MARITAL RAPE: THE MISUNDERSTOOD CRIME

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Introduction

Concern over the marital rape exemption has definitely increased in state judiciaries - unfortunately this does not equally apply to the state legislatures. Rape within marriage has been legally endorsed for more than one hundred years in America and to date, in most of the states this behaviour is legally protected, making the marital rape exemption the rule rather than the exemption [1] despite the twentieth century's enlightened views of marriage and female equality. Statistics are alarming [2], but appalling as they might sound, they seem to fail to persuade some who refuse to believe there is such a crime as marital rape. [3]

Increased awareness about rape has come about as women have gained more equality and as women's groups have strived to bring the public's attention to the fact that rape is not caused by the woman herself, but is the result of violence committed upon her by a violent person. It is precisely because of this long-standing and erroneous belief that rape is a sexual rather than a violent crime that it has been extremely difficult for legislatures, juries and the courts to deal rationally with the subject.

This papter will analyze: (1) the history of the marital rape exemption and the common law authority thereto, including a critique of the theories that have served to justify it, (ii) marital rape as a social crisis in America, (III) statutory and judiciary responses, (IV) constitutional considerations, and (V) possible statutory reforms.

1. History of Marital Rape Exemption and the Common Law Authority Thereto

The marital rape exemption owes its origin to English common law in the seventeenth century with Lord Matthew Hale's declaration that, "the husband cannot be gulity of a rape committed by himself upon his lawful 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." [4] Despite the fact that the marital rape exemption was an assertion with no fundamental judicial authority for support, this became the authority for the spousal immunity in both England and the United States. [5]

English cases subsequent to Hale's statement demonstrate that the marital rape exemption was not absolute in England even at the time. English common law presumed a wife impliedily consents to sexual intercourse with her husband; it also provided the wife with a revocable consent. Revocation of a wife's consent

was strictly limited and as a prerequisite required a mutual separation agreement or a court-ordered separation. Thus, "under English common law, there never existed and *absolute irrevocable* marital (rape) exemption that would protect a husband from a charge of rape in all circumstances." [6]

Early American cases did follow the English case law, but did not follow the exceptions which allowed a wife's consent to be revoked. In 1857, a Massachusetts court stated in *Commonwealth v. Frogerty,* [7] apparently the first American court to consider the Hale doctrine, that marriage was a defense to the charge of rape. [8] In 1905, a Texas case, *Frazier v. State,* [9] carried Hale's principle further and stated, consent is that "which she gives when she assumes the marriage relation, and which the law will not permit her to retract in order to charge her husband with the offense of rape." [10] However, this blind and unwarranted subscription to Hale's doctrine seems to have come to a halt in *State v. Smith,* [11] where the court concluded that it was "a bare, extra-judicial declaration made some 300 years ago, " [12] and found no authority to support it. [13]

In that case, Albert Smith, who was indicted for the rape of his wife sought to dismiss this count of the multicount indictment on the grounds that the common law excluded husbands from the charge of rape even if they had forcible sexual intercourse with their wives. [14] He further argued that New Jersey's rape statute codified that common law spousal exception and that it could not be altered by the court. At trial court level, the rape count of the indictment was dismissed [15] on the grounds that the court had no authority to end the marital exemption which had become an implied part of the rape statute of New Jersey. [16] Such a prerogative, according to the court, belonged exclusively to the legislature.

Following an amendment to the New Jersey rape statue in 1979, expressly providing that marriage to the victim was not a defense to the charge of rape, [17] the Supreme Court of New Jersey reversed the trial court's dismissal and reinstated the rape count against the defendant. Hale's implied consent doctrine was dismissed in the following manner:

> "Without deciding whether an exemption existed in any situations at all, we think that it was not meant to exist during the entire legal duration of a marriage. Therefore, we decline to apply mechanically a rule whose existence is in some doubt and which may never have been intended to apply to the factual situation presented by this case."[18]

Therefore,

> "A man separted from his wife - and perhaps one not separated - could not invoke an outdated and doubtful rule to avoid prosecution for rape simply because he was still legally married to his victim." [9]

Another landmark decision in this respect was *Commonwealth v. Chretien,* [20] wherein the Court of Massachusetts declared that no common law marital rape exemption exists in that state's rape statutes and husbands thus can be prosecuted for rape of their wives. The court found that the legislature's enactment of domestic violence legislation in 1978 expressed the legislature's intent ot criminalize marital rape.

These two decisions have already proved invalubale as regards cases challenging the existence of a common law marital rape exemption, and now stand as the leading case law on the issue in the United States. They have made it clear that regardless of whether such an exemption existed at common law, there is no place in today's society, given today's laws, for such an anachronistic concept.

New rationales were used to support Hale's principle after it was discovered that the principle lacked legal foundation - rationales which, although archaic in nature, unfortunately endured in American and English law for decades. Each of them will be examined in turn.

