⁵²

Illinois, Mississippi, and Puerto Rico have a complete marital rape exemption.⁵³ Eight states do not provide a spousal exemption if the parties are separated under court order.⁵⁴ When the circumstances involve separation, these states make allowances for the wife to get protection when raped by her husband. Four states will not exempt the husband from rape charges if the parties are living apart and one spouse files a petition for divorce, annulment, separation, or separate maintenance.⁵⁵ Such provisions help sidestep the issue of the wife's consent by proclaiming that circumstances such as separation change the legal marriage into a nullity. Seven states claim no exemption if the parties are living apart or if one spouse has initiated legal proceedings.⁵⁶ Through

ous spousal exemption from the law).

52. See NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., MARITAL RAPE EXEMPTION (1987) (forming a chart on marital rape laws on a state by state basis and devising nine categories of marital rape exemptions to organize the state laws).

53. ILL. REV. STAT. ch. 38, para. 12-18(c) (1983). Illinois law states that "no person may be charged [with criminal sexual assault] by his or her spouse." *Id.* The state may convict a spouse of aggravated criminal sexual assault if the victim reports it within thirty days of the assault to a law enforcement agency or the State's Attorney's office. *Id.* If a court finds the delay justified, it can waive the thirty-day limit. *Id.* Mississippi is silent on spousal immunity. MISS. CODE ANN. § 97-3-65 (1985); P.R. LAWS ANN. tit. 33, § 961-68 (1983).

54. LA. REV. STAT. ANN. § 14:41 (West 1986); 1989 Md. Laws 399. On May 5, 1989 the Maryland legislature revised their sexual offenses law. The exemption still does not apply if the parties are living separately pursuant to a decree of limited divorce, but now a husband can be prosecuted for rape if they are living separately pursuant to a written separation agreement executed by both spouses for at least six months before the rape. *Id.* Additionally, if the couple is living together, the husband can be prosecuted for rape only if he uses force (threat of force apparently does not constitute an element of rape for married women as it does for all other women) against the will and without the consent of his spouse. *Id.*; MO. ANN. STAT. § 566.0102 (Vernon 1979); N.D. CENT. CODE § 12.1-20-01 (1983) (exemplifying other states that do not provide a spousal exemption for separated parties). The code also includes a protection order for wives. 18 PA. CONS. STAT. ANN. § 3103 (Purdon 1983); S.C. CODE ANN. § 16-3-658 (Law. Co-op. 1977); S.D. Codified Laws Ann. § 22-22-1.1 (1985); UTAH CODE ANN. § 76-5-402,407 (1979).

55. IND. CODE ANN. § 35-42-4-1 (West 1984); KY. REV. STAT. ANN. 510.010(3) (Michie/Bobbs-Merrill 1986). Kentucky concludes that spouses who are legally separated are not married, which circumvents the marital rape exemption. *Id.*; MICH. COMP. LAWS ANN. § 2340 (West 1980); see also *State v. Hawkins*, 428 Mich. 903, 903, 407 N.W.2d 366, 367 (1987) (holding that a husband was not exempt from rape even though his wife's divorce petition was found invalid). The court felt that the separation and the commission of a felony under the rape statute disclaimed any evidence of the usual marital status. *Id.*; TENN. CODE ANN. § 39-2-610 (1979).

56. IDAHO CODE § 18-6-107(a) (1977). Idaho specifies that the parties must be voluntarily living apart for at least one hundred and eighty days. *Id.*; KAN. STAT. ANN. § 21-3503 (1987); LA. REV. STAT. ANN. § 14:41 (West 1986). Louisiana does not allow a spousal exemption if the parties are living apart or if the abuser knows that the court has issued a temporary restraining order or injunction against him. *Id.* at 14:41(c); N.M. STAT. ANN. § 30-9-10 (1978); OHIO REV. CODE ANN. § 2907.01(L)

statutory exceptions, these states erode the marital exemption, but do not completely address the problem.⁵⁷ Thirteen states do not allow an exemption if the parties are living apart.⁵⁸ The parties do not need a court order or separation agreement. While the clauses provide protection for some women, the general laws still promote the archaic spousal immunity law.⁵⁹ Twenty states have a partial or limited rape exemption.⁶⁰ Hawaii, Maine, Oregon, Vermont, Massachusetts, Nebraska,

(Anderson 1987); OKLA. STAT. ANN. tit. 21, § 111(B) (West 1984). Oklahoma's law includes orders of protection, but requires the use or threat of the ability to execute force or violence upon the victim. *Id.*; TEX. PENAL CODE ANN. § 22.011(C) (Vernon 1989).

57. See Note, *Removing the Spousal Exemption From Texas Law*, *supra* note 35, at 1061 (discussing that courts have recognized that sexual assault is a criminal violation no matter what the relationship is between the victim and assailant). Because rationales supporting the traditional rule of the marital rape exemption no longer apply in modern times, abolishing spousal immunity is the only logical extension of such concepts. *Id.*

58. ARIZ. REV. STAT. ANN. § 13-1401.4, -1404-1406 (1978); COLO. REV. STAT. § 18-3-409 (1975); IOWA CODE ANN. tit. 709.2-4 (West 1978); MISS. CODE ANN. § 97-3-65 (1985); Mississippi's non-exemption only applies to sexual battery. *Id.*; Mont. Code Ann. tit. 45-5-511(2) (1985); N.M. STAT. ANN. § 30-9-10E, -11 (1978); N.C. GEN. STAT. § 14-27.8 (1987). North Carolina does not allow for an exemption if the couple is living apart with a written separation agreement. *Id.*; OHIO REV. CODE ANN. § 2907.02(A)(1), .12(A)(1) (Anderson 1986).

Ohio provides no exemption for first degree rape. *Id.* at 2907.02(A)(1). Ohio also provides no exemption for rape by an instrument if the parties are living apart and the perpetrator administers drugs or intoxicants to the victim by force, threat of force, deception, or concealment for the purpose of preventing her resistance by impairing her control and/or judgment. *Id.* at § 2907.12(A)(1).

OKLA. STAT. ANN. tit. 21, § 111(B)(4) (West 1984); 18 PA. CONS. STAT. ANN. § 3103 (Purdon 1983); S.D. CODIFIED LAWS ANN. § 22-22-1.1 (1985). In South Dakota, the victim must file a complaint within ninety days of the attack. *Id.*; TEX. PENAL CODE ANN. § 22.011(C) (Vernon 1983); VA. CODE ANN. § 18.2-61(B) (1986).

In Virginia, the law does not provide a spousal exemption if the spouse performs the sexual act using force, threat, or intimidation. *Id.* Furthermore, the parties must be living apart at the time of the assault or, alternatively, the husband must have caused physical injury by force or violence. *Id.* The victim must report the violation to the proper agency within ten days of the assault. *Id.* There is a possibility of probation or a suspended sentence for spousal cases only if the defendant goes through counseling or if the court finds that it is in the best interest of the family unit and victim. *Id.* at § 18.2-61(C),(D).

59. See Note, *Sexism and the Common Law: Spousal Rape in Virginia* 8 GEO. MASON L. REV. 369, 386 (1986) (claiming that Virginia law still preserves the common law concepts of marital rape because it provides dissimilar provisions for married women and unmarried women); Note, *Removing the Spousal Exemption from Texas Law*, *supra* note 35, at 1061 (stating that limited exceptions to the marital rape exemption only provide a halfway solution).

60. ARK. STAT. ANN. § 5-14-102-106 (1987). The Arkansas law on forcible rape does not abolish the exemption. *Id.* Section 5-14-102 (general provision) provides an express spousal exemption. *Id.* The legislative history and commentary, however, indicate that no statutory exemption exists. NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., MARITAL RAPE EXEMPTION, n.3 (1987); CAL. PENAL CODE § 262 (West 1988). California supports a separate offense of spousal rape. *Id.*; CONN. GEN. STAT.

Alaska, Florida, Georgia, New Jersey, the District of Columbia, Wisconsin, Alabama, and New York have totally abolished the marital rape exemption.⁶¹ The cohabitators rape exemption focuses on the dis-

