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The Marital Rape Exemption in Pennsylvania: "With This Ring..."

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I. Introduction

> [T]he husband cannot be guilty 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.[1]
> Lord Matthew Hale

The common law rule that a husband who has forced intercourse with his wife may not be prosecuted for "rape" had its genesis in this pronouncement by Lord Matthew Hale. At the time of Lord Hale's statement, no *legal* authority existed to support this rationale.[2]

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1. HALE, PLEAS OF THE CROWN 628, 629 (1847). This statement, made by the seventeenth century British jurist, is the most famous and most frequently cited rationale for adherence to the common law rule that a husband may not be prosecuted for committing forced intercourse upon his wife. *See, e.g.,* People v. Damen, 28 Ill. 2d 464, 466, 193 N.E.2d 25, 27 (1963); People v. Pizzura, 211 Mich. 71, 73, 178 N.W. 235, 236 (1920); People v. Meli, 193 N.Y.S. 365, 366-67 (Sup. Ct. 1922); Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905); Commonwealth v. Fogerty, 74 Mass. (8 Gray) 389 (1857); Regina v. Clarke, 33 Crim. App. 216, 217, 2 All E.R. 448, 449 (1949). *But cf.* State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd,* 85 N.J. 183, 426 A.2d 38 (1981). The *Smith* courts launched an unprecedented attack upon the principle that a husband cannot be guilty of the rape of his wife. Lord Hale's rationale was criticized and its applicability to modern society questioned throughout the *Smith* opinions "In the years since Hale's formulation of the rule, attitudes towards the permanency of marriage have changed and divorce has become far easier to obtain. The rule, formulated under vastly different conditions, need not prevail when those conditions have changed." *Id.* at 201, 426 A.2d at 42.

Lord Hale couched this principle in terms of contract law. Under the contract approach, consent to the marital right of intercourse is irrevocably given by the wife at the time of marriage. This view, commonly referred to as the "implied consent theory" or the "contractual consent doctrines" is based upon the proposition that the matrimonial relationship imposes an obligation on the wife. In essence, the marital right of the husband exists, not by virtue of consent given at the time of each act of intercourse, as in the case of unmarried persons, but by virtue of the consent given by the wife at the time of the marriage. *See generally* Coddington, *Rape of a Wife,* 96 JUST. P. 199 (1932); Howard, *Rape of a Wife,* 118 JUST. P. 99 (1954); Neville, *Rape in Early English Law,* 121 JUST. P. 223 (1957).

2. In his dissent in Regina v. Clarence, 22 Q.B.D. 23, 57 (1888), Judge Field stated:

> [T]he authority of Hale, C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopt it. There may, I think, be many 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.

See also State v. Smith, 85 N.J. 193, 200, 426 A.2d 38, 41 (1981), "Hale cited no authority for this proposition and we have found none in earlier writers. Thus the marital exemption rule expressly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some 300 years ago."

For a review of earlier English law revealing concepts purportedly similar to Lord Hale's,

In the United States, the marital consent doctrine as articulated previously still pervades the statutes of virtually every jurisdiction.[3] The crime of rape is recognized as an act of violence that subjects the victim to physical and emotional pain and degradation,[4] but the same act, if it occurs between spouses, is not recognized as an offense in the majority of states.[5] Paradoxically, although marriage is viewed as an institution of vital interest to society and the state,[6] an entire class of women, simply by virtue of their marital status, are denied legal protection against forced sexual intercourse. Currently, Pennsylvania offers only minimal legal protection to a wife who is forced by her husband to submit to sexual intercourse.[7]

The seventeenth century view that the marriage contract contained an implied nonretractable consent to intercourse on the part of the wife[8] was rooted in the belief that a woman was the property of her mate.[9] This attitude reflected the proposition that upon marriage women forfeited their right to exercise free will in their sexual

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see Comment, *The Marital Exception to Rape: Past, Present and Future* [1978] DET. L. REV. 261, 263 n.15 [hereinafter cited as *Marital Exception*]. *See also* Part V,B. *infra.*

3. *See* Part III.A. *infra.*

4. Judicial opinions recognizing the effects of rape on the victim commonly state that "[t]he essence of the crime [of rape] is . . . not the fact of intercourse, but the injury and outrage to the modesty and feelings of the woman, by means of the carnal knowledge effected by force." State v. Castner, 122 Me. 106, 106, 119 A. 112, 112 (1921). *See also* State v. Romo, 66 Ariz. 174, 189, 185 P.2d 757, 767 (1947). More recently, the court in State v. Smith, 148 N.J. Super. 219, 226, 372 A.2d 386, 390 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981) stated: "Rape subjugates and humiliates the woman, leaving her with little retaliatory capability. . . ."

Numerous studies of the psychological aftermath of rape have been completed. For example, the Philadelphia Sexual Assault Victim Study, compiled by the Center for Rape Concern in Philadelphia, Pennsylvania, systematically explored the consequences of rape. The survey included over 1400 women of all ages who reported a rape or sexual assault to authorities in Philadelphia. Data analysis revealed particular adjustment problems in the following areas: (1) increased fear of being alone on the street; (2) decreased social activities; (3) changed eating and sleeping habits, including increased nightmares; (4) worsened relations with family, husband or boyfriend, and (5) increased negative feelings toward known or unknown men. *See* T. McCahill, L. Meyer & A. Fischman, THE AFTERMATH OF RAPE (1979). *See also* D. Chapell, R. Geis & G. Geis, FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER (1977).

5. *See* note 40 *infra.*

6. *See* State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981). "It has always been recognized that 'marriage contracts cannot be placed on par with ordinary contractual obligations' because, '[I]n every marriage contract, the State is an interested party.' " 148 N.J. Super. at 228, 372 A.2d at 390 (quoting PLOSCOWE, SEX AND THE LAW 3 (1951)). *See also* Sweigart v. State, 213 Ind. 157, 12 N.E.2d 134 (1938), which described marriage as "an institution involving the highest interest of society and is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State." *Id.* at 162, 12 N.E.2d at 138; Pisciotta v. Buccino, 22 N.J. Super. 114, 91 A.2d 629 (App. Div. 1952).

7. *See* note 12 and accompanying text *infra.*

8. *See* note 1 and accompanying text *supra.*

9. As the trial court in State v. Smith, 148 N.J. Super. 219, 229, 372 A.2d 386, 391 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981), commented, "A close examination of the historical origins of [the immunity of a husband for rape] reveal [*sic*] that it is rooted in the ancient concepts of a wife as a chattel and the inviolability of the husband's supreme role in a marriage relationship."

interactions. This proposition is clearly inconsistent with twentieth century standards.[10] Indeed, attitudes concerning women and marriage have changed so drastically in the past centuries, most pervasively in the past decade, that no reasonable justification exists for the continued exemption of a husband from criminal prosecution for the rape of his wife.[11]

Pennsylvania presently affords protection to a married woman from intercourse forced by her husband only in two situations: (1) if she is living in a residence separate from her husband, or (2) if she is living in the same residence with her husband but under the terms of a written separation agreement or court order.[12] If a woman in Pennsylvania is unable or unwilling to seek one of these arrangements,[13] however, her husband has "an unbridled right, *protected by law,* to force himself sexually upon her at any time he chooses."[14] This comment suggests consideration and rectification of the inadequate protection given to wives raped by their husbands. A discussion of the historical rationale of the marital rape exemption is

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See J. FLEMING, STOPPING WIFE ABUSE: A GUIDE TO THE EMOTIONAL, PSYCHOLOGICAL, AND LEGAL IMPLICATIONS FOR THE ABUSED WOMAN AND THOSE HELPING HER 3 (1979).

A related rationale underlying the immunity of the husband derives from the common law "unity of person" principle. As Blackstone described: "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 that of the husband under whose wing, protection and cover, she performs every thing." 1 BLACKSTONE, COMMENTARIES 442 (1765). *See also* Comment, *"'A Little Dearer Than His Horse'": Legal Stereotypes and the Feminine Personality,* 6 HARV. C.R.-C.L. L. REV. 259 (1971); G. BARKER-BENFIELD, THE HORRORS OF THE HALF-KNOWN LIFE (1976).

10. *See, e.g.,* L. KANTOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969).

11. While such concepts [as viewing the wife as the chattel of the husband] standing alone have long since disappeared, American courts in their mechanistic application of this principle have failed to come to grips with the changes that have occurred in the status of a wife since the 17th century. In other areas modern jurisprudence has consistently refused to permit such male dominated concepts to stand in the way of equal protection of the laws.

State v. Smith, 148 N.J. Super. 219, 229, 372 A.2d 386, 391 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981).

12. 18 PA. CONST. STAT. ANN. § 3103 (Purdon Supp. 1981) provides:

Whenever in this chapter [sexual offenses] the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship: Provided, however, That the exclusion shall be inoperative as respects spouses living in separate residences, or in the same residence but under terms of a written separation agreement or an order of a court of record. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.

Previously, spouses were required to live apart under a decree of judicial separation for the exclusion to be inoperative.

13. Reasons that wives remain with husbands who rape them may include the lack of financial means to leave; their fear of what their relatives, friends, and neighbors will think; or their fear of a violent husband. Additionally, wives may remain because they are socially conditioned to preserve their marriages at any cost. D. MARTIN, BATTERED WIVES (1976) at 72-86.

14. State v. Smith, 148 N.J. Super. 219, 227, 372 A.2d 386, 390 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981).

presented with an examination of the various statutory approaches allowing for a spousal prosecution. Arguments are offered to support the abolition of the marital rape exemption, and the difficulties of enforcement of a marital rape statute are analyzed. Several alternative legal protections are suggested in an attempt to present a viable solution to the marital rape problem.

II. Historical Analysis

A. Common Law: Husband as Perpetrator

The notion that a husband who rapes his wife lacks criminal liability first appeared in American jurisprudence as dictum in 1857 in *Commonwealth v. Fogerty.*[15] The Massachusetts court announced that it would always be a competent defense to show that the alleged victim was actually the wife of the defendant.[16] This grant of immunity virtually precluded a married woman from filing charges against her spouse for rape or assault with intent to rape.

Lord Hale's theory that upon marriage a wife automatically consents to the husband's demand of his "marital right of intercourse,"[17] controlled even when a wife *explicitly* denied her consent to cohabitation and sexual intercourse. Thus, in *Frazier v. State,*[18] the court steadfastly held that although the couple had separated, the husband could not be guilty of forcing intercourse upon his wife. One of the main reasons for this decision was "the matrimonial consent which [the woman] gives when she assumes the marriage relation."[19] The *Frazier* decision later served as the basis for the reversal of a husband's conviction for an assault with the intent to rape his wife in *Duckett v. State.*[20] The *Duckett* court found no violation of the law solely because the record indicated that the prosecutrix and accused were man and wife at the time of the offense.