A - Marriage Contract Implies Permanent Consent

This is by far the most commonly used justification. [21] Surprisingly, even in the light of the movement for women's equality, a 1984 Virginia Supreme Court decision, [22] while invoking this theory, declared that a wife must prove beyond a reasonable doubt that she revoked her implied consent through a "manifest intent" to terminate the marital relationship."[23]

Logically, even if one were to accept the implied consent theory, it is unrealistic to assume that the wife also consents to both violence and injurty. [24] Granted, both the wife and husband agree to have intercourse as part of the marriage consummation, but their personal sexual autonomy is not completely extinguished. [25] A well-reasoned opinion of Justice Wachtler of the New York Court of Appelas in *Liberta,* [26] found the implied consent to be "untenable." [27] Moreover, the consent doctirne effectively gives a husband the opportunity to take the law into his own hands with violence and force in order to make his wife comply with her alleged "implied consent" when he should peacefully seek a divorce or other similar relief in domestic courts. [28]

This theory appears more ludicrous in the light of the fact, that even if the wife could impliedly consent, the husband's remedy for a breach of contract would be in the form of damages, not a "forced (specific) performance." [29] As the *Smith* court rightly pointed out, this theory puts married women in a worse position than single women because the latter can charge rape against men who force them into sexual intercourse even if they have consented to intercourse with those men on previous occasions. [30] Given monogamy as a societal goal, the court noted that the acceptance of the contract theory could result in the bondage of the wife. [31]

When husband and wife are separated, the implied consent doctrine becomes irrelevant, because it is groundless to argue that the wife's implied consent still exists to have sexual intercourse with a man, her husband, with whom she no longer cohabits. Fortunately, many state statutes uphold a wife's revocation of consent when the couple has severed their union but the

requirements needed to establish revocation of consent and separation vary from state to state. [32]

B - Wife as Property of Her Husband

Indeed, before the passage of the Married Women's Property Acts, a married woman was unable to perform acts of civil life; wives viewed as their husband's chattel, deprived of all civil identity. [33] This theory is however, anachronistic in today's society especially in the light of the fact that women can own and control property separately from their husbands. Thus, it would logically follow that public policy which supports the marriage relationship must necessarily extend to the woman's right to control her body. [34]

In *Trammel v. United States,* [35] The Supreme Court rejected the archaic notion that the wife was a husband's chattel, [36] which goes to show that this theory is no longer accepted in American jurisprudence. Logically, it should also cease to be a justifiaction for the marital rape exemption. However, because the view of the women as the chattel of men has been relegated to history in American case law and in as much in America's tort low, it follows that rape laws should also change from protecting a man's property interests to guarding a woman's safety and privacy interests. [37]

C - The Unities Treaty

Blackstone articulated this doctirne in his *Commentaries.*

> "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated (into her husabnd.)" [38]

A husband cannot therefore be guilty of rape because he cannot be gulity of raping himself. This concept, fallacious on its face, has been abolished in most States. [39]

D - "Separate Spheres" Ideology

This theory gradually displaced the unities theory as the legal justification for sexual inequality. Under this vision of social relations, men inhabit the public realm of politics and the marketplace and women inhabit the private realm of the family. Women were no longer naturally inferior, but naturally different. This ideology helped shaped the notion that any legal intrusion upon the woman's sphere constituted an illegitimate public invasion of the private sphere. The private subordination of women was therefore accomplished by the absence of laws restraining male power. In this unregulated sphere, men were free to rape their wives. Although the nineteenth amendment, [40] Title VII of the Civil Rights act of 1964, [41] and the 1971 case *Reed v. Reed,* [42] represent legal signposts on the road to full disintegration of the separate spheres ideology, the vitality of the marital rape exemption testifies to the continuing influence of this ideology on the formation of legal doctrine. [43]

E - The Marital Rape Exemption Promotes Spousal Reconciliation

This is a more recent justification suggested for the marital rape exemption and is based on the rationale that allowing a wife to bring criminal charges against her husband for rape would impede any possibility of reconciling the marriage. This argument is undeniably fallacious on its face because it is the violence resulting from the rape, not the wife's attempt to find protection under the law, which unravels the marriage. [44] Moreover, this policy argument assumes that there remains a marriage to be reconciled and that the violence of rape is an injury from which a wife can recover and adjust. Yet even if a marriage could be reconciled and the perpetrator forgiven, it does not necessarily follow that a wife who declines reconciliation should be prevented from charging her husband with rape. [45]

It is true that the states have an interest in the physical protection of individuals as well as the family, but this state interest is not furthered by the marital rape exemption.

F - The State Should not Interfere with Marital Relationships

The assertion that the state's interest in promoting family harmony comes before that of protecting individuals is illogical. Although promoting harmony in marriage is a legitimate state interest, "there is no rational relation between allowing a husband to forcibly rape his wife and these interests." [46] As Justice Harlan stated in his dissenting opinion in *Poe v. Ullman,* [47] the family is sacred, but it is not beyond regulation "and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary of crime." [48]

G - The Marital Rape Exemption Eliminates Fabricated Charges

The fear here is that if a divorce is pending, the possibility for bringing a charge of rape against the husband would give women great power and wives would not forego the opportunity to retaliate. This proposition is overwhelmingly pregnant with misconceptions.