ANN. § 53(a)-70 (West 1988). Connecticut has an exemption for lesser degrees of rape and sexual assault, but not for first degree forcible rape. *Id.*; DEL. CODE ANN. tit. 11, § 763, 764 (1987). No exemptions exist for first and second degree rape, but exemptions exist for sexual assault and sexual misconduct. *Id.*; HAW. REV. STAT. § 707-730-734(1974); IOWA CODE ANN. § 709.2-4 (West 1979). Iowa has no spousal exemption to first degree and second degree sexual abuse, and has no exemptions for third degree sexual abuse. *Id.*; KAN. STAT. ANN. § 21-3501-3502 (Vernon 1987); LA. REV. STAT. ANN. § 14:43.2 (West 1986). Louisiana no longer has marital exemptions for aggravated sexual battery. *Id.*; ME. REV. STAT. ANN. tit. 17-A, §252 (1985); MINN. STAT. ANN. § 609.349 (West 1987). Minnesota's marital exemption applies to statutory rape and when the victim is mentally or physically disabled. *Id.*; MONT. CODE ANN. tit. 45-5-503(1) (1985). Montana's exemption only applies to sexual intercourse without consent. *Id.*; NEV. REV. STAT. ANN. § 200.373 (Michie 1987). Nevada does not allow for a spousal exemption if the assault is carried out under force or threat of force. *Id.*; N.H. REV. STAT. ANN. § 632-A:2-3, A:5 (1986). New Hampshire has a marital exemption for statutory rape and from rape of women who are mentally deficient. *Id.*; N.D. CENT. CODE § 12.1-20-03 (1985). North Dakota does not provide a marital exemption for first degree rape. *Id.*; OHIO REV. CODE ANN. § 2907.02(A)-02(B), .02(G), .12(A)(2), .12(C) (Anderson 1987). Ohio removed the marital exemption for forcible rape and forcible rape with an instrument. *Id.*; 18 PA. CONS. STAT. ANN. § 312 (Purdon 1983). Spousal sexual assault is a second degree felony in Pennsylvania. The spousal exemption applies to all other sexual offenses. *Id.*; R.I. GEN. LAWS § 11-37-2, -4, -6 (1988). Rhode Island retained the spousal exemption only for first degree assault when the victim is incapacitated, mentally disabled, or physically helpless. *Id.* at § 11-37-2; TEX. PENAL CODE ANN. § 22.021 (Vernon 1989). Texas eliminated the exemption for aggravated sexual assault and where the parties are living apart or have initiated legal proceedings for other degrees of sexual assault. *Id.* at 22.021; WASH. REV. CODE ANN. § 9A.44.010, .040, .050, .060 (1988). Washington abolished the marital exemption for first and second degree rape, but the exemption exists for third degree rape. *Id.*; W. VA. CODE § 61-8B-6 (1989). West Virginia established a separate crime of sexual assault of a spouse, which applies only to first degree rape and carries a lesser penalty than ordinary rape. *Id.*; WYO. STAT. § 6-2-307 (1988). Wyoming's exemption applies only to third and fourth degree rape, but it is removed for first and second degree rape. *Id.*; V.I. CODE ANN. tit. 14, § 1701 (1988). The Virgin Islands has no exemption for first degree rape, but applies the exemption to other sexual assault cases. *Id.*

61. *See, e.g.,* Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986) (finding the marital rape exemption invalid and holding that the criminal code applies to any female, which implies abolition of the cohabitor's exemption); *see also* Williams v. State, 494 So. 2d 819, 828 (Ala. Crim. App. 1986) (abolishing the marital exemption for forcible sodomy).

ALASKA STAT. § 11-41.443 (1988). Alaska has a specific section termed "spousal relationship no defense". *Id.*; D.C. CODE ANN. § 22-2801 (1967). The statute is silent with respect to the marital exemption, but marital rape cases are prosecuted. NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., MARITAL RAPE EXEMPTION, n.45 (1987); FLA. STAT. ANN. § 794-011 (West 1979). While Florida has no express exemption, spouses can be prosecuted. *State v. Smith*, 401 So. 2d 1126 (Fla. Dist. Ct. App. 1981); *State v. Rider*, 449 So. 2d 903 (Fla. Dist. Ct. App. 1984); GA. CODE ANN. § 16-6-1(a) (1988). Although Georgia has no express exemption, the court has held that the Georgia statute covers husbands for rape prosecutions. *Warren v. State*, 255 Ga. 151, 336 S.E.2d 221 (Ga. 1985); MASS. GEN. LAWS ANN. ch. 265, § 22, ch. 277, § 39

tinctions between legally married spouses and cohabitators and applies in eight states.⁶²

Five states follow the "voluntary social companion" rape exemption, which may include an exemption for unmarried cohabitators or exemption for date rape situations.⁶³ Each of these states approaches the issue differently and applies it to different situations. The voluntary social companion exemption expresses the concept that rape is impossible between any nonstranger with whom one already has a relationship. Such reasoning directly applies to married women. Society's apparent lack of understanding that intimate relationships do not erase a woman's right of consent is a grave cause for concern.

B. MODEL PENAL CODE PROVISION

Analogous to the majority of the states, the Model Penal Code⁶⁴ provides a modern, yet, limited approach to marital rape.⁶⁵ Married men

(West Supp. 1988); HAW. REV. STAT. § 707-730,-732 (1984); ME. REV. STAT. tit. 17-A, § 252 (1985); NEB. REV. STAT. § 28-319, -320 (1988); N.J. STAT. ANN. § 2C:14-5(b) (West 1982). New Jersey affirmatively eliminated the exemption. *Id.*

New York case law explains the position on the spousal exemption. *See People v. Liberta*, 64 N.Y.2d 152, 164, 485 N.Y.S.2d 207, 213, 474 N.E.2d 567, 573 (1984) (declaring the partial marital rape exemption rule to be unconstitutional and abolishing the marital rape exemption completely).

OR. REV. STAT. § 163.305 (1985); VT. STAT. ANN. tit. 13, § 3252 (1988); WIS. STAT. ANN. § 940.225(6) (West Supp. 1988). Wisconsin expressly removes the marital rape exemption. *Id.*

62. CONN. GEN. STAT. ANN. §§ 53(a)-67(b) (West 1987). Cohabitation is a defense in all rape cases, except first degree rape. *Id.*; IOWA CODE ANN. § 709.4 (West 1979). Iowa allows for a cohabitators exemption in third degree sexual abuse, but not in first and second degree sexual abuse. *Id.* at § 709.2 - .4; KAN. STAT. ANN. § 21-3502, -3503 (Vernon 1987). Kansas has no cohabitor exemption for first and second degree sexual abuse, but has an exemption for third degree sexual abuse. *Id.*; KY. REV. STAT. ANN. § 510.010(3) (Michie/Bobbs-Merrill 1986). Kentucky defines marriage without regard to the legal status, concentrating only on the fact that the individuals live together as husband and wife. *Id.*; MINN. STAT. ANN. § 609.342 (West 1987); DEL. CODE ANN. § 764 (1986); MONT. CODE ANN. tit. 45-5-511(2) (1986); W. VA. CODE § 61-8B-1(c)(2) (1989). West Virginia defines marriage as any couple living together as man and wife, whether they are legally married or not. *Id.*

63. DEL. CODE ANN. tit. 11, § 761(h) (1987). Delaware allows an exemption for spouses and cohabitators in first degree rape if the abuser did not seriously injure the victim physically, mentally, or emotionally. *Id.*; HAW. REV. STAT. § 707-730 (1987); ME. REV. STAT. ANN. tit. 17-A, § 252(3) (1985). Maine's exemption reduces the crime of rape to a class B felony and applies only if the victim voluntarily engaged in sexual conduct with the defendant at the time of the sexual act. *Id.*; MONT. CODE ANN. tit. 45-5-11(3) (1986). Montana's exemption only applies when the victim is mentally incapacitated and voluntarily and knowingly took an intoxicating substance. *Id.*; 18 PA. CONS. STAT. ANN. § 3101 (Purdon 1983).

64. MODEL PENAL CODE § 213.6 (Proposed Official Draft 1962).

65. *See S. ESTRICH, REAL RAPE 74* (1987) (commenting on the rather typical approach to expand immunity to cohabitating parties but also to impose limits such as

are immune from rape prosecution.⁶⁶ Legal separation, however, revokes such immunity.⁶⁷ Thus, a legally recognized marriage is not a prerequisite for a husband to rape his wife, but it is necessary in order to take away the power to rape.⁶⁸

The commentators to the Code stress the importance of a prior intimate relationship before the rape, which to them implies a generalized consent.⁶⁹ Therefore, at the very least, they argue that a husband must be exempt from rape based on presumed incapacity of the woman to consent.⁷⁰ Moreover, the commentators justify the modern code on the basis that penal law is an unwarranted intrusion into family life.⁷¹ Basically, the commentators exhort all of the common law rationales to support a Model Code that is not a just model for married women.

C. CRITICISM OF UNITED STATES LAW

Much criticism surrounds the various laws of the United States. Only fourteen states (including the District of Columbia) have totally abolished the marital rape exemption,⁷² while the other states adjust their marital rape laws, but refuse to go all the way and accept the concepts of the modern female and marriage. Instead they attach themselves to the common law rationales.

Moreover, the marital rape exemption elicits constitutional implications by impermissibly infringing upon a married woman's right to privacy by unconstitutionally placing conditions on a woman's right to marry.⁷³ The exemption also discriminates against all women, thereby violating the equal protection clause of the Fourteenth Amendment.⁷⁴

judicial separation).

66. See MODEL PENAL CODE § 231.1 (Proposed Official Draft 1962) (specifying that inherent in the definition of rape is that the victim is not the man's wife).

67. See *id.* (stating the general provisions applicable to the spousal relationship in the crime of rape).

68. S. ESTRICH, *supra* note 65, at 74-75.

69. See 2 MODEL PENAL CODE & COMMENTARIES, 244-46 (1980) (stating that the relationship creates a presumption of consent that is valid until it is revoked by separation or divorce).

70. See *id.* (citing an example of a man having intercourse with his unconscious wife).

71. See *id.* (claiming that the marital relationship cannot adjust itself if spouses are subject to penal sanctions).

72. See *supra* note 61 and accompanying text (listing the states that abolish the spousal exemption).

73. See *supra* note 13 and accompanying text (discussing the Supreme Court's development of the right to privacy embodied in the Bill of Rights).