Only the right of the wife "to protect her health and her life from the ungoverned lust of her husband"[21] limited the husband's

15. 74 Mass. (8 Gray) 489 (1857).

16. *Id.* at 491.

17. *See* note 1 and accompanying text *supra. Accord,* 13 R.C.L. 988 (1916): "[I]n the exercise of this marital right [the husband] cannot be guilty of the offense of rape." *Cf.* S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975). "[C]ompulsory sexual intercourse is *not* a husband's *right* in marriage, for such a 'right' gives lie to any concept of equality and human dignity." *Id.* at 381 (emphasis added).

18. 48 Tex. Crim. 142, 86 S.W. 754 (1905). In this case, the couple was denied a divorce for unspecified reasons. Thereafter, they continued to live in the same house, but did not share the same bedroom.

19. *Id.* at 143, 86 S.W. at 755. "[W]e are aware of no case holding that the husband can be guilty of the offense where he himself is the actual party to the intercourse." *Id. See also* State v. Haines, 51 La. 731, 25 So. 372 (1899) (husband cannot be guilty as principal in rape of wife).

20. 149 Tex. Crim. 100, 191 S.W.2d 879 (1946).

21. Hines v. Hines, 192 Iowa 569, 571, 185 N.W. 91, 92 (1921) (wife's divorce action

right to enforce a sexual connection.[22] Such extreme action by the husband was seen as a species of personal violence, unjustifiable under the claim of lawful exercise of marital rights.[23] Although considerations of "health and decency"[24] qualified the husband's rights, the wife still had to establish that excessive sexual demands, resulting in actual physical illness, had occurred; only then would courts afford the wife her single remedy — divorce.[25]

Following the award of a divorce decree, protection was afforded to the woman against sexual attack by her ex-mate.[26] This position, consistent with the consent doctrine, assumed that the wife's consent to all sexual relations with her husband ceased when the marriage was dissolved. Therefore, in *State v. Parsons,*[27] the

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alleged cruel and inhuman treatment and personal indignities from excessive demands for sexual intercourse that impaired her health and endangered her life).

22. 13 R.C.L. 988 (1916). "[T]hough technically her person is as sacred from his violence as from that of any other person, it is his legal right to enforce sexual connection." *Id.* at 1401.

23. Hines v. Hines, 192 Iowa 569, 570, 185 N.W. 91, 92 (1921). The *Hines* court declared:

> [T]hese [marital] rights are reciprocal, and exist on the part of the wife as distinctly as on the part of the husband. It is true that marital rights involve marital duties, and include the duty of forebearance on the part of the husband at the reasonable request of the wife, as well as the duty of submission on the part of the wife at the reasonable request of the husband. . . . To unduly emphasize either would be manifestly unjust.

Id.

24. Anonomyous, 206 Ala. 295, 297, 89 So. 462, 464 (1921). The wife wished to abstain from sexual intercourse to prevent the birth of more children because of the husband's financial inability to properly care for them. Although the Alabama court recognized that the "marital right" to sexual intercourse was not absolute, it rejected this reason for the wife's refusal. The court held that "[c]omplainant's summary denial of the right cannot upon the ground averred, be excused, much less justified, and she was by her own admission guilty of a grave breach of marital duty." *Id.*

25. Divorces were frequently granted on the grounds of cruelty or indignities arising from excessive sexual demands by the husband. *E.g.,* Cimijotti v. Cimijotti, 255 Iowa 77, 81, 121 N.W.2d 537, 541 (1963) (evidence of the adverse effect of excessive sexual demands made by defendant-husband on plaintiff-wife sufficient to uphold award of divorce); Griest v. Griest, 154 Md. 696, 140 A. 590 (1928) (husband's unreasonable insistence on marital rights during menopause amounted to cruelty entitling wife to divorce); Diehl v. Diehl, 188 Pa. Super. Ct. 491, 495, 149 A.2d 133, 135 (1959) ("[s]exual excess, although not endangering life, if it renders the condition of the spouse intolerable and life burdensome, constitutes indignities to the person").

Some courts have required a showing that the excessive demands resulted in injury to the wife's physical health. *See, e.g.,* Obennoskey v. Obennoskey, 215 Ark. 358, 361, 220 S.W.2d 610, 612 (1949); Mayhew v. Mayhew, 61 Conn. 233, 23 A. 966 (1891); Norvell v. Norvell, 194 S.W.2d 270, 272 (Tex. Civ. App. 1946). Other courts, however, have deemed it sufficient for the wife to show resultant mental disturbance:

> There are many courses of conduct other than outright physical violence which have been held by this court to satisfy these requirements [for cruel and inhuman treatment]. Any mistreatment which deprives the person of needed rest and peace of mind and affects the nervous system and bodily functions to the extent that the health is undermined, endangers the life as effectively as physical violence. These include . . . excessive sexual demands.

Cimijotti v. Cimijotti, 255 Iowa 77, 79, 121 N.W.2d 537, 538 (1963) (citations omitted); Hines v. Hines, 192 Iowa 569, 185 N.W. 91 (1921).

26. *See* Baugh v. State, 402 S.W.2d 768 (Tex. Crim. 1966) (prosecutrix and defendant were no longer husband and wife on evening of day prosectrix was granted divorce from defendant so that defendant's acts of forcing prosecutrix to have intercourse with him against her will on two occasions that evening constituted rape).

27. 285 S.W. 412 (Mo. 1926).

court refused to allow the previous marriage of the defendant to the prosecuting witness to "excuse, mitigate or palliate the offense."[28]

Some courts still rule that a wife is "irrebutably presumed to consent to sexual relations with her husband even if forcible and without consent."[29] The consent theory has been used to deny alimony to a wife that refuses, while married, to engage in normal sexual relations with her husband.[30] The wife's actions, "without any attempt to explain or justify the refusal, such as prior outrageous behavior by the denied spouse, constitutes cruel treatment and outrage of such nature as to render living together insupportable."[31]

B. Early Statutory Application: Husband as Perpetrator

During the middle and late nineteenth century, many states codified the English common law and incorporated the spousal exclusion into the statutory definition of rape. In those few states that did not codify the spousal exemption, judicial interpretation incorporated the exception.[32] Until recently, therefore, virtually all jurisdictions defined rape as any "unlawful carnal knowledge of a female *not the wife* of the defendant."[33] In fact, many decisions under such statutes held that an indictment was fatally defective if it failed to allege that the complainant was *not* the wife of the accused.[34]

C. Husband as Aider and Abettor

While a husband was personally able to force sexual intercourse upon his wife without incurring criminal liability, the common law rule did not allow a husband to assist or compel another man to rape his wife. Lord Hale believed that a wife gave her husband unbridled access to her body, but he conceded that she was "not to be by him prostituted to another."[35] The husband's presence during the act made him an abettor to the crime and therefore indictable as a prin-

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28. *Id.* at 412.

29. State v. Bell, 90 N.M. 134, 140, 560 P.2d 925, 931 (1977).

30. LeBlanc v. LeBlanc, 354 So. 2d 704 (La. 1978). "In this case Mrs. LeBlanc's failure to deny her husband's statements about refusal of sex leaves that testimony uncontradicted. She has thus failed to prove her entitlement to alimony." *Id.* at 705.

31. *Id.* at 705. *But cf.,* Hinkle v. Hinkle, 209 Ga. 554, 556, 74 S.E.2d 657, 658 (1953) (denial of sex must be for a continued period before court will grant divorce).

32. *See* note 141 and accompanying text *infra.*

33. *See* note 40 and accompanying text *infra.*

34. Strict constructionist courts required that the indictment specifically aver that the female was not the wife of the accused, *see, e.g.,* People v. Miles, 9 Cal. App. 312, 101 P. 525 (1908); People v. Kingcannon, 276 Ill. 251, 114 N.E. 508 (1916); Duggins v. State, 76 Okla. Crim. 168, 135 P.2d 347 (1943); Young v. Oklahoma, 8 Okla. 525, 58 P. 724 (1899); Dudley v. State, 37 Tex. Crim. 543, 40 S.W. 505 (1897). Other courts, however, did not declare the indictment insufficient for the failure to aver this status. *See* Curtis v. State, 89 Ark. 394, 117 S.W. 521 (1909); Commonwealth v. Landis, 129 Ky. 445, 112 S.W. 581 (1908); State v. Morrison, 46 Mont. 84, 125 P. 649 (1912).

35. 1 HALE, PLEAS OF THE CROWN 628, 630 (1847).

cipal.[36]

Consequently, by judicial declaration and uniform statutory definition, a husband could be prosecuted for the rape, or the assault with the intent to rape, of his wife only by "procuring, aiding, abetting or encouraging another to commit these offenses."[37] Originally, the exoneration or acquittal of the actual perpetrator was a viable defense for a husband charged as an accessory.[38] As the distinction between first and second degree principals dissolved, however, courts tried and convicted husbands as aiders, regardless of the prosecutorial status of the principal.[39]

III. Statutory Status of the Rule

A. State Statutes

The majority of states retain by statute the principle that a husband is legally incapable of raping his wife.[40] A growing minority, however, has recognized the social significance of this issue, and has revised pertinent criminal statutes to allow prosecution of husbands

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36. *Id.* In the absence of collusion, however, the husband was found to be the "sole perpetrator."

37. State v. Dowell, 106 N.C. 722, 724, 11 S.E. 525, 526 (1890). *Accord*, Elliott v. State, 190 Ga. 803, 10 S.E.2d 843 (1940); People v. Chapman, 62 Mich. 280, 28 N.W. 896 (1886); Kitchen v. State, 101 Tex. Crim, 439, 276 S.W. 252 (1925).

38. *See* State v. Haines, 51 La. 731, 25 So. 372 (1899) (principal in second degree cannot be found guilty unless principal in first degree is actually found to have perpetrated the act); Myers v. State, 19 Okla. Crim. 129, 197 P. 884 (1921).

39. *E.g.*, Cody v. State, 361 P.2d 307 (Okla. 1961), overruling Myers v. State, 19 Okla. Crim. 129, 197 P. 884 (1921). *See also* Rozell v. State, 502 S.W.2d 16 (Tex. 1973) (actual perpetrator acquitted, defendant convicted as a principal after he hit his wife and held her legs during the act).