(i) The possibility that married women will file charges is no greater than the possibility that unmarried women will do so;
(ii) The American judicial system is capable of determining and dismissing fabricated charges;
(iii) False charges can be asserted for any crime;
(iv) Rape trials are extremely embarassing for the victim and therefore it is unlikely that the revengeful wife would use this shameful, embarassing and self-incriminating channel for her retaliation;
(v) Abuse of the opportunity to charge husbands with rape has not occurred in jurisdictions that have abrogated the marital rape exemption. In fact, Oregon district attorney Peter Sandrock confirms that Oregon experienced no "flood" of marital rape cases since dropping its marital rape exemption in 1977. [49]

H - The Marital Rape Exemption Presents Insurmountable Problems of Proof

Although this seems to be a more plausible justification at first sight, it is still no excuse for disallowing a ravaged wife her constitutional right to seek a remedy at law. When has difficulty to prosecute determined what a crime is? Treason, conspiracy, child abuse, and incest are difficult to prove, but there is no outcry to decriminalize them.

I - Alternative Remedies Available

Although remedies for other injuries to a woman's body are available, such as assault and battery, none of these remedies punishes for the oppressive violence of the crime of rape. Assault and battery are different from rape because the latter crime involves a special humiliation and special violation.

The alternative remedies argument fails to recognise the fact that rape in marriage does not diminish the rights violated, and also that alternative remedies fail to protect the wife from further abuse. An appropriate deterent to this type of violent behaviour is not presently available.

J - Marital Rape is a Less Heinous Crime

Another justification offered for the marital rape exemption is that when performed by a spouse, rape is less serious than when performed by a stranger. This argument, however, seems to ignore the fact that, in most cases, a marital or acquaintance rape will be more traumatic for the victim than stranger rape. [50] Moreover,

> "When you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with the rapist." [53]

Marriage certainly does not mitigate rape's trauma, because it is a crime of violence - this theory is supported by the severe penalties associated with rape when contrasted with the lesser penalites for assault and battery. Therefore, a rape within the confines of marriage is no less heinous than stranger rape merely because the victim and rapist are married.

II. Marital Rape as a Social Crisis in America

These archaic and poorly reasoned rationales supporitng descriminilization of marital rape seem anachronistic in the progressive atmosphere of the twentieth century. Despite the momentum that the women's movement has gained throughout the past two decades, especially as regards the raging battles for equal pay, equal opportunity, relief from sexual harassment and the right to abortion, the marital rape issue was surprisingly ignored and remained very much "the crime in the closet." [52] As researcher Nicholas Groth points out, marital rape

> "may be the most predominant type of sexual offense committed...because of prevailing attitudes and legal codes, it goes largely undetected. Like other family problems, it is kept within the

> family and both mental health and criminal justice agencies have traditionally been cautious of 'interfering' in family matters." [53]

This ignorance was fostered, in large part, by the failure to report marital rape incidents to authorities and the afflicted wives' fear of reprisal. Only until recently, it was no small oversight to state that none of the states in the whole of the United States criminalized marital rape, and therefore women had no legal motivaiton to report it, especially if it would expose their marital problems or if they were unsure whether they could legally prove a rape had occurred. [54]

Fortunately, the situation is not so precarious today since a few states have abolished the implied or explicit marital rape exemption from their statutes. [55] Indeed, the law in most states protects a man from prosecution for the rape of his wife (as will be examined in Part III.) The marital "right" to rape one's wife is expressed in state criminal statutes, which typically define rape as "forced sexual intercourse with a female not the wife of the perpetrator." According to Black's Law Dictionary [56] however, the definition of rape is "unlawful sexual intercourse with a female without her consent." Moreover, several courts and scholars have determined rape to be sexual intercourse without consent.

Underlying these misconceptions in the crime of marital rape is a failure or refusal to acknowledge that rape is not a crime of sex but a crime of violence. It is the violence, outrage and injury to the victim, not the sex which demands criminal punishment. It is the coercion by the forecful penetration and threats against another's will which is the essence of rape. [57] Indeed, modern writers on the subject agree that the greatest harm of rape is the psychological injury, in addition to the physical injuries, resulting from the domination and denial of freedom. [58] Moreover, "marital rape is frequently quite violent and generally has more severe, traumatic effects on the victim than other rape." [59] Stranger rape is a devastating, one-time occurrence, marital rape frequently involves a seires of devastating occurrences, often spanning years. One study found that fifty-two percent of the victims of marital rape suffer severe long-term effects [60] as compared to thirty-nine percent of the victims of stranger rape. [61]

A married woman certainly relinquishes some autonomy, but she most certainly does not exchange her autonomy for a license by her husband to commit violence upon her body. Violence and marriage are strange bedfellows, but several studies have revealed that most battered woman have also been sexually assaulted, often because the wife conceded to intercourse in order to avoid being beaten. [62] The idea is certainly revolting, but violence and marriage do collide behind closed doors in our society.

Rape of a woman by her husband is not a bizarre, unusual or isolated act. Rather, marital rape is a problem of seirous magnitude and consequence, as we can infer from the above consideration. Professor Richard Gelles, sociologist at Rhode Island University, who has done extensive research on battered women, has estimated that the number of women in the United States who are raped by their husbands, as part of a beating or a sequel to it, could be well over two million. [63] The understanding of rape as violence is

tantamounting to resolving the central issue of whether thec rime of marital rape should be penalized.