74. See Note, *To Have and To Hold*, *supra* note 19, at 1272-73 (explaining how rights analysis and gender discrimination law offer women the means to gain equality through the legal system in marital rape). The rights analysis takes a straightforward approach toward individual victims, while the gender discrimination approach forces

Most importantly, the exemption's concepts are outmoded. The modern principle of equality in marriage disputes such an exemption.⁷⁶ Such equality must permeate the legal system's reality. Because the law often rests on prosecutorial discretion, prosecutors' attitudes must change along with the law for the rules to protect women adequately.⁷⁶

In these modern times, changes still need to occur in the United States. Specifically, every state, not just fourteen states, must totally repeal spousal exemptions to their rape laws. Providing limitations for the spousal exemptions, such as permitting it in cases of legal separation, as provided in the Model Penal Code, does not truly embrace the idea that a woman's consent to sexual relations resides solely within her. The formalistic act of marriage does not suddenly change this. Only abolition of the exemption tells society that marriage does not take away a woman's will.

III. MARITAL RAPE LAWS OF COMMON LAW COUNTRIES

A. STATUTORY ABOLITION OF THE MARITAL RAPE EXEMPTION

1. *New Zealand*

a. *Rape Law Reform (No. 2) Act of 1985*

The New Zealand Rape Law Reform (No. 2) Act of 1985 (Rape Reform Act)⁷⁷ specifically abolished spousal immunity in rape cases.⁷⁸

the courts to view the marital rape exemption as a thorn in the side of all women. *Id.*

75. See Freeman, *If You Can't Rape Your Wife Who[m] Can You Rape*, *supra* note 16, at 8 (commenting that women are no longer perceived as pawns in the marital market, however, leftover residue from opposite, archaic notions is the basis of the spousal exemption); Note, *The Marital Rape Exemption*, *supra* note 34, at 323 (concluding that because the underlying rationales are outdated, the courts and legislatures should decide that the spousal exemption has no place in modern criminal law); Comment, *Warren v. State: One Attempt to Modernize the Marital Rape Exemption*, 10 AM. J. TRIAL ADVOC. 157, 169-70 (1986) (stating that the change of women's status in American society began to move the trend away from the marital rape exemption, suggesting that modern courts will leave behind the common law views on marital rape).

76. See Jeffords, *Prosecutorial Discretion in Cases of Marital Rape*, 9 VICTIMOLOGY 415, 423-24 (1984) (finding that according to a mail survey, prosecutors in states where a spousal exemption for rape did not exist were less likely to think that maximum charges would be filed in marital rape cases as opposed to stranger rape cases).

77. Rape Law Reform (No. 2) Act of 1985, N.Z. Stat., reprinted in Simpkin, *Rape Law Reform (No. 2) Act 1985*, 5 AUKLAND U.L. REV. 514 (1987). The act consists of amendments to the Crimes Act of 1961, the Evidence Act of 1908, and the Summary Proceedings Act of 1957. *Id.*

78. The Crimes Amendment Act (No. 3) of 1985, N.Z. Stat., reprinted in

The legislative change occurred through the recognition of the archaic concept of women as chattels and the view of rape as a property crime against a woman's father or husband.⁷⁹ Through the Rape Reform Act, New Zealand acknowledged rape as a crime of assault.⁸⁰

b. Advantages of the Abolition of Spousal Immunity

Previous rape law required a husband and wife to live in separate residences at the time of the intercourse for the husband to be guilty of rape.⁸¹ Finding no cogent arguments to retain this law,⁸² the legislature enacted the Rape Reform Act.⁸³ Opponents argue that the changes are too extensive.⁸⁴ Others, however, praise the Rape Reform Act as a modernistic approach.⁸⁵ New Zealand's straightforward rape law eliminates any doubts surrounding the possible prosecution of a spouse by creating neither exceptions nor specified circumstances under which marital rape must occur.

A 1987 court of appeal's case, *R v. N (an accused)*,⁸⁶ demonstrates the effectiveness of the new rape law. At issue was the appellant husband's three year prison term he received for raping his wife at knife-point. At the time of the rape, the husband was separated from his wife but maintained frequent contact.⁸⁷ The court of appeal stated that just

Simpkin, *supra* note 77, at 514. Section 128(4) of the Act states that "a person may not be convicted of sexual violation in respect of sexual connection with another person notwithstanding that those persons were married to each other at the time of that sexual connection." *Id.*

79. See Simpkin, *supra* note 77, at 517 (stating that although the theories governing rape were outdated, Scotland needed specific legislative reforms because the courtroom continued to express these theories).

80. See *id.* (commenting that acknowledging marital rape as a crime of assault represents the contemporary attitude).

81. NEW ZEALAND COMMENTARY OF HALSBURY'S LAWS OF ENGLAND, ch. 79, at 33 (4th ed. 1983). Section C1117, a provision which governs the offenses by one spouse against the other, states that "a man cannot be convicted of the rape of his wife unless they were living apart in separate residences at the time of intercourse. . . ." *Id.*

82. See Note, *Proposed Reforms of the Law of Rape*, 5 OTAGO L. REV. 489, 490 (1983) (implying that the original common law notion that a wife gives her irrevocable implied consent to her husband's demands was too outdated to justify the immunity); Barrington, *The Rape Law Reform Process in New Zealand*, 8 CRIM. L.J. 307, 317 (1984) (focusing on the lack of real or logical arguments to retain spousal immunity).

83. Rape Law Reform (No. 2) Act of 1985, N.Z. Stat., *construed in* Simpkin, *supra* note 77, at 514.

84. Barrington, *Standing in the Shoes of the Rape Victim: Has the Law Gone Too Far?*, 4 NEW ZEALAND L.J. 408, 408 (1986). Because feminist groups presented the majority of submissions to the two Select Committees on the Rape Law Reform bills, some may argue that Parliament prematurely capitulated under this pressure. *Id.*

85. See *id.* at 411 (concluding that the law has not "gone too far").

86. *R v. N (an accused)*, 2 N.Z.L.R. 268 (C.A. 1987).

87. *Id.* at 268. When the wife did not respond to her husband's request of ending

because the parties are married, no separate sentencing regime is necessary in rape cases.⁸⁸ The court's rationale specifically noted that parliament made no distinction between spousal rape and other rapes because all rapes produce the same severity of outrage and violation.⁸⁹ This decision illustrates how a statute that abolishes the spousal exemption comes to the aid of married women in need of protection and justice. Without the benefit of the Rape Law Reform Act, the successful prosecution of such a violent man, who happened to be the victim's husband, would not have occurred.

2. Canada

Along with New Zealand, Canada rejects the marital rape exemption through statutory abolition. Canada's criminal code originally defined rape to include the usual spousal exemption.⁹⁰ Thus, according to the statute, a man could not rape his wife; no exceptions existed. Moreover, as of 1983, no reported cases existed where the accused and complainant were married at the time of the sexual act.⁹¹ Therefore, the only way to abolish or reduce the scope of the exemption was through statutory amendment.⁹²

In 1983, the Parliament of Canada amended the criminal code to abolish the exemption.⁹³ This represents clear progress for the married

the separation, she was raped by him in her bedroom with a kitchen knife as her husband's weapon. *Id.*

88. *Id.* at 270. The court squarely addressed the issue of the possibility of marital rape even though the defense counsel did not use the fact of the marriage in itself to justify a reduced penalty for the accused. *Id.* Defense counsel tried to advance the claims of a troubled marital history (i.e., defendant's personality and sexuality problems), which the court flatly rejected. *Id.*

89. *Id.* The court claimed that the circumstances of each case, inter-spousal and otherwise, governed the principles of sentencing. *Id.* at 271. Individual reactions to the crime were directly relevant to the court's penalty. *Id.* at 270. Because the wife in the present case suffered from the typical traumatic effects of rape, this played a large role in the jail sentence for her husband. *Id.* at 271.

90. CRIMINAL CODE, ch. 29, § 266 (Can. 1892). The Code states that "rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent." *Id.* The Criminal Code was updated in 1970, but still included the immunity in its definition of rape. "A male person commits rape when he has sexual intercourse with a female person who is not his wife. . ." An Act Respecting the Criminal Law, CAN. REV. STAT. ch. C-34 § 143 (1970).

91. Backhouse & Schoenroth, *supra* note 18, at 176.

92. *Id.*

93. An Act To Amend the Criminal Code in Relation to Sexual Offenses, R.S.C., ch. 125, § 246.8 (Can. 1983). The act states that:

A husband or wife may be charged with an offence under section 246.1 [sexual assault], 246.2 [sexual assault with a weapon, threats to a third party or causing bodily harm], or 246.3 [aggravated sexual assault] in respect of his or her spouse

women of Canada.⁹⁴ The judicial process will ultimately test the effectiveness of the law.

3. *Australia-Victoria*

a. *Crimes (Sexual Offenses) Act of 1980*

Marital rape law underwent two major revisions in Victoria.⁹⁵ At common law, the Victorian husband held a position similar to that of the English husband.⁹⁶ The position changed, however, with the Crimes (Sexual Offenses) Act⁹⁷ in 1980. The Act removed spousal immunity if the spouses were living separately,⁹⁸ and used the term sexual penetration instead of sexual intercourse.⁹⁹

b. *Crimes (Amendment) Act of 1985*

The Act of 1980 raised two questions. First, if the spouses were not living separately and apart, could a husband still be liable for rape?¹⁰⁰ Second, what exactly does separately and apart mean?¹⁰¹ Perhaps as a

whether or not the spouses are living together at the time the activity that forms the subject matter of the charge occurred.

Id.; see Temkin, *Women, Rape and Law Reform*, in RAPE 16, 34 (1986) (commenting that in Canada, unlike in England, the new legislation was the direct result of the fervent lobbying of women's organizations).