40. In the following jurisdictions, statutes specifically provide that rape is carnal knowledge of a man against a woman *not his wife*: ARIZ. REV. STAT. ANN. § 13-1406 (1978); CONN. GEN. STAT. ANN. § 53(a)-65(2)(3) (West Supp. 1981); ILL. ANN. STAT. ch. 38, § 11-1(a) (Smith-Hurd) (1979); IND. CODE ANN. § 35-42-4-1(b) (1979); KAN. STAT. ANN., § 21-3502(1) (Supp. 1979); KY. REV. STAT. ANN. § 510.010(8) (Baldwin 1975); LA. REV. STAT. ANN. § 14:41 (West Supp. 1981); ME. REV. STAT. ANN. tit. 17-A, § 252(B) (Supp. 1980); MO. ANN. STAT. § 566.030 (Vernon Supp. 1981); MONT. REV. CODE ANN. § 45-5-503 (1979); N.M. STAT. ANN. § 30-9-11 (1978); N.D. CENT. CODE § 12.1-20-02(1) (Supp. 1979); OHIO REV. CODE ANN. § 2907.05(A) (Baldwin 1979); OKLA. STAT. ANN. tit. 21, § 1111 (West 1958); R.I. GEN. LAWS § 11-37-1 (1979); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1980); TEX. PENAL CODE ANN. tit. 21, § 21.02(a) (Vernon 1974); UTAH CODE ANN. § 76-5-402(1) (Supp. 1979); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1980); WASH. REV. CODE ANN. § 9A.44.040 (Supp. 1981); W. VA. CODE § 61-8B-7(2) (1977); WIS. STAT. ANN. § 940.225(6) (West Supp. 1980-81); WYO. STAT. § 6-4-307 (1977).

The marital exemption from the definition of rape in other states is embodied in definitional provisions specifying that a "female," for the purpose of the sexual offense statutes, is "any female person who is *not married* to the actor." *See* ALA. CODE § 13A-6-60(4) (1975); N.Y. PENAL LAW § 130.00(4) (McKinney 1977).

In the following states, specific statutes exist which are entitled "Marital Exception": COLO. REV. STAT. § 18-3-409(1) (1978); IDAHO CODE § 18-6107 (1977); MD. CRIM CODE ANN. art. 27, § 464(D) (Supp. 1980); MICH. STAT. ANN. § 28.788(12) (Supp. 1981-82); NEV. REV. STAT. § 200.373 (1979); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1979); N.C. GEN. STAT. § 14-27.8 (1979); S.C. CODE § 16-3-658 (Supp. 1980); TENN. CODE ANN. § 39-3709 (Supp. 1980).

Thus, the common law rule is *explicitly* retained in 34 jurisdictions.

for raping their wives.[41] Current statutes reflect a wide range of requirements to be met before the marital rape exemption will be denied.[42]

Explicit recognition of a married woman's right to bring charges against her husband for forcible sexual intercourse exists in California,[43] New Jersey,[44] and Oregon.[45] Prosecution in these states is permitted at *any time* during the marital relationship; no requirement exists that formal steps be taken to dissolve the marriage. The California Penal Code contains two forcible sexual intercourse provisions,[46] one of which specifically addresses rape by a spouse.[47] The statute defines spousal rape as intercourse "accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury."[48] A violation of this spousal rape provision must be reported within thirty days of the occurrence to effect the arrest or prosecution of the perpetrator.[49] Punishment is set at either "imprisonment in the county jail for not more than one year or in the state prison for three, six, or eight years."[50]

The New Jersey Legislature revised its Code of Criminal Justice in 1979 to include spousal rape among the sexual assault provisions. Aggravated sexual assault is a crime of the first degree and is committed when an actor engages in an act of sexual penetration using "physical force or coercion and severe personal injury is sustained by the victim."[51] When sexual penetration occurs through the use of physical force or coercion, but no severe personal injury results, second degree sexual assault may be charged.[52] An explicit repeal of

41. The states which have to date amended their statutes include California, Iowa, Minnesota, Nebraska, New Jersey, and Oregon. *See* notes 43-45, 58, 59, 71 and accompanying text *infra.*

42. These statutes require some degree of dissolution of the marriage to take place before a husband may be prosecuted for the rape of his wife. Although some states end the marital exemption when the parties are separated under a court order, others require the parties to live apart under a separation agreement or order. *See* notes 57, 83 and and accompanying text *infra.*

43. CAL. PENAL CODE § 262(a) (West Supp. 1981) reads: "Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury on the spouse of another." This bill deleted the previous requirement that the spouse's resistance be overcome by force or violence.

44. N.J. STAT. ANN. § 2C:14-5(b) (West Supp. 1981): "No actor shall be presumed to be incapable of committing a crime under this chapter because of . . . marriage to the victim."

45. ORE. REV. STAT. § 163.375 (1979). Rape in the first degree now reads, "(1) A person who has sexual intercourse with a female commits the crime of rape in the first degree if: (a) The female is subjected to forcible compulsion by the male." The spousal exception was removed in 1977 when the definition of a female (any female not married to the actor) was removed. *See* ORE. REV. STAT. §163.305 § 163.475 (1977).

46. *See* CAL. PENAL CODE §§ 261-262 (West Supp. 1981).

47. *See* note 43 *supra.*

48. CAL. PENAL CODE § 262(a) (West Supp. 1981).

49. CAL. PENAL CODE § 262(b) (West Supp. 1981).

50. CAL. PENAL CODE § 264 (West Supp. 1981).

51. N.J. STAT. ANN. § 2C:14-2(a)(6) (West Supp. 1981).

52. N.J. STAT. ANN. § 2C:14-2(c)(1) (West Supp. 1981).

the common law spousal exception states that no actor shall be presumed incapable of committing sexual offenses because of marriage to the victim.[53]

In Oregon, "a person who has sexual intercourse with a female commits the crime of rape in the first degree if the female is subjected to forcible compulsion by the male."[54] The Oregon Legislative Assembly was the first to amend its crimes code to provide that the marital relationship of the parties does not prevent prosecution for any of the proscribed sexual offenses.[55] This significant statutory modification resulted in the widely publicized trial of John Rideout, the first husband prosecuted for the rape of his wife during their cohabitation.[56]

Other states have retreated from an absolute exemption of husbands, but a patchwork of provisions effectively maintains substantial prosecutorial barriers for the rape victim who is married to her assailant.[57] Minnesota,[58] Iowa,[59] and Nebraska,[60] however, have approached total abrogation of the marital rape exemption. The Minnesota enactments expressly delete the marital rape exception in cases of sexual contact or penetration in the following circumstances: (1) when the perpetrator uses force or coercion;[61] (2) when such force

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53. N.J. STAT. ANN. § 2C:14-5(b) (West Supp. 1981). *See* note 44 *supra.*

54. ORE. REV. STAT. § 163.275(1)(a) (1979).

55. The Oregon statutes were revised in 1977. The revision of the California and New Jersey provisions occurred in 1979).

56. State v. Rideout, [1979] 5 FAM. L. REP. (BNA) 2164.

57. The following states have a statutory marital exemption that is inapplicable, however, to married persons living in separate residences who have filed for divorce. IND. CODE ANN. § 35-42-4-1(b) (Burns 1979); ME. REV. STAT. ANN. tit. 17-A, § 251(A) (Supp. 1980); MD. CRIM. LAW CODE ANN. art. 27, § 464D (Supp. 1980) (divorce decree required); MICH. STAT. ANN. § 28.788(12) (Supp. 1981-82); MO. STAT. ANN. § 566.010(2) (Vernon Supp. 1981); NEV. REV. STAT. § 200.373(3) (1979). N.Y. PENAL LAW § 130.00(4) (McKinney Supp. 1980-81); N.C. GEN. STAT. § 14-27.8 (1979); R.I. GEN. LAWS § 11-37-1 (1979) (divorce decree required); S.C. CODE § 16-3-658 (Supp. 1980); TENN. CODE ANN. § 39.3709 (Supp. 1980); WIS. STAT. ANN. § 940.225(6) (West Supp. 1980-81).

In other states, the marital exemption terminates when the parties are living apart, whether or not a judicial separation decree is granted. *See, e.g.,* COLO. REV. STAT. § 18-3-409(2) (1978); IDAHO CODE § 18-6107(2) (1979) (180 day separation required); KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1975); UTAH CODE ANN. § 76-5-402(1) (Supp. 1979).

In the following states there is no exemption when the parties are living apart *or* have filed for legal separation or divorce: IDAHO CODE § 18-6107(1) (1979); MONT. REV. CODES ANN. § 45-5-506 (20 (1979); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1979); N.M. STAT. ANN. § 30-9-10(E) (1978); 18 PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1981).

58. MINN. STAT. ANN. § 609.341-609.351 (West Supp. 1981). "Nothing in this section shall be construed to prohibit or restrain the prosecution for any other offense committed by any person against his legal spouse." MINN. STAT. ANN. § 609.349 (West Supp. 1981). *See* notes 61-65 and accompanying the *infra.*

59. IOWA CODE ANN. §§ 709.1-709.10 (West 1979). *See* notes 66-70 and accompanying text *infra.*

60. NEB. REV. STAT. §§ 28-408.01 to 28-408.05 (1975). *See* note 71 and accompanying text *infra.*

61. MINN. STAT. ANN. § 609.344(c) (West Supp. 1981) (penetration); MINN. STAT. ANN. § 609.345(c) (West Supp. 1981) (contact).

or coercion causes personal injury to the victim;[62] (3) when the perpetrator is armed with a dangerous weapon and uses or threatens to use the weapon to cause submission;[63] and (4) when the circumstances of the attack cause the victim to reasonably fear imminent serious bodily harm.[64] The marital defense, however, extends to non-husband cohabitors and remains applicable when the victim is mentally or physically disabled. The defense also extends to cases of statutory rape.[65]

In Iowa, any sexual act between persons is deemed sexual abuse when the act is performed by force or against the will of the other.[66] A husband, therefore, is subject to criminal prosecution if, in the course of committing sexual abuse, he: (1) causes serious injury to his spouse;[67] (2) displays a deadly weapon in a threatening manner;[68] or (3) uses or threatens to use force which could result in death or serious injury to any person.[69] When, however, the sexual abuse occurs by the plain use of force, or against the will of the other, the husband is exempt from criminal prosecution. This immunity continues to exist because third degree sexual abuse can occur only "between persons who are not at the time cohabiting as husband and wife."[70] In essence, unless severe physical force or a weapon is used or threatened to be used against the wife-victim, her husband-assailant is not subject to criminal charges for sexual abuse.