III.Statutory and Judicial Responses

Marital rape law reform has proved to be slow and legislators remain indifferent. Unfortunately, even when legislatures have attempted some reform, most have failed to achieve total abolition of the marital rape exemption - which should be the ultimate goal for all states. It is difficult for women to lobby for this kind of legislation as Sherly Chase proves in disclosing details of the strategy and the cumbersome process that she and her dedicated entourage of women (and a few men) used to outlaw marital rape through the legislature, in the state of Connecticut. [64] This problem comes mainly in the women's attempt to relate to male legislators the physical and emotional horrors that have been committed by husbands. A form that was drawn up by a Montana legislator as a joke and circulated to other senators during a campaign for a marital rape law, demontrates why women might encoutner problems. [65] (See Appendix 1)

To date, only ten states expressly allow prosecution of husbands for marital rape under all cirumstances. [66] State rape stuatutes thwart prosecution for marital rape in various ways. Traditionally, rape has been defined as nonconsentual sexual intercourse by a man with a female, not his wife. Some states explicitly incorporate a marital rape exemption by defining rape in this manner, [67] while other states refer simply to intercourse with a female or person and then define that term to exclude the wife or spouse of the actor. [68]

In states with marital rape exemptions, the scope of the exemption depends upon the perceived stability of the underlying marriage. States generally regulate the scope of the exemption through the definition of "not married" under the statute. For example, some states define "not married" so as to allow prosecution only if the parties were living apart at the time of the incident. [69] Other states allow prosecution only if the parties at the time of the incident were separated by court order, [70] or were living apart and one spouse had filed a petition for annulment, divorce, separation, or separate maintenance. [71]

In Alabama, Illinois, and south Dakota, a husband is subject to prosecution for rape only if a final divorce decree existed at the time of the incident; a wife separated from her husband under agreement or court decree has no legal recourse. [72] Several states allow prosecution for husbands for charges of first or second-degree rape, but disallow prosecution for lesser sexual offenses. [73] The California statute is interesting in that it does not simply eliminate the spousal exception from the definition of rape but sets out various conditions that must be met beofre either spouse can charge the other with rape. Penal Code Section 262, Subsection 2(b) requires that the victim report the crime withing 30 days. A person convicted of spousal rape need not register as a sex offender, as a person convicted of rape of a nonspouse must. The legislature also expressly refused to extend to spousal rape subsections that define rape as an act of intercourse in which a person is prevented from resisting because he or she is administered a narcotic, intoxication, or anesthetic substance by or with privity of the accused. Thus, if a spouse is legally unable to consent,

under the influence of a narcotic substance, that spouse in unable to revoke his or her 'consent', this clearly means that the contractual consent theory is alive and well in the California Penal Code. [74]

As the above legislative update indicates, there has certainly been some improvement as regards the outlawing of marital rape in several states - but more needs to be done in order to reach the ultimate goal, which is the criminalization of marital rape *in all circumstances.* At this point, it would be interesting to give an overview of the latest case-law on the subject, and in doing so to detect the courts' attitude in handling such cases.

Most of the legal changes in this respect have occurred since 1979 when John Rideout of Salem, Oregon, was acquitted of raping his wife, Greta, in a trial that attracted nationwide attention. At that time, laws dating to the seventeenth century, when a woman was viewed as the legal property of her husband, were still in effect in nearly all 50 states. The Rideout trial marked the beginning of a trend toward equal treatment of marital and non-marital rape.

The traditional elements of the crime of rape are three, but a fourth is often included in the marital rape exemption. They are: (1) carnal knowledge, penetration, or intercourse (2) force and (3) nonconsent. The fourth element some courts included was that the victim could not be the wife of the perpetrator. [75] For many years, the fact that prosecutrix and defendant were not married was very important, even if later this fact was only necessary as evidence to prove there was consent to the common law crime of rape. However, the courts were instrumental in eroding this common law marital rape exemption doctrine, and then bringing down the elements of rape to only three. In *State v. Smith* [76] as has already been pointed out above, the Court levelled an unprecedented attack on the common law marital rape exemption, even after analyzing the history and doubtful validity and existence of the alleged common law exemption, it concluded that it was now no longer a part of the rape statute so as to exempt defendant-husband from prosecution and conviction for rape of the spouse. Although the Court expressed a strong disapproval of the common law exemption, it relegated its abolition to the state legislature. [77] Although the New Jersey court limited its decision to the facts of the *Smith* case, it left no doubt as to it its distaste for the common law exemption.

In a similar case, *Commonwealth v. James K. Chretien,* [78] which involved the interpretation of a rape statute that did not contain an express spousal exemption, a husband was convicted of raping his wife while the two were living apart and a final divorce decree was pending. [79] The court held that the common law applied to husbands only when the marriage relationship had been severed by a divorce judgement *nisi.* Therefore, if the marriage had been severed a husband could be convicted for marital rape. [80] The court here spoke about an "intent" of the legislature's comprehensive revision of the rape laws in 1974, to criminalize marital rape and eliminate any spousal exemption. The decision went further than that of the New Jersey court, since it did not limit the opinion to only more rapes occurring after the entry of a preliminary divorce decree or occurring after the spouses had separated. By holding that

the 1974 revisions eliminated the spousal exemption altogether, spouses in ongoing marriages, even while still living together, are subject to prosecution under the 1974 revised Massachusetts rape statute.