94. See Temkin, *supra* note 93, at 34 (mentioning the symbolic achievements of the new law as raising the status of married women in the legal system).

95. See Corns, *Liability of Husbands for Rape-In-Marriage—The Victorian Position*, 7 CRIM. L.J. 102, 102-12 (1983) (discussing reforms in Victoria's spousal immunity laws).

96. See *id.* at 102-103 (commenting that the husband had immunity from prosecution for first degree rape of his wife with the usual exceptions inherent in the common law).

97. Crimes (Sexual Offenses) Act of 1980, Vict. Acts (Austl.).

98. *Id.* at § 62(2). Section five adds the following:

(2) [W]here a married person is living separately and apart from his spouse the existence of the marriage shall not constitute, or raise any presumption of, consent by one to an act of sexual penetration with the other or to an indecent assault (with or without aggravating circumstances) by the other.

Id.

99. *Id.* at § 4(d)(2); see also Corns, *supra* note 95, at 103 (discussing the definition of sexual penetration which makes it possible for a husband to be guilty of raping his wife even if sexual intercourse (per vaginam) did not occur).

100. Corns, *supra* note 95, at 103. No clear answer has been resolved, only speculation has resulted. *Id.* at 107.

101. *Id.* at 103. To establish if the spouses were living separately and apart, the

reaction to these rhetorical questions, the Parliament again changed the rape law. The Crimes (Amendment) Act of 1985¹⁰² effectively answered these problems when it totally eliminated the spousal exemption.¹⁰³ Presently, a husband, no matter what his living circumstances are, may be liable for rape. This approach prompts no question of when a rape could apply to a husband-wife situation and recognizes a married woman as an individual with independent rights.

4. *Australia-New South Wales*

a. *Statutory Law*

In New South Wales, the law delineates unlawful sexual intercourse into three categories. Category one is the infliction of grievous bodily harm with intent to have intercourse (most serious).¹⁰⁴ Category two is the infliction of actual bodily harm with intent to have intercourse.¹⁰⁵ Category three is sexual intercourse without consent (least serious).¹⁰⁶ Because the law abolishes spousal immunity, each category of rape applies to husbands.¹⁰⁷

court must examine the total marital relationship. *Id.* at 111.

102. Crimes (Amendment) Act of 1985, § 10, Vict. Acts (Austl.).

103. *Id.* Section ten of the amendment substituted the following for section 62 of the Principal Act: "(2) [T]he existence of a marriage does not constitute, or raise any presumption of, consent by a person to an act of sexual penetration with another person or to an indecent assault (with or without aggravating circumstances) by another person." *Id.*

104. Crimes (Sexual Assault) Amendment Act of 1981, No. 42, § 61B, N.S.W. Stat. (Austl.). This offense is described as "inflicting grievous bodily harm with intent to have sexual intercourse." *Id.*; see Cunliffe, *Consent and Sexual Offences Law Reform in New South Wales*, 8 CRIM. L.J. 271, 275 (1984) (reprinting the same provisions, when they were part of the Crimes Act of 1900 (N.S.W.)).

105. Crimes (Sexual Assault) Amendment Act of 1981, No. 42, § 61C, N.S.W. Stat. (Austl.). This sexual assault category is termed as "infliction actual bodily harm. . .with intent to have sexual intercourse." *Id.*

106. Crimes (Sexual Assault) Amendment Act of 1981, § 61D, N.S.W. Stat. (Austl.). Category three is defined as "sexual intercourse without consent." *Id.* A fourth category exists, however it relates to indecent assaults and acts of indecency. *Id.* at § 61E.

107. Crimes (Sexual Assault) Amendment Act of 1981, § 61A(4), N.S.W. Stat. (Austl.).

61A(4) The fact that a person is married to a person—(a) upon whom an offence under section 61B, 61C, or 61D is alleged to have been committed shall be no bar to the first-mentioned person being convicted of the offence; or (b) upon whom an offence under any of those sections is alleged to have been attempted shall be no bar to the first mentioned person being convicted of the attempt.

Id.

b. *No Marital Rape Exemption-Problems and Benefits*

Although the rape law acknowledges a married woman's right to nonconsent, it also prompts complaints. One example of such complaints is that a vague law intruding upon a couple's marriage bed is not appreciated.¹⁰⁸ In addition, the provision's wording complicates the situation. It is unclear whether the threatened person (who could be a third party, e.g., a wife's child) or the person actually attacked is the person "upon whom" an offense is committed, and, therefore, able to bring a successful prosecution.¹⁰⁹ Voluntariness and consent are no longer the issues they should be for marital rape cases.¹¹⁰ Instead, the marital rape law focuses on an abstract notion of not desiring to have intercourse rather than whether the person nonetheless voluntarily had sexual relations.¹¹¹ Furthermore, abolishing the spousal immunity without defining what is sexually permissible (i.e., only sexually indecent) within a marriage makes the law overinclusive by opening up the opportunity to punish spouses who think the acts are just indecent rather than illegal.¹¹²

Despite other countries' admiration of the modern policies of New South Wales, critics who view the statute as overinclusive fear that protecting wives will interfere with husbands' marital rights. Such an opinion, however, ignores other countries, such as New Zealand, Canada, and the state of Victoria, that maintain a similar law with no apparent problem of overinclusiveness. Also forgotten is a married woman's right of nonconsent. Protecting this right is more important than justifying an irrational idea of a man retaining a right to sex in marriage whenever he desires.

108. See Cunliffe, *supra* note 104, at 292 (arguing that the law neither clearly indicates whether marriage provides implied consent for indecent assault nor adequately defines indecent assault).

109. See *id.* at 291 (stating an example that if a husband assaults or threatens to assault a child to force his wife to have intercourse with him, he could profit from the immunity because the child is the person upon whom the offense was committed although the act of forcing was against the spouse).

110. See *id.* at 293-94 (noting that commentators sometimes fail to recognize that give-and-take is inherent in the marital relationship). Commentators argue that the test for rape should focus on voluntariness and not on whether the person can say that she did not want to engage in sexual activity at that time. *Id.*

111. See *id.* at 293 (citing examples of women stating that they have sex all the time with their husbands when they do not genuinely want to, but they have the sex voluntarily just to get some peace from their husband's demands).

112. *Id.* at 295. This can be solved by abolishing the spousal immunity along with defining what is sexually permissible in marriage. *Id.*

5. Analytical Summary

Canada, New Zealand, and the Australian states of Victoria and New South Wales have made complete reforms in their rape laws by declaring marital rape illegal. Canada, New Zealand, and New South Wales revamped their old statutes to extend the modern mores of women into the law. Victoria initially only wanted to provide immunity for spouses in the case of separation. However, the discovery that such an approach would create more questions involving the circumstances constituting separateness and still leave married women unprotected prompted total abolition of the immunity as the only clear answer. The statutory reforms of all the above countries have their share of traditional common law based critics proclaiming the law should not invade the home; yet, legislatures making new acts for marital reform send out a message that societies hold married women to be human beings, with the right of consent equal to all other women.

B. NO STATUTORY ACKNOWLEDGEMENT OF MARITAL RAPE, YET JUDICIAL REFORM

1. England

a. *Sexual Offences (Amendment) Act of 1976 and Its Effects*

England's marital rape law closely corresponds to the laws in the majority of American states because it provides exceptions to the spousal exemption, yet, strongly adheres to the traditional common law. The Sexual Offences (Amendment) Act of 1976¹¹³ contains the provisions of the rape law in England. The Act accepts the basic proposition that a husband cannot be guilty of raping his wife.¹¹⁴ The common law, however, provides four exceptions.¹¹⁵ First, the exemption will not apply if a wife obtains a separation order which contains a noncohabitation clause from a magistrate's court.¹¹⁶ Second, it will also not apply if

113. Sexual Offences (Amendment) Act of 1976, ch. 82 (Eng.).

114. See *id.* at § 1 (defining rape as a man having unlawful sexual intercourse with a woman; unlawful traditionally means a nonmarital context); see also J.F. ARCHBOLD, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES 1794 (1982) [hereinafter ARCHBOLD] (maintaining that the law encompasses Hale's general concept and accepts it as the basis of the law by stating that a husband can not be guilty of rape upon his wife).

115. See ARCHBOLD, *supra* note 114 at 1794 (1982) (stating that the common law exceptions to Hale's general proposition are based on the fact that the court orders eliminate the wife's matrimonial consent, which she has given to her husband through marriage as a matter of law). Only through the law can a married woman effectively revoke her consent in order for a charge of rape to apply to her husband. *Id.*

116. See *R. v. Clark*, 2 All E.R. at 448 (explaining how such an order precludes

a couple separates and signs a separation agreement that includes a nonmolestation clause.¹¹⁷ Third, it will not apply if a wife initiates divorce proceedings and obtains an injunction forbidding her husband from molesting her.¹¹⁸ Fourth, the court will not apply the exemption if a court grants a wife a decree nisi in divorce proceedings.¹¹⁹ The law, however, does not give a husband immunity from aiding and abetting another person to rape his wife.¹²⁰ In addition, if a husband uses force or violence when exercising his rights to intercourse, the charge of wounding or assaulting his wife may stand.¹²¹

Parliament passed The Sexual Offences (Amendment) Act of 1976 as a result of the decision in *Director of Public Prosecutions v. Morgan*.¹²² In *Morgan*, the public's reaction of shock over the acquittal of the men in a rape trial prompted the formation of a committee to examine the laws governing sexual offenses.¹²³ The committee, however, did not examine marital rape.¹²⁴

application of the exemption).