The Nebraska Legislature amended its rape statutes to incorporate gender-neutral language.[71] Whether the legislature intended to abandon the spousal rape defense is an issue among commentators.[72] Neither the courts nor the legislature have definitively decided this question, but a strong presumption exists that spousal rape incidents

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62. MINN. STAT. ANN. § 609.342(e)(i) (West Supp. 1981) (penetration); MINN. STAT. ANN. § 609.343(e)(i) (West Supp. 1981) (contact).

63. MINN. STAT. ANN. § 609.342(d) (West Supp. 1981) (penetration); MINN. STAT. ANN. § 609.343(d) (West Supp. 1981) (contact).

64. MINN. STAT. ANN. § 609.342(c) (West Supp. 1981) (penetration); MINN. STAT. ANN. § 609.343(c) (West Supp. 1981) (contact).

65. MINN. STAT. ANN. § 609.349 (West Supp. 1981).

66. IOWA CODE ANN. § 709.1(1) (West 1979) states: "In any case where the consent or acquiescence of the other is procured by threats of violence toward any person, the act is done against the will of the other."

67. IOWA CODE ANN. § 709.2 (West 1979).

68. IOWA CODE ANN. § 709.3(1) (West 1979).

69. IOWA CODE ANN. § 709.3(1) (West 1979).

70. IOWA CODE ANN. § 709.4 (West 1979).

71. NEB. REV. STAT. §§ 28.408.01.-28.408.05 (1975) ("any person who subjects another person . . .").

72. Several commentators recognize that the Nebraska statutes are silent on the immunity issue. *See Marital Exception, supra* note 2 at 265 n.24; Comment, *The Marital Rape Exemption,* 52 N.Y.U. L. REV. 306, 318 n.77 (1977) [hereinafter cited as Marital Rape].

Other commentators, however, have concluded that Nebraska allows the prosecution of a husband who rapes his wife. *See, e.g.,* S. Barry, *Spousal Rape: The Uncommon Law,* 66 A.B.A. JOURNAL 1088, 1090 (Sept. 1980).

may be prosecuted.[73] The absence of a separate provision, common in other state statutes, that specifically limits or denies a husband's liability, supports the assumption that the legislature intended to protect married women from rape by their husbands.[74] Similarly, Hawaii deleted the marital rape exemption by incorporating gender-neutral terms into its rape statute.[75] Unlike Nebraska, however, Hawaii exempts "voluntary social companions" from criminal liability for rape in the first degree,[76] which arguably operates to except spouses or cohabitants.[77]

The marital rape law in Delaware is particularly unclear. The exemption has been removed from first and second degree rape offenses,[78] but a female who was the "date" of the defendant and who previously engaged in sexual *contact* with him is not protected from subsequent nonconsensual intercourse.[79] Although judicially untested, this exemption may serve to negate criminal liability for spouses or cohabitants who are considered "voluntary social companions" for purposes of the statute.

The remaining jurisdictions require varying degrees of dissolution of the marriage in order to charge a husband with the rape of his wife.[80] Some state classifications require the couple to live in separate residences. Others require separate residences and filed divorce or separation petitions.[81] Several jurisdictions disallow the marital

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73. This presumption is based on several factors. First, the intent of the legislature is expounded in NEB. REV. STAT. § 28.408.01 (1975): "It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of *the victim* at all stages of judicial process." (emphasis added). Second, the victim is described as "the person alleging to have been sexually molested." NEB. REV. STAT. § 28-408.02(6) (1975). Third, the absence of a "not his spouse" clause, coupled with the absence of a reference to marriage or spouses in the statute, allows a strong inference that a spousal prosecution for rape is available.

74. *See, e.g.,* COLO. REV. STAT. § 18-3-409(2) (1978) (exception terminates where spouses live apart whether or not under a decree of judicial separation). *Cf.,* MD. CRIM. LAW ANN. art. 27, § 464D (Supp. 1980) (parties must be living apart pursuant to divorce decree for husband to be liable).

75. HAWAII REV. STAT. §§ 707-730 to 707-742 (1979).

76. HAWAII REV. STAT. § 709-730 (1979).

77. Arguably, spouses and cohabitants constitute voluntary social companions of the actor on the occasion in question, provided that the couple has not manifested an intention to dissolve the relationship, for example, through the establishment of separate residences or the institution of a separation agreement.

78. "A male is guilty of rape in the first degree when he intentionally engages in sexual intercourse with a female without her consent, and: (1) in the course of the offense he inflicts serious physical, mental or emotional injury upon the victim." DEL. CODE ANN. tit. 11, § 764 "A male is guilty of rape in the second degree when he intentionally engages in sexual intercourse with a female without her consent." DEL. CODE ANN. tit. 11, § 764(2) (1979).

79. DEL. CODE ANN. tit. 11, § 763 (1979) "Sexual contact" is defined as "any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire of either party." DEL. CODE ANN. tit. 11, § 773(d) (1979).

80. *See, e.g.,* ALASKA STAT. § 11.41.445(a)(1) (1978); COLO. REV. STAT. § 18-3-409(2) (1978); IDAHO CODE § 18-6107(2) (1979) (180 day requirement); KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1975); 18 PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1981); UTAH CODE ANN. § 76-5-402(1) (Supp. 1979).

81. *See* note 57 *supra.*

exemption when the parties live apart *or* have initiated separation or divorce proceedings.[82] Other states required a court-ordered separation or supervised separation agreement before rape statutes are enforceable.[83]

Although the statutes of six states do not employ an express marital exemption clause,[84] the intention to retain the common law rule is presumed.[85] Explicit preclusion of the prosecution of a mate for the rape of his wife exists in thirty-four states insofar as their statutes limit possible victims to females *other than the spouse* of the actor.[86] Of the states retaining the marital exception, the majority also except cohabitants.[87] Additionally, voluntary social companions are immunized in several states.[88]

B. The Pennsylvania Statute

In Pennsylvania, a woman must be in a prescribed relationship with her husband before she is afforded the protection of sexual assault statutes. By virtue of a 1976 amendment,[89] a husband may only be charged with the rape of his wife in two specific situations. First, a husband who forces intercourse upon his wife when the spouses are living in separate residences is not protected by the marital exclusion.[90] Second, when spouses remain in the same residence, but are subject to either a written separation agreement or a court-

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82. *See* note 57 *supra.*

83. *See, e.g.,* LA. REV. STAT. ANN. § 13:31 (West Supp. 1981); N.M. STAT. ANN. § 30-9-10E (1978); OHIO REV. CODE ANN. § 2907.05(A) (Baldwin 1979); 18 PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1981); WYO. STAT. § 6-4-307 (1977).

84. *See* ARK. REV. STAT. ANN. § 41-1804.-41-1809 (1977); FLA. STAT. ANN. § 794.011 (West 1976); GA. CODE ANN. §§ 26-2001.-26-2022 (Supp. 1980); MASS. GEN. LAWS ANN. ch. 265, § 22 (West Supp. 1980); MISS. CODE ANN. § 97-3.65 (Supp. 1979); VA. CODE § 18.2-61 (1970).

85. Because of the prevalence of the common law rule and the deep entrenchment of the rule in social mores, one can argue that the legislatures of these states did not intend to abolish the common law exemption. *See* Annot., 84 A.L.R.2d 1017, 1019 (1962). *But cf.,* 14 *Nat'l Clearing House Rev.* 538 (No. 6, Oct. 1980) (issue remains a matter of judicial decision and legislative intent).

86. *See* note 40 *supra.*

87. Cohabitants are excepted in: ALA. CODE § 13A-6-60(4) (1977); COLO. REV. STAT. § 18-3-409(10 (1978); CONN. GEN. STAT. ANN. § 53(a)-67(b) (West Supp. 1981); DEL. CODE ANN. tit. 11, § 772(b) (1979) (sexual assault); IOWA CODE ANN. § 709.4 (West 1979) (3d degree sexual abuse); KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1975); ME. REV. STAT. ANN. tit. 17-A, § 252.2 (Supp. 1980); MONT. REV. CODES ANN. § 45-5-506 (1979); 18 PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1981); TEX. PENAL CODE ANN. tit. 21, § 21.12 (Vernon 1974); W. VA. CODE § 61-8B-1(2) (1977).

88. DEL. CODE ANN. tit. 11, § 764(2) (first degree rape exemption if victim was defendant's "voluntary social companion"); HAWAII REV. STAT. § 707-730(1)(a)(i) (1979) (exemption to first degree rape if victim was defendant's "voluntary social companion" who had permitted the defendant sexual intercourse within the previous twelve months); ME. REV. STAT. ANN. tit. 17-A, § 252.3 (Supp. 1980) (exemption reduces class A crime to class B crime); W. VA. CODE § 61-8B-3(a) (iii) (1977) (exemption to first degree sexual assault).

89. Act of May 18, 1976, P.L. 120, No. 53, § 1 (amending B.B. 12:5(a) 18 PA. CONS. STAT. ANN. § 3102 (Purdon 1973)) *See* note 12 *supra.*

90. 18 PA. CONS. STAT. ANN. 3103 (Purdon Supp. 1981).

imposed separation order, the marital exception is dissolved.[91]

This current provision is more accommodating than the prior law, which required that the spouses live apart under a judicial separation decree.[92] Even under the amendment, however, protection remains inadequate and unrealistic. Although no official statistics on the subject of marital rape in Pennsylvania are available prior to 1977,[93] the year in which rape was defined as an act of sexual penetration by a male upon a female not his wife, various estimates have since been made of the incidence of marital rape.[94] Research on victim-offender relationships dispels the myth that the majority of women are raped by strangers.[95] Indeed, studies reveal that "the

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91. *Id.*

92. 18 PA. CONS. STAT. ANN. § 3103 (Purdon 1973) (amended 1976).

93. Forced marital sex is considerably underreported because it is either regarded as normal, or women are reluctant to admit that it happens to them. One research report indicates that "such incidents seem to occur in both generally violent and violence-free relationships." D. Finkelhov & K. Yllo, *Forced Sex in Marriage: A Preliminary Research Report* [Dept. of Soc., Univ. of N.H. 1980] (on file in office of Dickinson Law Review). These researchers have engaged in substantial sociological investigation on the phenomenon of marital rape. Their research and analysis indicates that in many instances the offender's goal appears to be to humiliate and retaliate against his wife. *Id.* Results warranted a distinction in the types of relationships in which sexual violence was found. First, women who were subject to a large amount of physical and verbal abuse (minimal relation to sex), were subject to sexual violence as another aspect of this general abuse. *Id.* Analysis of the second group, whose members encountered little physical violence, revealed that forced sex resulted from specifically sexual conflicts (e.g., frequency of and appropriateness of sexual activities). In essence, "[a]t some point [the] disagreement spills over into violence. The man decides he is being denied and frustrated and that he is going to get what he wants by force." *Id.* at 17. *See generally* Comment, *Rape and Battery Between Husband and Wife,* 6 STAN. L. REV. 719 (1954) [hereinafter cited as *Rape and Battery*].