Unfortunately, both the New Jersey and Massachusetts courts refused to decide the threshold question of whether Hale's doctrine constituted part of the common law - both courts based their holdings on the assumption that the exemption was part of the common law. However, the importance of these two cases lies in that they constitute a break-away from the long unchallenged belief that a marital rape exemption exists under common law.

A more recent move away from the common law's absolute marital exemption occurred in 1983, when a New York court struck down New York's statutory marital rape exemption because it violated equal protection rights guaranteed in both the state and federal constitutions. [81] Indeed, *People v. DeStefano,* was the first case in this country to examine the constitutionality of an express statutory marital rape exemption. It is a landmark case in that it lays the groundwork for future constitutional challenges to the marital rape exemption. [82] The court examined the traditional justifications for the marital rape exemption and concluded that none of them constituted a government interest sufficient to meet any of the three tests associated with equal protection analysis. The court held the "implied consent" theory invalid because of the recognized constitutional right of a woman to have an abortion and use birth control without her husband's approval. It concluded that the "logical extension of more rights is that a woman has the right to refuse the physical act that leads to pregnancy and that a woman's right "to individual autonomy and to control procreation are but part of the more comprehensive right to bodily integrity." [83]

Another significant case in this respect is *State v. Rider,* [84] where the Florida Court of Appeals held that Florid's sexual battery statute, which contains no express spousal exemption, does not incorporate a common-law exemption. In the *Rider* case, the spouses were living together as husband and wife at the time of the rape. No divorce or serparation proceedings had been initialted, and no temporary restraining order or separation agreement existed. The first Florida case to address the marital rape exemption was *Florida v. Smith,* [85] and there it was held that no common-law exemption exists in Florida, but it was unclear whether this would be applied only to separated spouses. The Court of Appeals in *Re Rider* adopted a broad interpretation of *Re Smith* and refused to distinguish between spouses living together and those living apart for purposes of eliminating the marital rape exemption. The *Rider* decision, like the 1981 Masachusetts case of *Commonwealth v. Chretien,* (above) expressly held that no common law marital exemption exists even in the case of cohabiting spouses. Thus, the Florida cases are extremely significant in states that have no express statutory exemption, for they suggest that when courts in those states adjudicate marital rape cases they are not confronted with a choice of *applying or abolishing* a legitimate common law doctrine, but with *adopting* an antiquated doctrine of dubious origins that is incompatible with 20th century legal and societal concepts of marriage and women's autonomy. [86]

Two recent Virginia Supreme Court cases have established a very limited exception to the common law concept of spousal rape immunity: *Weishaupt v. Commonwealth*, [87] and *Kizer v. Commonwealth*. [88] In the first case, the Virginia Supreme Court held that a common law marital exemption does not apply when there has been a 'defacto' end to the marriage. The court refused to decide whether a common law exemption should be abandoned altogether, limiting its holding to the particular facts of the case. In *Re Weishaupt,* the husband and wife had maintained separate residences and refrained from any sexual contact. After approximately eleven months of continuous separtion, the husband attempted to have sexual relations with his estranged wife. The court rejected defendant's contention that the English common law contained an absolute marital rape exemption which should apply in Virginia, on the ground that the implied consent to sexual relations in a marriage could be revoked. The court also held that in the light of recent cases in Virginia establishing a woman's independent control over her property, she should have the same protection and control over her physical person. [89] The court also found that the Virginia no fault divorce statute "embodies a legislative endorsement of a woman's unilateral right to withdraw an implied consent to marital sex." [90] If the state failed to recognize the wife's ability to unilaterally withdraw the implied consent to marital sex, then it would have to deny the wife's statutory right to withdraw from the marriage contract. [91] The court also stressed three requirements for the recognition of unilateral revocation of consent:

1) intent to terminate the marital relationship by living separate and apart from her husband
2) refraining from voluntary sexual intercourse with her husband
3) conducting herself in a manner that establishes a *defacto* end to the marriage. [92]

Recently however, in *Kizer v. Commonwealth,* the Virginia Supreme Court clarified *Re Weishaupt* so as to significantly limit the impact of that decision. In *Re Kizer,* the couple had not consistently maintained separate residences, though they were living apart at the time of the alleged rape. The marital history was replete with trial separations and attempts to make the marriage work. After a lengthy separation period, the husband gained entrance to the apartment and had forcible sexual intercourse with his wife. The majority opinion noted that, under *Re Weishaupt,* the wife's revocation of consent must be demonstrated by her manifest intent to terminate the marital relationship. The court found evidence to show a violation of the rape statute, but insufficient evidence to satisfy the third element required to show the requisite intent. Although the couple had lived separate and apart and refrained from voluntary sexual intercourse, the commonwealth failed to demonstrate that the wife had, in light of all the circumstances, conducted herself in a manner that established a *de facto* (or actual) end to the marriage. The majority concluded that a wife's conduct must be such that the husband perceived, or reasonably should have perceived, that the marriage actually was ended in order to meet the third *Weishaupt* requirement. [93]