117. See *R. v. Miller*, 2 Q.B. at 282 (distinguishing the application of the spousal exemption in the case of such a separation agreement).

118. See *R. v. Steele*, 65 Crim. App. at 22 (stating that initiating divorce proceedings permits the inapplication of the spousal exemption).

119. See *R. v. O'Brien*, 3 All E.R. at 663 (stating that a decree nisi, a decree made in an undefended suit which dissolves the marriage on the ground that the husband behaves in such a way that his wife can not be expected to live with him, effectively brought the marriage to an end). The difference between a decree nisi and a decree absolute is only a technicality for the existence of a marriage. *Id.*

120. ARCHBOLD, *supra* note 114, at 1794. Archbold states that "both a husband and a boy under 14 may be aiders and abettors." *Id.*

121. *Id.* at 1794. Archbold comments that "a husband is not entitled to use force or violence for the purpose of exercising his right to intercourse, and if he does, though he is not guilty of rape, he may be guilty of wounding or assault." *Id.*

122. *Director of Public Prosecutions v. Morgan*, [1975] 2 All E.R. 347. The House of Lords decided that a man should not be found guilty of rape if he honestly believed that the woman consented to sexual intercourse, even if the belief was unreasonable. *Id.* The case involved a man who invited three men to go to his house and have sex with his wife. *Id.* He added that she may struggle a bit, however, she enjoyed this as a prelude to sex. *Id.* The men followed the husband's directions, and they (husband and the men) were subsequently found not guilty of rape because the husband's directions proved that they honestly believed the wife wanted to have sex with them. *Id.*

123. See Freeman, *supra* note 16, at 27 (commenting that a female judge chaired a committee to look into the law of rape as a result of the decision in *Morgan*); M. BENN, A. COOTE & T. GILL, *THE RAPE CONTROVERSY* 11 (1986) (commenting on the effects of the *Morgan* decision). The protests from women's groups and some Members of Parliament prompted the Home Secretary to appoint an advisory group, headed by Mrs. Justice Heilbron, to examine the rape law. *Id.* The group recommended changes to the existing law, which were presented as a Private Member's Bill to Parliament. *Id.* This bill was subsequently passed as the Sexual Offences (Amendment) Act of 1976. *Id.*

124. See Freeman, *supra* note 16, at 27 (commenting on the history of the legislation, which belies its final traditional common law construction). Although the laws on marital rape did not change at its committee stage in the House of Commons, an

The Criminal Law Revision Committee (CLRC),¹²⁵ in consultation with the Policy Advisory Committee on Sexual Offenses (PAC),¹²⁶ provided a broader review of sexual crimes when they published their fifteenth report dealing with sexual offenses in 1984.¹²⁷ Their recommendations included the topic of marital rape.¹²⁸ Only a narrow majority of the committee favored retaining the present law.¹²⁹ They reasoned that a husband rapist is not as threatening as a stranger rapist,¹³⁰ despite the definition of rape as nonconsensual sexual intercourse.¹³¹ The CLRC also noted the inappropriateness of imprisonment in marital rape cases, especially when no physical injury has occurred.¹³² They viewed marital rape as "involving violence, in the sense of injury but not as an offense of violence itself."¹³³ The Committee appropriated the

amendment that would have removed the spousal immunity provision entirely was moved and carried. *Id.* The provision stated "[i]n any prosecution on a charge of rape a woman shall not be presumed to have consented to intercourse with a man only on the ground that she is his wife." *Id.* (quoting PARL. DEB. H.C. (5th ser.) 21 (Mar. 24, 1976), Official Report of Standing Committee F.) Unfortunately, the amendment to the bill was not included in the final Act. *Id.*

125. See Wells, *Law Reform, Rape and Ideology*, 12 J. OF L. SOC'Y 63, 63 (1985) (explaining that the CLRC is a part-time group of seventeen lawyers, two of whom are women, that examines matters which the Home Secretary refers to them).

126. See Wells, *supra* note 125, at 63 (defining the group as consisting of fifteen members, four from the CLRC and the rest from the areas of social work and probation, seven of whom were women).

127. CRIMINAL LAW REVISION COMMITTEE, SEXUAL OFFENSES, 1984, CMND. SER. 4 NO. 9213.

128. *Id.* at part XIV. The committee concluded that:

(10) We recommend that the offence of rape be extended to enable a prosecution to be brought for rape where a man has sexual intercourse with his wife without her consent when the two are not cohabitating with each other. We are, however, divided over whether the offence of rape should be further extended to all cases of non-consensual sexual intercourse within marriage.

Id.

129. See Wells, *supra* note 125, at 65 (commenting that the majority of the PAC were in favor of totally abolishing the spousal immunity). Without this support, it was likely that more members would have been in favor of retaining the present law. *Id.*

130. *Id.* at 70. Wells explains that under English law the gravamen of rape is the injury caused to the wife, not the forced sexual act. *Id.* Sexual relations in marriage often involve a compromise, especially by the wife. *Id.* Thus, forced intercourse within a sexual relationship is rape only if it is violent. *Id.* If it is violent, however, then it is not truly rape unless a serious injury results. *Id.* Therefore, for a rape to occur under English law there must be violence and no sexual relationship.

131. See *id.* (assuming that the false stereotype of the "real rapist" which is that of a stranger, not a person known to the victim, influenced the Committee).

132. See *id.* at 70-71 (asserting that this idea is a result of the belief that marital rape is the least serious, violence is rather serious, and nonmarital rape is the most serious).

133. *Id.* at 71. The CLRC, because it focuses on physical injury and equates it with violence, overlooks the emotional and traumatic effects of marital rape. *Id.* at 70.

myth of equating the stranger rapist with the real rapist, and, therefore, did not recommend appropriate changes in the marital rape law to conform to modern notions of rape.¹³⁴

Although other bills in Parliament discussed sexual offenses reform, the refusal to eliminate the marital rape exemption continued. For example, the disappointing Sexual Offences Bill¹³⁵ failed to change the marital rape law.¹³⁶ This overlooked the whole trauma and significance of marital rape.¹³⁷

*b. Expansion of the Sexual Offences (Amendment) Act of 1976—
R. v. Reeves and R. v. Roberts*

Despite the legislature's stagnancy in implementing marital rape legislation, recent case law addressing the marital rape issue is encouraging to women. Two cases illustrate the British judiciary's expansion of the marital rape law to provide justice for victims. The court of appeal in *R. v. Reeves*¹³⁸ defined the circumstances when the wife's conduct waived a nonmolestation or noncohabitation injunction against her husband.¹³⁹ The court held that the correct rule on resuming cohabitation was that the husband and wife "voluntarily resumed the matrimonial relationship and had become once more husband and wife in the ordinary sense."¹⁴⁰ This fair approach relies on the total renewal of the marriage, but that result may reflect the horrifying facts of the case—a husband forcing sex upon his bedridden, cancer-stricken wife.¹⁴¹

Therefore, the CLRC views marital rape as not serious and nonmarital rape (which by the Committee's view, includes violence) as serious. *Id.* at 70-71.

134. *See id.* at 72 (concluding that CLRC neglected to consider the contemporary values of society when it decided on legal reforms). The CLRC was unsuccessful because it failed to realize that Victorian laws should only be applied to Victorian ethics. *Id.*

135. *See A New Approach to Sexual Offences*, 135 NEW L.J. 93, 94 (1984) (noting that the bill received all party support).

136. *See id.* at 93 (noting that the bill did not create an offense for marital rape).

137. *See id.* (criticizing the bill for ignoring the deep trauma and injury that wives incur when they suffer marital rape, and asserting that marital rape is not an uncommon occurrence).

138. *R. v. Reeves*, [1983] 5 Crim. App., reprinted in 48 J. CRIM. L. 352 (1984).

139. *R. v. Reeves*, 48 J. CRIM. L. at 352.

140. *Id.* at 353. The trial judge directed the jury on this rule, but after the judge convicted the defendant of rape and sentenced him to four years imprisonment, the defendant appealed. *Id.* He argued that the judge should have directed the jury that once his wife allowed him to do the acts incompatible with her injunction, she had waived the injunction. *Id.* The court of appeals agreed with the trial judge. *Id.*

141. *Id.* The defendant's wife had obtained an injunction against him not to molest, interfere, contact her, or come within a quarter of a mile of her house. *Id.* When she was ill with cancer and unable to leave her bed, however, the defendant entered her house, pulled her clothes off, forced her to have sexual intercourse with him, and stayed

The court of appeals in *R. v. Roberts*¹⁴² concluded that a husband was guilty of raping his wife despite the lack of a nonmolestation clause in the deed of separation.¹⁴³ Thus, this case could represent that a wife may effectively revoke her consent by a simple separation agreement without the inclusion of a nonmolestation clause. Such an advancement allows a greater opportunity for prosecution under marital rape law.¹⁴⁴

c. Criticism of British Law

Although the trend that the British judiciary adopts is a modernization of the previous approaches, additional measures need to materialize for an effective resolution. England must criminalize marital rape.¹⁴⁵ Although a man is married to a woman, he does not have unlimited sexual rights over her.¹⁴⁶ In addition, even though the Sexual Offences (Amendment) Act retains the traditional exemption to the marital rape law and leaves the judiciary to propose exceptions to the rule, the exceptions of divorce and separations effectively remove the parties from the marital context. Therefore, the law still recognizes the concept of a marital rape impossibility. If reform of sexual offenses is indicative of a society's progress in sexual equality and integrity, the Sexual Offences (Amendment) Act of 1976 and the CLRC's work show England has made little progress for the rights of women.¹⁴⁷

in the house for several days afterwards. *Id.*

142. *R. v. Roberts*, construed in CRIM. L.R. 188-89 (1986).