94. The conventional wisdom concerning rape suggests that women are typically assaulted in dark alleys by strangers. The research which has been carried out on patterns of rape indicates that this conventional wisdom may be more myth than reality. Amir's research (1971) on patterns of victimization revealed that 48% of the rape victims knew the offender. Pauline Bart's (1975) examination of 1,070 questionnaires filled out by victims of rape found that 5% of the women were raped by relatives, .4% by husbands, 1% by lovers, and 3% by ex-lovers. Thus, a total of 8.4% of the women were raped by men with whom they had intimate relations. Bart's survey also found that 12% of rape victims were raped by dates and 22% were raped by acquaintances. Less then half of the victims (41%) were raped by total strangers.

R. GELLES, FAMILY VIOLENCE 125 (1979).

In order to acquire direct information on marital rape, Gelles gathered data from two investigations. The first, a survey of Rape-Crisis Centers, provided information on the number of cases of marital rape encountered at these shelters. The agencies that provided information reported that raped wives were likely to be fearful of future assaults. The second investigation was a segment of a larger study of physical violence between husbands and wives. These interviews revealed that husbands appeared to believe that their wives should have intercourse with them on demand. Moreover, husbands viewed a refusal of intercourse as grounds for beating or intimidating their wives. *Id.* at 131.

95. *See* Gelles, *supra* note 94, at 125. Additional research on rape reveals a pattern that victims were likely to know the offender or to be related to the offender. Of the 250 rape victims studied by the Center for Rape Concern at Philadelphia General Hospital (PGH), 58% of the victims under the age of 18 were assaulted by a relative or acquaintance. *See* T. MCCAHILL, L. MEYER, & A. FISHMAN, THE AFTERMATH OF RAPE 9 (1979).

Direct evidence of the *prevalence* of marital rape in the population at large was gathered in a 1978 study completed in San Francisco. *See* D. Russell, THE PREVALENCE AND IMPACT OF MARITAL RAPE IN SAN FRANCISCO (Dept. of Soc., Mills College 1980) (paper presented at Am. Soc. Assoc. meeting) (on file in office of Dickinson Law Review). Seventy-eight women

women who are raped by boyfriends, dates, husbands, relatives and other men that they know *might* represent the tip of an iceberg which reveals a more extensive pattern relating intimacy with forced sexual relations."[96]

Judicial interpretations of the present rape and rape-related statutes in Pennsylvania illustrate the effect of poor legislative drafting. According to the 1963 and 1966 statutes, "*whoever* [had] unlawful carnal knowledge of a woman, forcibly and against her will" was guilty of rape.[97] The general definition of "whoever"specified *any* person or individual.[98] Because the courts presumed to follow the common law rule, the complainant's husband was not included in the "whoever" classification. The propriety of this interpretation of the statute was implied from the use of the adjective "unlawful" in proscribing the sexual behavior.[99]

Furthermore, the Pennsylvania Supreme Court, in *Commonwealth v. Walker,*[100] misinterpreted the legislative intent to afford protection to rape victims. In *Walker,* the court declared that "the legislative scheme [was] to protect *all* females from invasions of the person . . . [and] to protect *all* females from force and where force is used, the actor is guilty of rape."[101] It was an impossibility, however, for *all* females to be protected because women married to their assailants received no protection under the pure common law rule followed at the time of the *Walker* case.

The Pennsylvania Crimes Code,[102] enacted in 1973, uses more

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in the sample of 930 experienced rape or attempted rape by a husband or ex-husband at least one time. *Id.* at 2.

This research also compiled statistics of multiple spousal rapes. Of the 71 women reporting multiple rapes by their husbands, 29% reported being raped once, 13% were reportedly raped from 2-5 times, 13% from 6-10 times, 13% from 11-20 times, and 34% 20 times or more. *Id.* at 3.

A different type of study was performed in 1979 in an effort to reconcile representativeness problems created by agency-based samples. *See* J. Doron, CONFLICT AND VIOLENCE IN INTIMATE RELATIONSHIPS: FOCUS ON MARITAL RAPE (Barnard College 1980) (paper presented at Am. Soc. Assoc. meeting) (on file in office of Dickinson Law Review).

For additional discussion of rape in marriage, see H. FEILD & L. BIENEN, JURORS AND RAPE 163-66 (1980); D. RUSSELL, THE POLITICS OF RAPE 117-29 (1975).

96. GELLES, *supra* note 94, at 126.

97. PA. STAT. ANN. tit. 18, § 4721 (Purdon 1963). Upon revision in 1966, PA. STAT. ANN. tit. 18, § 4721(a) provided:

> Whoever has unlawful carnal knowledge of a woman, forcibly and against her will, is guilty of rape, a felony,,and on conviction, shall be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), and undergo imprisonment . . . not less than fifteen (15) years or more than life if in the course of the commission of the act, he inflicts serious bodily injury upon anyone.

98. PA. STAT. ANN. tit. 18, § 4103 (Purdon 1966).

99. *See* Comment, *Revision of the Law of Sex Crimes in Pennsylvania and New Jersey,* 78 DICK. L. REV. 73, 74 (1974).

100. 468 Pa. 323, 362 A.2d 227 (1976). The defendant was convicted of forcible and statutory rape. At the time the offenses were committed, the applicable statute was PA. STAT. ANN. tit. 18, § 4721(a)(b) (Purdon 1966). *See* note 97 *supra.*

101. 468 Pa. at 334, 362 A.2d at 232 (emphasis added).

102. 18 PA. CONS. STAT. ANN. § 101 (Purdon 1973). "The Pennsylvania Crimes Code

explicit terminology in its definitions and clarifies the protection afforded by the rape statute. A rape does not occur unless the victim is a person not the spouse of the actor.[103] The definition of spouse is broad and includes a female cohabitating with a male, regardless of the legal status of the relationship.[104]

C. Federal Proposals

1. American Law Institute - Model Penal Code.—The 1962 Model Penal Code[105] (MPC) retains the traditional limitation of rape to instances of male aggression against a female who is not his wife.[106] The marital privilege is not removed until a divorce judgment or judicial separation decree is obtained by spouses living in separate residences.[107] The exclusion is extended to unmarried persons living together as if man and wife.[108]

Under the MPC approach, a husband who rapes his wife while she is unconscious incurs no criminal liability.[109] Additionally, a husband who forces sexual intercourse upon his wife after giving her drugs or intoxicants without her knowledge and substantially impairing her ability to appraise or control her conduct, cannot be charged with rape.[110] Furthermore, a husband who has forced sexual intercourse with his wife by using threats of imminent death, serious bodily harm, or extreme pain cannot be prosecuted for rape.[111] These acts, if perpetrated upon any female other than the wife of the actor, are classified as second degree felonies under the MPC.[112] In contrast, a first degree felony rape occurs when the victim is not the "date" of the actor on the occasion of the crime and has not previ-

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presents an amalgam of prior law (judicial and statutory), the Model Penal Code, and the P.B.A. Proposed Code." Comment, *Revision of the Law of Crimes in Pennsylvania and New Jersey,* 78 DICK. L. REV. 73, 77 (1974). "The Crimes Code provides that rape is not committed unless the victim is 'a person not the spouse of the actor,' thus clarifying the ambiguity in the old law." *Id.*

103. 18 PA. CONS. STAT. ANN. tit. 18, § 3121 (Purdon 1973).

104. *Id.* at § 3103 (Purdon Supp. 1981).

105. MODEL PENAL CODE (Official Draft, 1980). The Model Penal Code, promulgated by the American Law Institute, has stimulated the widespread revision and codification of the substantive criminal law in the United States. Thirty-four state codifications or revisions have drawn upon the Model and revisions are proposed in ten other states. Courts look to the Model Code as a persuasive statement of the principles and rules by which decisions should be guided in construing provisions of the new codes as well as in areas governed by unwritten law.

106. MODEL PENAL CODE § 213.1(1)(a)-(d) (1980).

107. MODEL PENAL CODE § 213.6(2) (1980). An informal separation arrangement made between legally married persons living apart is insufficient to render the exclusion inapplicable.

108. MODEL PENAL CODE § 213.6(2) (1980).

109. *Id.* at § 213.1(1)(c) (1980).

110. *Id.* at § 213.1(1)(b) (1980).

111. *Id.* at § 213.2(1)(a) (1980).

112. *Id.* at § 213.1 (1) (a)-(c) (1980).

ously permitted him sexual liberties.[113] If a "woman of ordinary resolution" could not resist the threats used by the rapist who compels her to submit, then a "gross sexual imposition" has been committed.[114] These arguably anachronistic provisions remain unchanged since the drafting of the MPC.

The MPC's commentary on the retention of the spousal/cohabitant exclusion is contradictory.[115] Comments to the rape provisions acknowledge that the traditional rationale for a husband's legal incapacity to rape his own wife — that marriage constitutes a blanket consent to sexual intimacy revocable only upon dissolution of the marital relationship — is essentially fictive. "[T]here is no reason why agreement to enter into a relationship of intimacy necessarily means consent to intercourse on demand."[116] Moreover, the American Law Institute (ALI), which drafted the MPC, professes to advocate "a fresh look at the advisability of the spousal exclusion."[117] The comments to the MPC admit that a woman may marry without surrendering to intercourse on demand and if on occasion she refuses, the husband has no right to force her submission.[118] The ALI, however, declines to endorse spousal liability for rape[119] and is content with a husband's prosecution for assault.[120]

The ALI declares that the harm inflicted by a husband when he forcibly rapes his wife is "qualitatively different" from the harm inflicted upon the victim by a stranger.[121] In essence, the Institute believes that only stranger-rapists warrant prosecution for their acts. A Comment provides:

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113. MODEL PENAL CODE § 213.1(ii) (1980).

"Rape is a felony of the second degree unless . . . (ii) the victim was *not* a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which case the offense is a felony of the first degree." *Id.* (emphasis added).

114. MODEL PENAL CODE § 213.1(2)(a) (1980).

115. Many of the commentaries to the Model Penal Code date from the mid-1950's and express attitudes that are inaccurate and inconsistent with modern social mores.

116. MODEL PENAL CODE § 213.1, Comment 8(c) (1980).

117. *Id.*

118. *Id. Accord,* State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977), *aff'd per curiam,* 168 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981).