In Virginia, therefore, the additional proof of violence required to rebut the presumption of consent is replaced by the requirement that a wife manifest her intent to end the marriage. A married woman must not only provide sufficient evidence to sustain a conviction under the rape statute, but must also provide the requisite intent by satisfying the three factual requirements established in *Re Weishaupt*. The result of the Supreme Court's clarification of that third requirement, however, is to place a much more arduous burden on a victim of spousal rape than that borne by a victim of rape by a stranger or even a fiancé. [94]

Georgia too has lately joined the growing list of states that recognize marital rape as crime. In *Warren v. Georgia,* [95] the court refused to read a marital rape exemption into the Georgia rape statue, concluding that the implied consent theory is "without logical meaning and obviously conflicts with our constitutional and statutory laws and our regard for all citizens of this state."

Women's rights organizations were particularly pleased by the New York court decision in *People v. Liberta,* [96] where the New York Court of Appeals held that New York's rape statue violated equal protection. [97] The decision declared that a married woman has the same right to control her own body as does an unmarried woman. The New York decision is unequivocal, whereas most other states, even the more progressive ones, have retained some differences between marital and non-marital cases. For example, some states allow prosecution in marital cases only if the woman was subjected to actual physical abuse before being raped - not just the threat of physical harm. Other states consider marital rape as a second degree felony, while non-marital rape may be prosecuted as a first-degree folony. According to Judge Wachtler, the chief judge of the New York Court of Appeals, "there is no rational basis for distinguishing between marital rape and non-marital rape. To do so is to violate the constitutional guarantee of equal protection under the law."[98]

The New York decision is also significant because it appears to be the first time that the highest court in any state invalidated an explicit statutory exemption for marital rape. "We recognize that a court should be reluctant to expand criminal statutes due to the danger of usuring the role of the legislature," Associate Judge Wachtler wrote for the court, "but in this case, overriding policy concerns dictate our following such a course." [99]

From that which has been discussed above, it may be fairly inferred that the courts have been more responsive than the state legislatures to the seriousness of the crime of marital rape. They have certainly served as catalysts for the gradual erosion of the common law marital rape exemption and the traditional policy justifiaction of the crime of marital rape. Laura X, director of the National Clearinghouse on Marital Rape in Berkely, California, said that winning a court case is a much easier process than lobbying a state legislature. [100] One hopes that other state courts follow suit to *Re Liberta,* and that gradually all state legislatures will endorse marital rape as a crime.

IV. Constitutional Considerations

The constitutional problems inherent in nearly all rape statutes must also

be examined and analyzed before the marital rape exemption could be justified. Part IV focuses on a rights-based argument as a means both for challenging the constitutionality of the marital rape exemption and for achieving gender equality. The constitutional right to equal protection of the law and the constitutional right to privacy agruably threaten the constitutionality of the marital rape exemption.

The second part of Part IV agrues that although a rights-based approach, is a powerful one to take in court to render the exemption invalid, it may not be the wisest legal avenue by which to challenge the marital exemption, because it fails to identify marital rape as part of the broader problem of women's subordinaiton. [101] The gender discrimination approachf might, however, very well serve this purpose, especially after the Supreme Court's decision in *Personnel Adminsitraotr v. Feeney.* [102]

A (i) - The Marital Rape Exemption Violates Equal Protection

The equal protection clause of the United States Constitution guarantees that individuals who are similarly situated will be similarly treated. The equal protection clause does not prevent discrimination; it requires that a classification cannot be arbitrary, cannot unfairly restrict fundamental rights, and cannot be founded on discriminatory criteria. Therefore, statutory schemes which deny identical tratment for identical acts are ripe for equal protection challenges. [103] A statute which treats males and females differently violates the equal protection clause unless the statute's classification scheme is substantially related to an important governmental interest. [104]

Classifications based on marital status, those which treat married individuals differently from unmarried individuals for the same crime, are subject to the middle tier scrutiny afforded gender classifications. [105] In *Eisenstadt v. Baird,* [106] the Supreme Court found a classification scheme discriminating against unmarried persons to be unconstitutional. More than a decade after *Eisenstadt* was decided, a lower court held that New York's marital rape exemption violated the rights of married women. [107] In this landmark case, the court rejected all the traditional policy arguments for sustaining the marital rape exemption and found there was no governmental interest protected by the marital rape exemption. [108]

Other courts that have considered equal protection challenges to their marital rape exemptions have steadfastly held to the argument that only females can become pregnant and that the state's primary legitimate interest is the pregnancy prevention of young, often unwed women, [109] in order to show that gender-based classification was substantially related to the achievement of the governmental objective and therefore within constitutional limits. However, following this rationale, the courts failed to analyze the definition for the crime of rape, and it overlooked the fact that rape is not merely intercourse but a crime of violence. Following this line of reasoning, the statute's purpose should be to prevent the violent intrusion of a person's body, and thus prevention of pregnancy is not a governmental interest substantially related, nor rationally related, to the achievement of preventing violence and intrusion.