143. *Id.* In June 1984 the court arranged an ouster order, commanding the husband out of the home. *Id.* The court also issued a restraining order that prevented the husband from molesting or going near his wife for two months. *Id.* A formal deed of separation that did not contain a noncohabitation or nonmolestation clause was granted. *Id.*

The husband argued that expiration of the injunction in August 1984 revived his wife's consent to intercourse. *Id.* The judge held that although the wife's consent had already terminated, the facts of the case coupled with the nonmolestation clause in the separation deed did not revoke the wife's consent. *Id.*

144. *Id.* at 189. The commentary on the case suggests that although the law on rape still insists that a wife cannot unilaterally revoke her consent, a wife may revoke her consent with a simple agreement with her husband. *Id.* On the other hand, the case could merely represent that a deed of separation is as effective in revoking consent as a deed with a nonmolestation clause. *Id.*

145. See BENN & COOTE, *supra* note 123, at 26 (adding that the courts should consider the nature of the parties' relationship before reading a verdict and sentencing the husband).

146. See *id.* (arguing that the law should not give men the right to have forced, nonconsensual intercourse with their wives by virtue of the circumstance of marriage).

147. See Wells, *supra* note 125, at 72 (commenting on the CLRC's failure to change the law to reflect current values of personal integrity for married women); Temkin, *supra* note 93, at 38-40 (stating that England's lack of progress was due to the

2. Scotland

a. Attempt to Change Traditional Common Law View

The traditionally conservative statutory rape law of Scotland and the tempering influence of Scotland's judiciary parallel those of England. In Scotland, the history of rape law rests on Hume's view that a husband cannot rape his wife.¹⁴⁸ Since statutory law is silent on the matter of marital rape,¹⁴⁹ Hume's common law view stands.

One of the first signs of reform for married women was the case of *H.M. Advocate v. Duffy*.¹⁵⁰ Lord Robertson took issue with Hume's views and thereby encouraged the development of Scottish rape law. He noted that no Scottish case on marital rape existed (common law governs the marital rape issue) and he criticized the idea of the marital rape exemption.¹⁵¹ While the *Duffy* holding did not unvaryingly exempt a husband from prosecution for rape, it did not make him invariably liable for marital rape.¹⁵² The *Duffy* principles, which do not bar a husband from prosecution for rape and do not require separation as a prerequisite for a charge of rape, however, are major progressive steps for married women in Scotland's criminal law and surpass the limitations of the laws of England.¹⁵³ By acknowledging that a rape can occur between spouses without a separation or divorce, the *Duffy* decision highlights the view that marriage does not preclude spousal rape.

influence of the CLRC which guided the English legislature against rape reform with no strong and powerful women's lobby to push for changes in the law of rape).

148. D. HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIMES, 306 (4th ed. 1844). Hume states that "[The husband] cannot himself commit a rape on his own wife" *Id.*

149. See Sexual Offences (Scotland) Act of 1976, CURRENT LAW STATUTES ANNOTATED, ch. 67, § 2 (giving no mention to rape crimes involving spouses).

150. *H.M. Advocate v. Duffy*, 1983 S.L.T. 7.

151. *Id.* at 8. Lord Robertson (judge) felt that in modern times it was illogical to treat marital rape cases differently than assault in marriage cases, which subject the husband to prosecution. *Id.* The judge continued to reason that Hume was writing one hundred and fifty years ago when women held a substantially lower position in society, thus, his opinion should not apply in contemporary times. *Id.* at 9. Finally, Lord Robertson concluded by stating that he did not think that "[I]t can be affirmed as a matter of principle that the law of Scotland today is that a husband in no circumstances can be guilty of the crime of rape upon his wife. It is a motion for which I am not prepared to accede" *Id.*

152. See Temkin, *Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives*, 47 MOD. L. REV. 625, 627 (1984) (claiming that the couple's living apart probably dictated the result because the court felt the exemption was particularly wrong in cases of separation).

153. Forte, *Marital Rape: A Cautionary Note*, 99 L.Q. REV. 513, 514 (1983).

b. *Uncertainty About the State of the Rape Law*

Although the *Duffy* decision is encouraging, it is just one case and uncertainty exists over whether the rest of the Scottish law will assume the *Duffy* position. For example, the Scottish Law Commission, responding to demands of reform in the Scottish law, failed to address marital rape in their report.¹⁵⁴ Instead, the Commission focused solely on the use of sexual history evidence and the concept of anonymity for the victim.¹⁵⁵ Furthermore, in *H.M. Advocate v. Paxton*,¹⁵⁶ the High Court of Justiciary centered only on the issue of the parties' separation. The court held that Hume's stance against the possibility of marital rape still was the law of Scotland (*Duffy* did not change this, according to the court), but that an exception existed.¹⁵⁷ Specifically, when the husband and wife are de facto separated and the wife withdraws herself from the society of her husband, which is an issue for the factfinder, a husband may be guilty of raping his wife.¹⁵⁸ However, in *S. v. H.M. Advocate*¹⁵⁹ the High Court of Justiciary boldly declared that Hume's view of spousal immunity was no longer justified.¹⁶⁰ Lord Emslie expressly stated that a wife's revocable consent during marriage can be established as revoked dependant on all of the circumstances; separation is no longer the only action that shows revoked consent to intercourse.¹⁶¹ This case appears as a bright light for married women, but until the legislature makes changes, one can only hope that the rule promulgated in *Duffy* and broadened even more in *S. v. H.M. Advocate*, which allows prosecution of rape under normal marital conditions of cohabitation, remains the influential point of law in Scotland.

154. SCOTTISH LAW COMMISSION, EVIDENCE: REPORT ON EVIDENCE IN CASES OF RAPE AND OTHER SEXUAL OFFENSES, 1983, No. 78, *construed in* Temkin, *supra* note 152, at 625.

155. *Id.*

156. *H.M. Advocate v. Paxton*, 1984 J.C. 94, 1985 S.L.T. 96 (LEXIS, Scot library, Cases file).

157. *Id.* The court maintained that the *Duffy* court just found an exception for Hume's statement of generality and that Hume's view still represented the law of Scotland. *Id.*

158. *Id.* The court concluded that the question before them was a narrow one, only if Hume's declaration of law was applicable to the specific circumstances of the case before them—that of a separated couple. *Id.*

159. *S. v. H.M. Advocate*, 1989 S.L.T. 469.

160. *Id.* at 473. The court claimed that if there was ever a reason to justify spousal immunity, no such justification existed in present times. *Id.* According to the court, no longer did a wife irrevocably consent to marital intercourse. *Id.*

161. *Id.* The court maintained that implied consent in marriage was a fiction and therefore a woman's consent was revocable. *Id.* The court continued that even though lack of a separation will make proving nonconsent more difficult, the question for the court was still just a factual question—whether the woman withheld her consent. *Id.*

3. Australia—Tasmania

The statutory law of Tasmania typifies the old, traditional rape law. The Criminal Code of Tasmania¹⁶² defines rape in common law form, providing no protection to married women.¹⁶³ It includes the common law rule of spousal immunity, but does not contain the usual common law exceptions to the rule.¹⁶⁴

The Tasmanian judiciary seems aware of the inadequacy of such a dated rule. In *Bellchambers v. The Queen*,¹⁶⁵ the judges commented on the injustice of a rule that never gives a married woman a right to refuse consent to intercourse with her husband.¹⁶⁶ Despite the remarks of the judiciary in *Bellchambers*, Tasmania has not, however, followed the lead of other Australian states in changing its rape law; it maintains the archaic spousal immunity in the face of open criticism.

4. South Africa

South Africa leans towards the nonremodeling mode of Tasmania. The issue of marital rape has never come directly before a South African court.¹⁶⁷ However, the chances that a wife could prosecute her husband for rape, even if they were separated, are extremely slight; the accepted legal position is that the marital rape exemption is part of the law.¹⁶⁸

Two legal developments began to change this archaic attitude. The first development was the recent case of *S. v. H.*¹⁶⁹ Even though the South African judiciary was not compelled to make any statements, it

162. Criminal Code Act of 1924, TAs. STAT. (Austl.).

163. *Id.* The law defines rape as nonconsensual carnal knowledge of a female who is not the person's spouse without her consent. *Id.*

164. *Id.*

165. *Bellchambers v. The Queen*, construed in 7 CRIM. L.J. 291 (1983).

166. *Id.* at 292. The judges saw the existing law as unacceptable on two levels. *Id.* As with the common law rule, the law was outdated and prejudicial against women. *Id.* Even worse, the law did not provide any circumstances in which a woman could revoke her consent. *Id.*

167. See Kaganas, *Rape in Marriage: Developments in South African Law*, 35 INT'L & COMP. L.Q. 456, 457 (1986) (commenting that judges and academics tended to view inter-spousal rape as noncriminal). The author traces the exemption to English and Roman-Dutch law. *Id.*

168. See Murray, *Some Comments on Rape in Marriage and the English Criminal Law Revision Committee's Report on Sexual Offenses*, 102 S. AFR. L.J. 157, 158 (1985) (stating that the spousal exemption exists in South African law, police often state a husband cannot rape his wife; yet, it has not been judicially decided).