119. MODEL PENAL CODE § 213.1, Comment 8(c) (1980), provides in part: "Finally, there is the case of intercourse coerced by force or threat of physical harm. Here the law already authorizes a penalty for assault."

120. *Id.*

121. Although the Model Penal Code does not equate the harm imposed by "stranger" rape with the harm resultant from "spousal" rape, other commentators do not agree. *See, e.g.,* Doron, *supra* note 95, at 7. "Marital rape is an extreme, severe and painful form of violence between husband and wife. As one former victim commented, 'Being beaten, especially by someone you love, is the most degrading and humiliating experience a woman can have.'. . . Marital rape appears to be one of the most upsetting kinds of rape experiences for women. As may be seen . . . 65% of the women who were raped by a relative other than a husband . . . and 61% of women raped by a stranger report being *extremely upset* as compared with 59% of women raped by a husband, 42% of women raped by an acquaintance. . . ." Russell, *supra* note 95, at 8.

> The gravity of the crime of forcible rape derives not merely from its violent character but also from its achievement of a particularly degrading kind of unwanted intimacy. Where the attacker stands in an ongoing relation of sexual intimacy, that evil, as distinct from the force used to compel submission, may well be thought qualitatively different. The character of the voluntary association of husband and wife, in other words, may be thought to affect the nature of the harm involved in unwanted intercourse. That, in any event, is the conclusion long endorsed by the law of rape and carried forward in the Model Code provision.[122]

The nationwide adoption of this MPC formulation is questionable in light of the epidemic of reported offenses[123] and the marked increase in public concern.[124] Many states, however, have enacted either comprehensive criminal code revisions or piecemeal sexual offense statutes based on the MPC draft.[125] Until the MPC incorporates contemporary standards for the marital relationship and its partners, the majority of states cannot be expected to make substantial changes.

2. Reform of the Existing Federal Rape Law.—The existing federal rape provision is criticized by one commentator for being "grossly obsolete and indiscriminate."[126] In 1971, the National Commission on Reform of Federal Criminal Laws made comprehensive recommendations for revision of the federal criminal code.[127] The Commission defined rape in the traditional manner as "sexual intercourse by a male with a female not his wife."[128] The legislative draft differentiated in terms of seriousness between rapes perpetrated by a stranger and those committed when the victim was a "voluntary companion of the actor [and had] previously permitted him sexual liberties."[129]

The Criminal Code Reform Act of 1979, [130] recently introduced

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122. MODEL PENAL CODE § 213.1, Comment 8(c) (1980).

123. *See* note 94 *supra.*

124. "The increased attention on the plight of victims of sexual assaults led to the establishment of Rape-Crisis Centers throughout the nation which provide legal, medical, and social services to victims of rape." GELLES, *supra* note 94, at 127. *see generally* W. Goode, *Force and Violence in the Family,* – J. MARR AND FAM. 31 (1971); W. O'Donnell, *Consensual Marital Sodomy and Marital Rape - The Role of the Law and the Role of the Victim* (Dept. of Criminal Justice, Univ. of Cinn. 1980) (on file in office of Dickinson Law Review).

125. *See* note 105 *supra.*

126. Stein, *Comment on Rape, Involuntary Sodomy, Sexual Abuse and Related Offenses,* NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: 2 Working Papers 867 (1968) [hereinafter cited as Working Papers]. The author offers legislative history and analysis of the present federal rape law. *See* 18 U.S.C. § 2031 (1976), which provides: "Whoever within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer death, or imprisonment for any term of years or for life."

127. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: Study Draft (1970) (hereinafter cited as *Study Draft*).

128. *Study Draft, supra* note 127, § 1641(1).

129. *Study Draft, supra* note 127, § 1641(2).

130. Proposed Amendments to Title 18 of United States Code: Hearing on S.1722, S.1723 Before the Comm. on the Judiciary, 96th Cong., 1st Sess. (1979). The proposed bill was intro-

in the Senate, proposed to codify, revise, and reform the present Federal Criminal Code. The new provision would allow the wife to file a rape charge naming her husband as a principal.[131] To be actionable, however, the offense that is alleged must contain some evidence of violence. The proposal prescribes that a person is guilty of rape if he engages in a sexual act with another by compelling that person to participate through the *use* of force, or by causing the other person to fear that death or serious bodily injury is imminent.[132]

If the Criminal Code Reform Act of 1979 is passed, its rape provision may serve as an impetus to states that have not amended their statutes to permit all women to prosecute for rape regardless of their relationship with the assailant.[133] If the federal act is defeated, the denial of the wife's ability to bring a sexual assault prosecution may retard any advancement by state legislatures.

IV. Recent Developments

A. Attack on Common Law Rationales

The most important recent treatment of marital rape is the New Jersey Superior and Supreme Court decisions in *State v. Smith.*[134] Although the lower court upheld the common-law rule, it also launched an unprecedented attack upon the principle justifying its holding. Indeed, the lower *Smith* court was the first to question the permanency of a wife's continuous consent to sexual intercourse with

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duced by Senators Kennedy, Thurmond, DeConcini, Hatch, and Simpson on September 7, 1979.

131. The marital exemption was excised in 1977 from a previous bill at the urging of feminist groups. Senator Birch Bayh circulated a memorandum proposing the change among Judiciary Committee members. When it was evident that the move would have overwhelming support in the Committee, amendment was made to the bill without debate.

132. S.1722, 96th Cong. 1st Sess. (1979) (emphasis added).

133. *See* Comment, ". . . For She Has No Right or Power to Refuse Her Consent," [1979] CRIM. L. REV. 558.

134. 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981). In 1975, the defendant was charged with rape, attrocious assault and battery, private lewdness, and impairing the morals of a minor. Both courts, however, focused on the issue of whether a husband could be guilty of raping his wife. The lower court maintained that the husband should be held criminally liable for rape, but it dismissed all charges against him even though the other issues could have been tried. *See also Ex parte* Kantrowitz, 24 Cal. App. 203, 140 P. 1078 (1914); *Smith & Hogan, Criminal Law* 288 (3d ed. 1973).

In a companion case, State v. Morrison, 85 N.J. 212, 426 A.2d 47 (1981), the state supreme court also held that the defendant was properly convicted of raping his estranged wife. The court based its decision on the finding that "the purported common-law marital exemption from rape would not exempt defendant under the circumstances." *Id.* at 212, 426 A.2d at 48. The *Morrison* facts reveal: (1) that the defendant and his wife had separated more than six months before the alleged crime; (2) that the wife had filed a complaint for divorce; (3) that the wife had obtained a temporary restraining order to keep defendant from "harassing, threatening or harming" her, and (4) that the defendant had executed an agreement not to molest his estranged wife. *Id.* "The presence of [these] additional circumstances . . . offer[ed] even more compelling reasons that (*sic*) those in *Smith* for holding that defendant could be convicted of raping his wife." *Id.* at 213, 426 A.2d at 48.

her husband upon marriage. It attacked the most prevalent and enduring rationale for the marital rape exemption, declared that the application of contract law to the area of forcible sexual acts was illogical,[135] and defended the right of married women to govern sexual access to their bodies.[136]

> To continue to perpetuate such approval leads to insiduous deprivation of sexual privacy to a victimized married woman. Policy consideration labels should not be permitted to thwart justice. Rather, having recognized that *all* women are entitled to this uniquely female right of privacy, policy considerations should propel us to insist that such lawless invasions not be condoned under the guise of nice applications of contract law.[137]

The applicable statute in *Smith* did not specifically exclude a wife-rape victim from its proscription;[138] therefore, the issue addressed by the New Jersey Supreme Court was whether a husband could be charged with and convicted of raping his wife under the former statute. Because the language of the statute did not reveal a spousal exemption, the court's inquiry went beyond the "plain meaning" of the statute.[139] The court determined that "the common law did not include an absolute marital exemption from prosecution for rape under all conditions."[140] Although the lower court felt powerless to disturb the common law or usurp the function of the legislature,[141] the state supreme court concluded that New Jersey "did not

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135. [J]urisdictions which have refused to allow such prosecutions have uniformly and summarily rationalized that a husband cannot be guilty of rape because the wife, upon entering into marriage, has irrevocably given her consent to sexual communication. They 'reason,' as did Hale, that the element of lack of consent has not been satisfied. (citations omitted). It would appear that this superficial reasoning has been perpetuated without serious challenge and without consideration of the fact that such a mechanical application of principles of contract law are illogically applied in the area of forcible sexual invasions.

148 N.J. Super. at 226-27, 372 A.2d at 390. *See* note 1 and accompanying text *supra.*

136. The court noted that "the issue should not be decided on the basis of the consent doctrine." 148 N.J. Super. at 228, 372 A.2d at 391. *See also* Howard, *supra* note 1.

137. 148 N.J. Super. at 228, 372 A.2d at 390. *See* note 147 and accompanying text *infra.*

138. The pertinent statute provided: Any person who has carnal knowledge of a woman forcibly against her will . . . is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000 or by imprisonment for not more than 30 years or both. N.J. STAT. ANN. § 2A:138-1 (West 1969). (current version at N.J. STAT. ANN. § 2C:14-2 (West Supp. 1981)). Although the holding of the lower court in *Smith* was criticized because of its strict adherence to the status quo, the compelling language used by the court motivated legislative change. In 1979, New Jersey revised its Code of Criminal Justice. N.J. STAT. ANN. § 2C:14-5(b) (West Supp. 1981) clearly illustrates the legislative determination that a spouse should not be excluded from punishment or enjoy any preferential treatment in matters such as marital rape. *See* note 44 *supra.*

In addition, the scope of the current statute is more expansive. "Under [N.J. STAT. ANN.] § 2C:14-5(b) married men or women, whether *living with* or separately from their spouses, will not be able to force their sexual wills upon their spouses without incurring the severe penalties attached to our laws proscribing sexual assault." State v. Smith, 85 N.J. 193, 210, 426 A.2d 38, 47 (1981), *rev'g* 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977) (emphasis added).

139. 85 N.J. 193, 198, 426 A.2d 38, 40-1 (1981).

140. *Id.* at 203, 426 A.2d at 43.

141. "[I]t is more properly a legislative, rather than a judicial function, to determine or redetermine the type of conduct which will constitute the substantive crime of rape." 148 N.J. Super. at 233, 372 A.2d at 393.

have a marital exemption rule for rape in 1975 that would have applied to this defendant and prevented his indictment and conviction on the charge of raping his wife."[142]

In reaching its decision, the state supreme court declared inviable the three major common law justifications for the marital exemption. First, the court announced that "the notion that a woman was the property of her husband or father, . . . was never valid in this country."[143] Second, the principle of "marital unity"[144] was deemed discarded in New Jersey by statutes enacted and cases decided prior to the husband's commission of the alleged crime,[145] and therefore was eliminated as a basis for the marital exemption.