In the past, courts were more prepared to uphold gender-based rape

statutes upon finding of an important governmental interest that is substantially related to the gender-based classification scheme. [110] However, lately, a trend of holdings that statutes with marital rape exemptions violate the equal protection clause of the fourteenth amendment has emerged. [111] Hopefully, this step in the right direction on the part of the courts, will be coupled with willing and apt responses on the part of the state legislatures.

A(ii)- The Marital Exemption Violates the Right to Privacy

Although the constitution does not explicity guarantee a right to privacy, the Supreme Court has established the constitutional status this right in such cases as *Griswold v. Connecticut,* [112] *Eisenstadt v. Baird,* [113] and *Roe v. Wade.* [114] In Eisenstadt, the Court refined the contours of personal privacy to mean "the right of the *individual*...to be free from individual governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [115]

The right to privacy has been held to protect bodily integrity, [116] reproductive freedom, [117] and individual autonomy. [118] The marital rape exemption allows a husband to violate his wife's bodily integrity. It allows him to impregnate her against her will in denial of her reproductive freedom. And perhaps most importantly, the exemption extinguishes a married woman's autonomy in one of the most personal and intimate of all human interactions. The state thus violates the privacy rights of married women by allowing their husbands to rape them without fear of prosecution.

State laws that interfere with the right to privacy in this way must be narrowly tailored to further a compelling state interest. [119] Some of the state interests behind marital rape (which have already been examined) include respecting marital privacy, encouraging the reconciliation of spouses and obviating the evidentiary problem of proving lack of consent in marital rape claims but none of these withstands the test of intermediate scrutiny and therefore fall short of satisfying a strict standard of judicial review. [120]

A second challenge to the marital rape exemption within the ambit of the right to privacy is that is unconstitutionally burdens the privacy rights of all women. [121] Specifically, the marital rape exemption falls within the doctrin of "unconsitutional conditions" which holds that a state may not condition the receipt of government benefits upon the nonassertion of a constitutional right. [122] The marital rape exemtpion unconsitutionally conditions women's receipt of governmental benefits in two distinct ways. First, the exemption conditions the benefit of marriage upon women's forfeiture of their rights to bodily integrity, procreative freedom, and individual autonomy. [123] Second, the exemption works in reverse by conditioning the benefit of protection from rape upon women's forfeiture of their fundamental right to marry. [124] Thus, the exemption forces all women to surrender either their right to marry or their right to privacy. Strict scrutiny is applied by the courts in such cases, and since as has been indicated, none of the traditional rationales for the marital exemption withstand intermediate scrutiny, they would certainly fail this higher level of review. In short, because the state has no compelling governmental interest in permitting marital rape, only statutes which eliminate the marital

rape exemption can withstand constitutional scrutiny based on the right to privacy. [125]

B - Limitations of Rights Approach and a Possibly More Successful Alternative Under ***Personnel Administrator v. Feeney***

Undeniably, the rights approach as a challenge for the constitutionality of the marital rape exemption provides a powerful argument. But a strategy based on the gender discrimination approach precisely because of its broader political perspective might be a wiser medium to ensure the outlawing of the marital rape exemption.

In the sphere of sexuality, the values of security and freedom were and still are at loggerheads. In the context of marital rape, a woman's right to marital privacy (individual security) confronts a man's right to marital privacy (freedom from state intrusion.) The rights approach offers no perspective to help us decide whether the man's right to marifal privacy is more or less fundamental than the woman's right to bodily integrity. Besides, the rights approach seems to ignore the only true ground of decision in this context: the reality of women's sexual subordination to man. A rights approach individualizes the problem of marital rape by defining it in terms of individual rights. The evil of marital rape must be corrected because it is the sexual subordination of one group in society to another rather than because it is a violation of individual rights. This facilitates the creation of bonds among women who would be thus empowered as a group - the way is thus paved for a challenge based on the gender approach.

In *Personnel Administrator v. Feeney,* [126] the Supreme Court announced a test for evalutating gender-neutral statutes that allegedly discriminate on the basis of sex. *Feeny* asks whether the facially neutral law reflects covert discriminatory intent. The answer is in the affirmative if (i) adverse effects and (ii) legislative history reveal such intent

The marital rape exemption must therefore be examined under these two miscroscopes. Women, unarguably suffer adverse effects when they are raped by their husbands. The exemption indirectly sanctions sexual violence against women and thus perpetrates the myth of the powerless, subordinate female. Also, the exemption perpetuates "archaic and overbroad" generalzations concering the proper roles of the sexes. [127] In recent cases, the Supreme Court has made clear that laws promoting gender stereotypes must be subject to heightened scrutiny, because they freeze biology into social destiny. [128]

The primary evidence of discriminatory intent is derived from the historical background and legislative history of a law. We must have proof, therefore, that the legislative adopted the marital rape exemption at least in part "because of" its adverse effects upon women. Although legilative records of the adoption of marital rape exemption are not available, judical opinion and treatises from the nineteenth century confirm that the marital rape exemption was codified from the common law which was in turn based on Hale's doctrine of implied consent. This theory, as discussed above, reflects a discriminatory vision of women as property and as naturally destined for life in the private sphere. This discriminatory purpose clearly constituted the basis for the exemption at the time of the adoption and served as the exemption's primary rationale well into

the twentieth century. The contemporary justifications for the marital rape exemption, although different in form from their nineteenth century predecessors, continue to reflect an underlying adherence to an ideology of female inferiority. [129]

The marital rape exemption has passed both tests - there is proof of adverse impact and legislative intent. For these reasons, it must be unconstitutional.