169. *S. v. H.*, South African Law Reports 750 (1985 (2)); see also Milton, *Rape in Marriage and Assault in Rape*, 102 S. AFR. L.J. 367 (1985) (discussing the impact of this case on the marital rape controversy).

decided to comment on the marital rape rule.¹⁷⁰ In responding to the position that rape by a husband was a legal impossibility, Judge Nienaber of the South African judiciary held that authority supporting such a view was scarce and that such a position affronted present-day morality.¹⁷¹ Judge Nienaber questioned the detrimental effects of the legal concept of marital rape for women and added comments regarding the relationship between marital assault and marital rape, the former providing no spousal immunity.¹⁷² Finally, the judge stressed that a woman's interest in her bodily integrity must take precedence over the marital privileges of her husband.¹⁷³

The second development was a report relating to women and sexual offenses published by the South African Law Commission.¹⁷⁴ The Commission recommended total abolition of the spousal immunity rule.¹⁷⁵ The recommendation, however, attached one limiting qualification; namely, the Attorney General must consent to the prosecution of spousal rape before it is initiated.¹⁷⁶ Although this qualification restricts the reach of the law, the Commission's recommendations raise the possibility of legislative reform that is far more effective than the slow process of judicial changes.¹⁷⁷

5. Analytical Summary

England, Scotland, Tasmania, and South Africa have no statutory

170. See Kaganas, *supra* note 167, at 458 (commenting on Judge Nienaber's attempt to disassociate South Africa from Hale's common law principle).

171. S. v. H., South African Law Reports at 752.

172. *Id.* at 755-56. The judge explained that the pivotal point of the marital exemption rule was that the act of intercourse between husband and wife was not unlawful, and, therefore, gave the husband immunity from the assault taking place within the actual act of intercourse. *Id.* He added that violence beyond this would constitute unlawful assault. *Id.* Judge Nienaber questioned the soundness of such a policy that either deprived married women of the protections of the criminal law or interfered in the marital bed. *Id.* at 753. Finally, the judge concluded that rape was defined as sexual intercourse obtained without consent, and that force or violence played no role in the crime. *Id.* Accordingly, Nienaber held that a husband is not immune from prosecution for assault of his wife. *Id.* at 755.

173. *Id.* at 756; Kaganas, *supra* note 167, at 458.

174. WOMEN AND SEXUAL OFFENSES IN SOUTH AFRICA, Project 45, Apr. 1985, construed in Kaganas, *supra* note 167, at 457.

175. *Id.*

176. See *id.* (asserting that this qualification is a mistake because it treats marital rape cases differently from other rape cases).

177. See Kaganas & Murray, *supra* note 11, at 135 (maintaining that the judiciary has conservative prosecutors who may be reluctant to bring such cases, thereby, leaving a large number of women unprotected). In addition, statutory reform, unlike judicial reforms, would base decisions on the existence of consortium, not the fiction of consent. *Id.* at 135.

changes in their rape laws despite the advances women have made in the past decades. Since their legislatures seem unable to take any action, the courts and various commissions are left to prompt reform. The ability for law commissions to effectuate changes in the law is evident by the emphasis placed on the English CLRC's recommendation of spousal immunity, by the lack of comment on the matter by the Scottish Law Commission and the various legal scholars in each country, and by the lack of change in the statutory law after the reports were published. Moreover, one of the most hopeful signs of change in South Africa comes from the South African Law Commission's recommendation of abolition of spousal immunity for rape. The judiciary in the above countries are left with the job of expanding the narrow statutory law or common law. Although modern changes can be effectuated, the judiciary, unless it is the highest court, does not promote any sort of universal legal acceptance. What is revealed from these judiciary and administrative actions is that when they begin to pave the way for marital rape law changes, it signifies the necessity of the legislature to confront the reality of married women as distinct individuals and pass a resolution abolishing the marital rape exemption.

C. THE BACKWARDS APPROACH OF THE LEGISLATURE FOR MARITAL RAPE

1. *Australia—South Australia*

a. *Statutory Rape Law*

South Australia takes an opposite and rather backwards approach to marital rape compared with the processes of the other aforementioned countries. In 1976, the original South Australian bill drafted on marital rape, which provided no spousal immunity,¹⁷⁸ was deemed inadequate. Legislators later limited the provision because of concern about the strain it placed on a marriage.¹⁷⁹ In addition, worries abounded about vindictive wives misusing such a rule to the detriment of the husband.¹⁸⁰ Thus, the legislature added an amendment to the bill, limiting

178. See Scutt, *Consent in Rape: The Problem of the Marriage Contract* 3 MONASH U.L. REV. 255, 277-78 (1977) (citing S.12(5) Bill No. 55, South Australia Parliament (1976)) (providing no presumed consent to either sexual intercourse or to indecent assault merely because the parties are spouses).

179. See *id.* at 277 (discussing how the legislatures had no concern about the wife's feelings of a rule disallowing her husband to use her for his sexual purposes at his demand).

180. See *id.* at 277 (commenting that the Criminal Law and Penal Methods Reform Committee of South Australia was even set up to judge the propriety of a law

the circumstances of prosecution for marital rape with special qualifications governing the definition of spousal rape; this was the form of the Criminal Law Consolidation Amendment Act of 1976 (Act).¹⁸¹

b. Criticism of Limited Spousal Immunity

In addition to the questionable reasoning behind the Act,¹⁸² a number of problems exist with the law. One provision that limits immunity requires that the alleged offense consist of or be associated with an assault threatening or causing actual bodily harm.¹⁸³ Pursuant to the Act, if a woman unwillingly submits to her husband's sexual demands before he harms her or threatens harm, she may have no cause of action.¹⁸⁴ This necessitates the wife to physically defend herself during intercourse in order to successfully prosecute for rape, which improperly encourages self-help in criminal matters.¹⁸⁵

Other aspects of the Act also present problems. Having to show actual or threatened bodily harm¹⁸⁶ ignores the true concept of rape as nonconsensual sex.¹⁸⁷ Moreover, nonconsent is inclusive of the act of

that put such a dangerous weapon into wives' hands).

181. Criminal Law Consolidation Amendment Act of 1976, § 73(5), S. Austl. Acts. The amendment states that:

[A] person shall not be convicted of rape or indecent assault upon his spouse, or an attempt to commit, or assault with intent to commit, rape or indecent assault upon his spouse . . . unless the alleged offence consisted of, was preceded or accompanied by, or was associated with-

- (a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
- (b) an act of gross indecency, or threat of such an act, against the spouse;
- (c) an act calculated seriously and substantially to humiliate the spouse; or
- (d) threat of the commission of a criminal act against any person.

Id.

182. *Id.*

183. Criminal Law Consolidation Amendment Act of 1976, § 73(5)(a), S. Austl. Acts.

184. See Scutt, *supra* note 178, at 283 (discussing the law's "active harm" requirement).

185. See *id.* (commenting that such a requirement is at odds with the usual criminal law view that does not condone self-help; it also opens the wife up to prosecution if she injures her husband in the process).

186. Criminal Law Consolidation Amendment Act of 1976, § 73(5)(a), S. Austl. Acts.

187. See Scutt, *supra* note 178, at 282 (stating that rape is carnal knowledge without consent and maligning that definition by adding a requirement of physical threat or actual injury).

rape and the threat to do the act.¹⁸⁸ A further problem is the lack of definition in the Act. Even though no bodily contact has occurred, a sexual offense may constitute gross indecency.¹⁸⁹ The legislature, however, failed to define the acts that constitute gross indecency in the law. Thus, prospective defendants have no idea of what would bring them within the ambit of the criminal law.¹⁹⁰ Finally, the new qualifications added into the Act as amended¹⁹¹ are so confusing and non-definable (e.g., what is gross indecency exactly?) that they may render the law meaningless.¹⁹²

The critics suggest that the legislature should have either left the law alone,¹⁹³ or have treated married and single women and married and single men equally with regard to presumptions of consent when it comes to rape.¹⁹⁴ Such concepts comply with the modern view of a woman holding rights when she marries and not relegating them as unnecessary if such rights interfere with a superficially harmonious marriage. South Australia may face the same problem Victoria previously met with when they first changed their rape law. Specifically, confusion over terms and failure to move toward a concept of true equality could lead South Australia in the direction of more reforms.

IV. RECOMMENDATION—ABOLISH THE MARITAL RAPE EXEMPTION

The examination of marital rape laws and the various critiques of each type of law lead to one determination; namely, all countries and states must statutorily abolish marital rape exemptions and criminalize marital rape. The rationales used to justify the spousal exemption are not persuasive. Abolishing the immunity would not increase the

188. Criminal Law Consolidation Amendment Act of 1976, § 73(5)(d), S. Austl. Acts; see Scutt, *supra* note 178, at 281 (noting the unlikelihood a person would knowingly achieve nonconsensual intercourse without first threatening to carry out such an act).

189. See *id.* (finding that exposing an erect penis to a non-consenting spouse may qualify as grossly indecent behavior under the Amended Act, and noting the unreasonableness of applying conflicting standards to married and unmarried parties).

190. See *id.* at 280 (stating that failure to outline what constitutes gross indecency gives prospective defendants no notice of what is illegal).