The implied consent rationale, the third and most prevalent justification, was found to be "offensive to [the court's] valued ideals of personal liberty."[146] Consequently, the court declared the implied consent rationale unsound:

> If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage "contract," may she not also revoke a "term" of that contract, namely, consent to intercourse? Just as a husband has no right to imprison his wife because of her marriage vow to him . . . he has no right to force sexual relations upon her against her will.[147]

Furthermore, the demise of the common law justifications and the "plain meaning" of the statute gave the defendant sufficient notice that his conduct would no longer be tolerated. Because "[t]he personal liberty of women and the recognition of them as independent citizens under the law had developed beyond question through legislative and judicial actions over more than a century,"[148] no person in New Jersey in 1975 "could justifiably claim that a man had a legal right to impose his sexual will forcefully and violently on a woman, even if it was his wife."[149] The *Smith* court decision should serve as a model because of its refusal to mechanistically apply an outdated rule. The implementation of statutory reform and a more contemporary interpretation of statutes would likely begin if other courts adopted as strong a position on the marital rape issue.

B. Prosecutorial Trend

The emerging trend among state prosecutors to actually pursue criminal charges against men accused of raping their estranged wives

142. 85 N.J. 193, 207, 426 A.2d 38, 45 (1981), *rev'g,* 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977).
143. *Id.* at 204, 426 A.2d at 43-44.
144. *See* note 179 and accompanying text *infra.*
145. 85 N.J. 193, 205, 426 A.2d 38, 44 (1981).
146. *Id.*
147. *Id.* at 205, 426 A.2d at 44.
148. *Id.* at 210, 426 A.2d at 46.
149. *Id.* at 210, 426 A.2d at 47.

is significant.[150] Traditionally, spousal rape suits were rarely prosecuted. Statutory impediments aside, the reluctance to initiate prosecutions may be attributed to the following: (1) the evidentiary difficulty of proving the rape offense, particularly lack of consent;[151] (2) the dropping of charges by victims who fear censure from husbands, relatives, and neighbors;[152] and (3) the lack of social significance assigned to the marital rape issue.[153]

Commonwealth v. Chretien[154] illustrates the trend toward criminal prosecution of husband-rapists. There, the state prosecuted under a Massachusetts statute[155] that provided for criminal prosecution of whoever compelled a person to submit to sexual intercourse by force or threat of bodily injury. In *Chretien,* the defendant-husband was convicted and sentenced to imprisonment for raping his wife while the couple was living apart. This result may have been influenced by the corroboration of the wife's complaint by the couple's nine-year old son, which eliminated evidentiary problems concerning the wife's revocation of consent to sexual intercourse.[156] Nevertheless, the decision in *Chretien* is a significant step in the prosecution of marital rape incidents because previously the common law was presumed to continue in Massachusetts in the absence of a statutory spousal exemption.[157]

The *Chretien* case indicates the presence of aggressive prosecutors. The courts, however, have not been as aggressive in the vindication of the rights of wives. The defendant in *People v. Kubasiak*[158] was charged with felonious assault, breaking and entering with the intent to commit felonious assault, and first degree criminal sexual conduct against his wife.[159] Testimony revealed that to gain entry

150. The significance of this trend is that many prosecutors in the past openly expressed their lack of sympathy for victims of marital rape. Prosecutors have often counseled victims to drop rape charges against their spouse because of the difficulty of proving non-consent. *See* Barry, *supra* note 72, at 1088-91.

151. *See Marital Rape, supra* note 72, at 313-15; Comment, *Marital Rape in California: For Better or For Worse,* 8 SAN FERN. V. L. REV. 239, 250-51 (1980) [hereinafter cited as *Rape in California*].

152. *See* Barry, *supra* note 72, at 1091.

153. *See* notes 93-96 *supra.*

154. [1979] 5 FAM. L. REP. (BNA) 2962 (Mass. Sup. Ct. Oct. 16, 1979).

155. "(a) Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compel such person to submit by threat of bodily injury . . . ." MASS. GEN. LAWS ANN. ch. 265, § 22(a) (West Supp. 1981).

156. [1979] 5 FAM. L. REP. (BNA) 2962 (Mass. Sup. Ct. Oct. 16, 1979). The couple's nine-year-old son testified at trial that he saw his father drag his mother into the bedroom of the mother's home. For discussion of difficulty in establishing lack of consent of the victim of marital rape, see discussion at Part VI.B. *infra.*

157. *See* FEILD & BIENEN, *supra* note 95, at 304.

158. 98 Mich. App. 529, 296 N.W.2d 298 (1980).

159. MICH. STAT. ANN. § 28.788(2) (Supp. 1981) proscribes criminal sexual conduct in the first degree. This section provides that

(1) [a] person is guilty of criminal sexual conduct in the first degree if he or she

into the apartment of defendant's estranged wife, defendant and another broke a window. The victim was then forced into the bedroom by the defendant and sexually attacked.

The *Kubasiak* court admitted that the applicable statutory spousal exclusion was reasonably subject to two or more interpretations.[160] The court, however, strictly applied the statute. This precluded a finding of first degree criminal sexual conduct because neither party had filed an action for divorce or separation. Although the court recognized that the "[Michigan] Legislature intended that the criminal sexual conduct act strengthen the criminal law describing unlawful sexual conduct,"[161] it refused to recognize that the statutory terms encompassed the defendant's act.

A better reasoned approach was propounded in the concurring opinion, which urged the legislature to modify the statute and remove the divorce or separation filing requirement. The concurrence recognized that many possible financial and social reasons[162] contribute to a spouse's choice to separate on an informal basis and not file for a divorce or a formal separation. The concurring judge did not believe that these "spouses should be penalized for their choice, one which may have been selected out of necessity."[163] Although this plea for relaxation of the statute may deserve credit, it also warrants criticism because it requires a wife to overtly renounce the mar-

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engages in sexual penetration with another person and if any of the following circumstances exists:

. . . .

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats. . . .

In addition, the spousal exception provision states:

A person does not commit sexual *assault* under this act if the victim is his or her legal spouse, unless the couple are living apart *and* one of them has filed for separate maintenance or divorce.

MICH. STAT. ANN. § 28.788(12) (Supp. 1981) (emphasis added).

160. People v. Kubasiak, 98 Mich. App. 529, 533, 296 N.W.2d 298, 300 (1980). Since the defendant's wife was the alleged victim of the criminal sexual conduct, the defendant contended that the marital relationship precluded a finding that first-degree criminal sexual conduct had been committed.

The defendant argued that interspousal immunity extended to all forms of criminal sexual conduct and in particular to first-degree criminal sexual conduct. *Id.* at 533, 296 N.W.2d at 300. The state, on the other hand, argued that the statute's use of the term sexual "assault" indicates that interspousal immunity extends only to those acts of criminal sexual conduct which include an assault, that is, assault with intent to commit criminal sexual conduct. *Id. See, e.g.,* MICH. STAT. ANN. § 28.788(7) (Supp. 1981).

161. 98 Mich. App. at 535, 296 N.W.2d at 301 (1980).

162. The concurring opinion did not expatiate on these reasons. Other commentators, however, have suggested that religious tenets and financial dependence may keep the woman from formally separating or divorcing. *See* Finkelhor and Yllo, *supra* note 93, at 4. *See generally* BROWNMILLER, *supra* note 16; Martin, *supra* note 12.

163. 98 Mich. App. at 539, 296 N.W.2d at 303 (1980).

riage by divorce or separation in order to withdraw consent to sexual intercourse. This requirement directly contradicts both the married woman's right to sexual privacy espoused in *Smith*[164] and the principle of equality in marriage.[165] It also fails to acknowledge the harm that flows from rape, even rape between spouses.[166]

C. Constitutional Attack

Prosecuted under Oregon's revised rape statute, *State v. Rideout*[167] attracted national attention as the first case in which a husband was brought to trial for raping his wife while the two were legally married and cohabitating. The constitutionality of the statute was challenged by the defendant on the grounds that constitutional guarantees of marital privacy and equal protection were violated. The trial judge rejected this attack and upheld the statute in pre-trial rulings.[168]

Similarly, a constitutional challenge of state interference with the private sexual behavior of adults was made in *State v. Bateman.*[169] In *Bateman,* statutes proscribing sodomy and lewd acts were attacked as unconstitutional because they were applied to both consenting and nonconsenting married couples.[170] The court of appeals began its discussion of the constitutionality of the statute with an analysis of *Griswold v. Connecticut.*[171] The court perceived in *Griswold* the existence of a constitutionally protected right of privacy in marital relations. This fundamental right of privacy[172] is fiercely protected in the absence of a compelling state interest. Moreover, any law attempting to regulate the sexual conduct of married persons

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164. *See* notes 134-37 and accompanying text *supra.* Some form of rejection of the marriage is required in the majority of jurisdictions to prove the actual non-consent of the victim. Under this view, a victim cannot be said to consent to sexual intercourse if she has (1) established a residence separate from her husband, (2) filed for divorce, (3) filed for court-order of separation, or (4) entered a voluntary formal separation agreement. Indeed, only these requirements (or variations thereof) will trigger prosecution of a husband for the rape of his wife in the majority of states. *See* note 42 *supra.*

165. *See Marital Rape, supra* note 72 at 309.

166. *See, e.g.,* M. Notman & C. Nadelson, *The Rape Victim: Psychodynamic Considerations,* 133 AM. J. OF PSYCH. 408, 409 (1976).

167. [1979] 5 FAM. L. REP. (BNA) 2164.

168. *Id.*

169. 25 Ariz. App. 1, 540 P.2d 732 (1975), *aff'd in part, rev'd in part* 113 Ariz. 107, 547 P.2d 6 (1976).

170. The defendant was charged with committing anal intercourse upon his wife and forcing her to perform fellatio upon him. The defendant filed a motion to dismiss on the grounds that the statutes defining these crimes were unconstitutional since they did not allow a defense of consent. The trial court instructed the jury that consent is a defense to the pertinent statutes. Verdicts of guilty were returned. Defendant then renewed his motion to dismiss, which was granted by the court. The trial court found that the statutes in question would be unconstitutional as applied to consenting married couples. The court of appeals affirmed this decision.

171. 381 U.S. 479 (1969). *Griswold* addressed the constitutionality of Connecticut statutes criminalizing the use of contraceptives by married couples and criminalizing the activities of those who aided and abetted in the use of these materials.