V. Possible Statutory Reform

Marital rape is definitely out of the closet and there is not even an outside chance that it will be shoved back again. Whether changes in rape laws come about by court decisions or legislation, advocates agree that marital rape must be made a crime in all fifty states.

Statutes avoiding all archaic policy justifiactions and explicitly providing punishment for marital rape are needed throughout the nation. The most enlightened approach would settle equal protection problems with a gender-neutral sexual offense which punishes both men and women for any penetration, however slight, and for all other deviant sex crimes.

New Hampshire has lately revised its sexual assaults and related offenses statute. [130] A cursory look at this newly amended statute gives an idea of how an enlightened statutory approach should be. The statute is gender neutral and specifically disallows the traditional marital rape exemption. Since the perpetrator is defined as a "person" [131] then both male and female victims are afforded equal protection under the law.

The statute also provides for appropriate graduated penalties for varying levels of sexual assault. Most importantly, however, the statute explicitly states that "(a)n actor commits a crime under this chapter even thought the victim is the actor's legal spouse." [132] This specific language leaves no doubt that the common law marital rape exemption is no longer part of New Hampshire's law; and it will serve to quash arguments that the statute was silent on the issue because it was not intended to punish spouses.

More and more states should subscribe to this approach and reform their statutes accordingly. Making sure that the three important elements of (1) gender neutrality, (2) gradation of penalties, (3) explicit abolition of the marital exemption are included therein in clear-cut language. Cohabitors and voluntary companions should be included in the definition of "legal spouse".

Conclusion

The role of criminal law in our society is to label those behaviours which are so reprehensible that a civilized society will not tolerate them. As this paper has analyzed, marital rape is very much a reality in our society. It is not only the role of social scientists to acknowledge and deal with this reality, but it is primarly the duty of the state legislatures and the courts to protect women, as a group from such a crime of violence. The evolution of women's status from chattel to full-fledged person with all the rights and responsibilities of citizenship forces the legal system to rethink many of its platitudes and policies, and to help shape attitudes that view rape as a violent act in *any* context - marital

rape is therefore no exception. The time has to come to realize that no legal, political or moral justifications exist to allow a man to use force to invade his wife's bodily privacy.

Ironically, the legacy of Hale's flippant and unfounded statement that a husband cannot rape his wife [133] continues to ravage American women - even though some progressive states [134] have realized and endorsed its anachronism and unconstitutionality. Unfortunately, however, even though the case for total reform of archaic American rape laws is compelling, most legislatures are unwilling to correct the evils fostered by the marital rape exemption. The courts in some states have been more responsive, albeit slow, in taking the initiative. By focusing upon the harm done to women as a group, and identifying the issue as inequality, American legislatures and courts must first acknowledge rape for what it is - a crime of violence to which no individual, married or single should be subjected - and then proceed to abolish, in no unclear terms, the marital rape exemption and provide for prosecution of marital rape.

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New York has removed its marital rape exemption through judicial action. See People v. Liberta, 64 N.Y. 2d 152, 474 N.E. 2d 567 (1984), cert. denied, 105 S. Ct.2029 (1985). The Georgia judiciary has held that its rape statute, which is silent on marital rape, does not implicitly incorporate the common law exemption. See Warren v. State, 225 Ga. 151, 336 S.E. 2d 221 (1985).

2 National Center on Women and Family Law estimates that ⅓ of the women who retreat to shelters have been sexually assaulted by their husbands. D. Martin, *Battered Wives,* 226 (1983) p. 26 Diana E.H. Russell's study published in *Rape in Marriage* (1982) found that 16 percent of the women surveyed were victims of rape or attempted rape by their husbands or ex-husbands. Id. at 57.

2. Also, Russell infers that more than 1 in every 7 women who have ever been married have been raped in marriage. Id. at_____

3 For example, in 1979, California state senator Bob Wilson protested a California law allowing prosecution for marital rape and stated, "If you can't rape your wife, who can you rape?" Id. at 26.

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36 Id at 51-52.
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38 1 W. Blackstone, Commentaries, *442.
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APPENDIX I

FORM DRAWN UP BY MONTANA LEGISLATION

Due to a situation in Oregon in which a man is on trial for raping his wife, the following "consent form" is being furnished as a public service for Montana's males.
It is recommended that no sexual contact be made by Montana's males with their wives until this form has been filled out and signed.
Remember, tonight she may be willing, but tomorrow YOU MAY BE CHARGED WITH RAPE.

Agreement

I, _____, do hereby on this _____ day of _____

(Check one)

_____ Beg
_____ Request
_____ Agree
_____ Grudingly agree (please pull down my nightgown when you're through)

to have sexual relations with my husband between the hours of _____ and _____

_____
(Signed)

Public Service Form No. 61600.

Legally, this form is but a one-time agreement, of course. Any sexual contact other than on the above date and at the above time shall require a new agreement.

Additional copies of this form can be obtained from State Senator Pat Regan. Detach form on dotted lines.