191. Criminal Law Consolidation Amendment Act of 1976, § 73(5), S. Austl. Acts; see note 181 (listing the four qualifications for spousal rape).

192. See Scutt, *supra* note 178, at 279 (using the humiliation qualification as an example and stating that nonconsensual intercourse would fulfill the qualification).

193. See *id.* at 283 (complaining that the Act adds confusion and that the common law could have dealt with the issue because the common law defines rape as being nonconsensual, which could easily include marital rape).

194. See *id.* at 283-84 (suggesting that South Australia follow such a course).

probability of marital collapse; the marriage has already deteriorated if rape occurs.¹⁹⁵ The increased risk of fabricated accusations and blackmail between spouses is not a true or justified reason for retaining the marital immunity.¹⁹⁶ It is wrongly assumed that if countries abolish the exemption, the floodgates of litigation will open and vindictive, lying wives will invade the courts with false complaints; proof to the opposite conclusion is documented.¹⁹⁷ This assumption is, in fact, just an extension of the stereotype of a vindictive wife.¹⁹⁸ Furthermore, although difficulty in acquiring evidence in marital rape cases may be an obstacle, many illegalities are difficult to prove, and, yet, are not abolished as crimes.¹⁹⁹ In addition, even if women tend to change their minds about

195. See Backhouse & Schoenroth, *supra* note 18, at 178 (contending that legal action can do no more damage to marriage than rape and that preserving violent relationships are not acceptable goals); Note, *The Marital Rape Exemption*, *supra* note 34, at 315-16 (stating that the marital reconciliation rationale in support of the marital rape exemption does not recognize that the wife usually files rape charges when the spouses are separated after a long history of marital discord); see also Note, *To Have and To Hold*, *supra* note 19, at 1268-69 (noting that the violent act of rape, not a legal proceeding, disrupts the marriage, and adding that the reconciliation in the marriage is often part of the cycle of psychological dependence on a violent husband).

196. See Note, *The Marital Rape Exemption*, *supra* note 34, at 314-15 (stating that the whole ordeal of rape prosecutions are often more shameful and fearful for the victim, rendering it highly unlikely that a vengeful woman would choose to personally degrade herself); Freeman, *supra* note 16, at 19 (arguing that if marital rape is plagued by evidentiary problems, a vindictive wife would hardly use such difficult means); see also Backhouse & Schoenroth, *supra* note 18, at 178 (raising the proposition that the safeguards of the criminal justice system, including proof beyond a reasonable doubt and the use of juries, are sufficient to determine the validity of rape charges).

197. See NATIONAL CLEARINGHOUSE ON MARITAL RAPE, WOMEN'S HISTORY RESEARCH CENTER, PROSECUTION STATISTICS RE: HUSBANDS WHO HAVE RAPED THEIR WIVES SINCE FALL 1978 AFTER OREGON RIDEOUT TRIAL (1985) (citing the percentage of convictions of completed cases as 89% for separated couples, 86% for couples that were together, and 88% as an average for both); D. RUSSELL, *supra* note 6, at 205 (finding that wives who report the rape to the police are usually the most traumatized by the experience, therefore the fear of unfounded reports is not appropriate).

198. See D. FINKELHOR & K. YLLO, *supra* note 1, at 175 (stating that the corroboration requirement present in some rape statutes also upholds the view that women lie in sexual crimes).

199. See Backhouse & Schoenroth, *supra* note 18, at 179-80 (claiming that evidentiary problems do not justify the immunity when women are unable to meet the steep burden of proof and when this deprives them of justice); Freeman, *supra* note 16, at 18-19 (stating that it strains credulity to prosecute rape cases that only involve stranger rapists); Note, *The Marital Rape Exemption*, *supra* note 34, at 314 (stating that the same evidentiary problems concerning consent are involved in all rape cases, particularly when the parties have had previous sexual relations); Note, *To Have and To Hold*, *supra* note 19, at 1269 (presenting two arguments which explain the use of the evidentiary difficulty rationale). The view which focuses on the problems in acquiring evidence bases itself on a deep discriminatory idea of women as liars. *Id.* In addition, the view ignores the reality of the stigma of bringing rape complaints; this stigma leads women to conceal the incident rather than to bring forward a complaint. *Id.*

testifying against their husbands, this is no justification to retain the immunity.²⁰⁰ Finally, other laws such as family laws and assault and battery laws are not adequate for dealing with marital rape as a distinct crime of humiliation and violence.²⁰¹

Providing compromises, such as the common law exceptions to the spousal immunity laws maintained in England, the criminal law act in South Australia, and the majority of the state statutes in the United States are not solutions to marital rape. Instead, the laws punish a husband for rape only when no marriage really exists, as in legal separation. This perpetuates the theory that under ordinary circumstances rape in marriage is by definition impossible.

Retaining statutory spousal immunity, as exemplified by Tasmania, South Africa, Scotland, England, and three states in the United States, defies logic by stating that married women must always consent to marital sex. Moreover, the legislatures' inaction tells married women that they do not deserve protection because the common law view of women as their husband's chattel still prevails. Additional problems are created when judges attempt to construct common law solutions to the problem, as in England, Scotland, Tasmania, and South Africa, thereby, adding more questions as to the state of the rape law. Common law solutions to statutory problems place the role of women in the criminal justice system in a quandary. A woman can not derive the full benefit from a law when she is unsure what the law is. Statutory abolition of the spousal exemption for rape is the only solution that sends a clear message to the married woman and contains an unqualified right to refuse sex in the context of marriage.

Each common law country or state examined above originally rested its rationale for the exemption on outdated theories of marriage and women. Nevertheless, Canada, New Zealand, a select number of states

200. See Freeman, *supra* note 16, at 20 (suggesting that courts could use the spousal immunity rationale for marital assault cases, but noting that no debate has ever centered on establishing spousal immunity in assault cases); see also Temkin, *supra* note 44, at 409-10 (noting that although a time lag often exists between the commission and the reporting of any rape case, the police are attuned to this, and prosecutors therefore do not dismiss these other cases).

201. See Backhouse & Schoenroth, *supra* note 18, at 179 (contending that rape is a greater invasion than other types of physical assault, therefore, assault and battery laws are not appropriate protection); Freeman, *supra* note 16, at 20-21 (asserting that divorce proceedings as an alternative remedy are not an answer for poor women who are financially dependent on their husbands, and arguing that family law does not necessarily give women protection); see also Note, *The Marital Rape Exemption*, *supra* note 34, at 316 (commenting that discussing alternative remedies assumes the validity of the exemption and fails to realize that rape laws protect women from the severe emotional and psychological consequences of the act of rape).

in the United States, and the Australian states of Victoria and New South Wales statutorily eliminated the spousal exemption due to the realization that marital rape exemptions symbolize the degradation of the married woman and subjugation of her rights in a modern society. These countries have succeeded in harmonizing the law with modern societal attitudes. They stand as examples for other common law countries.

CONCLUSION

A law that does not give married and unmarried women equal protection creates conditions that lead to marital rape.²⁰² It allows men and women to believe that wife rape is acceptable.²⁰³ Making wife rape illegal will remove the destructive attitudes that promote marital rape.²⁰⁴ Such an action raises a moral boundary that informs society that a punishment results if the boundary is transgressed.²⁰⁵ Husbands may then begin to recognize that marital rape is wrong. Recognition coupled with criminal punishment should deter husbands from raping their wives.²⁰⁶ Women should not have to tolerate rape and violence in

202. See D. RUSSELL, *supra* note 6, at 360 (stating that men will not change unless they have to change, and asserting that treating rape in marriage as a husband's privilege is an insult and a danger to all women).

203. See *id.* at 357 (commenting that the legality of marital rape not only perpetuates the toleration of it but also causes the toleration because the legality makes people treat marital rape as acceptable conduct).

Examples of this acceptance often come from women themselves. Diana Russell's survey offers the following examples:

Mrs. Keating: He'd want it, I'd be tired. This is a big complaint of wives . . . I'm a nice wife. I don't want, he want, okay, I lay there just like a sick person . . . He wants it, I do it.

Mrs. Randle: Many times I didn't feel like having sex but I did it. With a husband, you feel forced. I have an obligation to my husband which is very bad. It's always been a man's world.

Mrs. Matthews: [I] wasn't physically interested in him, and I only had sex with him because it was a wifely duty.

Mrs. Ingalls: He didn't use physical force, but there was this feeling that 'you might as well give in because he has the right to it.'

Mrs. Victor: When I'm sleeping I don't want to be bothered. He didn't force me but if I didn't want it, he'd do it anyhow.

Id. at 81-83.

204. See *id.* at 357 (commenting that society must make wife rape illegal and that it must destroy the stereotypes and myths that accompany marital rape so that society may understand marital rape as a serious crime).

205. See D. FINKELHOR & K. YLLO, *supra* note 1, at 198 (commenting that changing the marital rape law will raise the public's awareness of the value of equal protection to married women and, therefore, possibly deter this behavior).

206. See *id.* (stating that after public debate and the enactment of a law providing

marriage. Total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that marital rape is not a husband's privilege,²⁰⁷ but rather a violent act and an injustice that must be criminalized.

for punishment of offenders, men will not think they have a right to force sex upon their wives and women will be justified in complaining about nonconsensual intercourse).

207. See D. RUSSELL, *supra* note 6, at 358 (concluding that charging a husband with rape is a symbol of a woman's right to decide if, when, how, and with whom she will have sexual relations).