172. *Id.* at 485.

must be shown to be "necessary . . . to the accomplishment of a permissible state policy."[173] In its interpretation of *Griswold,* the *Bateman* court expressly recognized that the state has the power to constitutionally regulate forceful, nonconsenting sexual behavior between married couples.[174]

The *Bateman* court concluded that one of the fundamental rights within the marriage relationship is consensual sexual activity, which is protected from government regulation.[175] Therefore, the court held that "[the state] cannot constitutionally criminalize consenting sexual behavior carried on by a married couple in private."[176] The significance of *Bateman* is its answer to the ultimate question — is *nonconsenting* sexual activity between married persons constitutionally protected? The court stated that although Arizona had not criminalized forcible rape between husband and wife, this did not mean that the state did not have the power to criminalize such behavior. "[T]he State does have a compelling state interest in protecting its citizens from force and violence, even if that citizen happens to be married to the perpetrator of the violence."[177]

The judicial recognition that wives should be protected from the sexual violence of their husbands is an encouragement. Indeed, the Arizona Supreme Court[178] agreed that the protection of citizens from violence, "even if the combatants are married to one another,"[179] is a compelling state interest. The application of the *Bateman* rationale requires that marital rape be acknowledged as a proper concern warranting state intervention and protection. Under this constitutional approach, therefore, the marital rape exemption should fall.

V. Abolition of the Marital Rape Exemption: Supporting Arguments

A. Implied Consent Theory

The most common rationale supporting the spousal exception is

173. *Id.* at 497.

174. 25 Ariz. App. at –, 540 P.2d at 734, 736 (1975). "[T]he right of privacy in the marriage relationship does not create an all embracing fortress impregnable to the thrusts of state regulation, but rather is descriptive of only certain types of marital conduct which is protected." *Id.* at –, 540 P.2d at 734.

175. The *Bateman* court concluded that in the absence of a "compelling state interest" consensual sexual activity is protected from governmental regulation as a fundamental right inherent in the marriage relationship. *Id.* at –, 540 P.2d at 736. If the state, however, is able to articulate a compelling interest pursuant to its state regulating powers, it may criminalize sexual behavior. *Id.*

176. *Id.*

177. *Id.*

178. 113 Ariz. 107, 547 P.2d 6 (1976) (*en banc*), *aff'g in part, rev'g in part,* 25 Ariz. App. 1, 540 P.2d 732 (1975).

179. *Id.* at 110, 547 P.2d at 9.

that upon marriage the wife irrevocably consents to the husband's demand of the marital right to sexual intercourse. By contemporary standards, however, the proposition that a marriage license constitutes consent to all spousal sexual relations is a legal fiction.[180] Upon marriage, a person may indicate that he or she will usually consent to sexual relations. It does not necessarily follow, however, that upon marriage a person indicates willingness to engage in sexual relations with his or her spouse.[181] The consent doctrine, therefore, is a poor basis for determining whether a husband who forces his wife to have sexual intercourse should be subject to criminal penalty. Indeed, "in this more enlightened age there is no longer room for such parochial thinking."[182]

If the doctrine of implied consent is analyzed in other legal areas, its fallacious application to the marital rape issue becomes obvious. Therefore, if forcible sexual intercourse between spouses cannot be rape because of implied consent, then neither can forced sexual intercourse be a battery, since consent will likewise negate that offense.[183] Just as a marriage certificate is not a license for the spouse to commit assault and battery, it is not a license for the spouse to rape. Consent to sexual intercourse should be granted mutually by husband and wife, and if on occasion a wife refuses, "the husband has no right to compel her to submit."[184]

B. Inequities Imposed on Married Women

At common law, the legal identity of a woman merged into her husband's.[185] The wife's existence became completely incorporated

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180. Comment, *Towards a Consent Standard in the Law of Rape,* 43 CHI. L. REV. 613 (1976). This commentator recognizes that a strong policy reason for abolishing the consent rationale is to protect freedom of choice:

> The most dramatic example of the law's failure to place limits on the scope of effective consent in rape cases is the legal fiction that marriage constitutes consent to all marital sexual relations, no matter how brutal or unwelcome. Though this practice may be justified by judicial policy decisions to avoid the emotional issues and proof problems involved in family disputes, or to encourage parties in an ongoing relationship to resolve problems privately, the courts rarely articulate policy grounds for decisions in this area. Were they to do so, they would be forced to recognize that there are strong policy considerations behind the criminalization of rape which disclose the unfairness and danger of uncritical, universal application of this legal fiction.

Id. at 641 (footnotes omitted). *See* notes 136, 137 and accompanying text *supra.*

181. *See* State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981). *See also Rape and Battery, supra* note 93, at 722-23, "It is unreasonable to infer that a wife intends to make her body accessible to her husband whenever he wants her." *Id.*

182. State v. Smith, 169 N.J. Super. 98, 101, 404 A.2d 331, 333 (App. Div. 1979), *aff'g per curiam,* 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981).

183. *See Rape and Battery, supra* note 93, at 722-23.

184. MODEL PENAL CODE § 213.1, Comment 8(c) (1980).

185. 1 BLACKSTONE, COMMENTARIES 430 (1765). Blackstone describes the relationship as follows:

and consolidated; in essence, the wife became her husband's chattel. Thus, a husband could not be charged with the criminal rape of his wife; as his chattel, she could be used as any other piece of property. The adoption of Married Women's Property Acts, which specifically addressed the inequities imposed upon married women, abrogated this discriminatory concept of wife as chattel. The property acts, adopted in every American jurisdiction, provided married women with the capacity to sue and be sued as if unmarried, to hold, manage, and convey property, and to make contracts.[186]

The trend toward abrogation of the interspousal immunity defense has proceeded steadily in the twentieth century, allowing a wife to sue her husband for negligence, assault and other personal torts.[187] The marital privilege against adverse spousal testimony, said to foster family harmony, has been abandoned if one spouse commits an offense against the other or the property of the other.[188] Additionally, a husband and wife are no longer considered incapable of criminally conspiring with one another.[189] The abolition of spousal immunity in the area of rape is congruent with these modern developments.

C. Protection from Other Domestic Crimes

The criminal law protects a spouse against gross bodily inva-

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> 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 that of the husband under whose wing, protection and cover, she performs every thing . . . .

Id.

186. *See, e.g.,* N.J. STAT. ANN. § 37:2-12 (West 1968).

187. The Pennsylvania Supreme Court abrogated the judicially created doctrine of interspousal immunity in *all* tort actions in *Hack v. Hack,* No. 81-516 (Pa. Supreme Court, filed July 14, 1981). The court concluded "that a tortfeasor's immunity from liability because of his marital relationship with the injured party cannot be sustained on the basis of law, logic or public policy." *Id.* at 3. In addition, the court admitted "that interspousal immunity has survived as a doctrine in this Commonwealth only because this Court has erroneously interpreted the statutes relating to married women . . . and adhered to outmoded common law concepts." *Id.* at 4. *See* PA. STAT. ANN. tit. 48, § 1. (Purdon 1965). *See also* Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 A. 663 (1936) (interspousal defense abolished in wrongful death actions).

188. Until recently, the general rule in federal courts held that one spouse could not be a witness against the other in a criminal case on the policy grounds that such a privilege was "necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well." Hawkins v. United States, 358 U.S. 74, 77 (1958). In Trammel v. United States, 445 U.S. 40, 53 (1980), however the Supreme Court held that "apart from confidential communications, a witness spouse alone has the privilege to refuse to testify adversely; [and] the witness may be neither compelled to testify nor foreclosed from testifying." The rule is also subject to a well-established exception when one spouse commits an offense against the other. *See* FED. R. EVID. §§ 502, 505; Wyatt v. United States, 362 U.S. 525 (1960). In United States v. Allery, 526 F.2d 1362 (8th Cir. 1975), the court announced that a crime against a child of either spouse is a wrong against the other spouse rendering adverse spousal testimony admissible. *Id.* at 1366. *Accord,* United States v. Cameron, 556 F.2d 752 (5th Cir. 1977). *See also* State v. Moxley, 6 Wash. App. 153, 491 P.2d 1326 (1972) (threat to kill wife is not protected by marital privilege against disclosure).

189. *See, e.g.,* United States v. Dege, 364 U.S. 51 (1960); Pegram v. United States, 361 F.2d 820 (8th Cir. 1966).

sion. A husband may be found guilty of murder, manslaughter, and abortion committed against his wife.[190] Logically, criminal sanctions should also be imposed on a man for forcible intercourse with his wife and for any injuries arising therefrom.

In the last decade, the advent of judicial intervention into the marriage relationship directed the media's attention to spouse abuse. It is recognized as a problem warranting increased legal and police protection and public funding.[191] Additionally, legislative enactments provide an alternative for victims of domestic violence.[192] Typically, however, these acts address only physical abuse or harassment. Marital rape is accompanied by physical abuse in many instances, but legislative endeavors ignore the sexual assault component in marital rapes. The essence of the crime of rape, in addition to the forced intercourse, is the injury and outrage to the victim's emotions.[193] It is therefore crucial that marital rape be afforded the legislative and judicial attention that it presently lacks.

D. Challenge to the Constitutionality of Rape Statutes

The constitutionality of rape and sexual offense statutes is most often challenged on the ground that the different treatment of males and females is a denial of equal protection.[194] In *State v. Reilly,*[195] the defendant attacked the New York rape statute[196] on the ground that its singular reference to "males" treated rape as a purely masculine crime by eliminating females from culpability. The court rejected this claim and found that the "physiological reality" that only females may be raped provided a clearly rational basis for the legislative limitation to males.[197] In the opinion of the court, "the protection of *females* from rape is a legitimate and essential legislative objective."[198] The classification was found to bear a "fair, reason-

190. For more detailed discussion on these areas, see *Rape and Battery, supra* note 93, at 720-22.

191. For an excellent examination of the phenomenon of abuse, see MARTIN, *supra* at note 13.

192. *See, e.g.,* IOWA CODE ANN. § 238.1 (West Supp. 1981); PA. STAT. ANN. tit. 35, §§ 10181-10190 (Purdon Supp. 1981). *See* notes 223-26 and accompanying text *infra.*

193. *See* State v. Romo, 66 Ariz. 174, 185 P.2d 757 (1947); Commonwealth v. Goldenberg, 338 Mass. 377, 155 N.E.2d 187 (1958); Commonwealth v. McCan, 227 Mass. 199, 178 N.E. 633 (1931).

194. *See* State v. Griffin, 226 Ind. 279, 79 N.E.2d 537 (1948) (statute punishing only male persons for visiting house of prostitution not unconstitutional); State v. Devall, 302 So. 2d 909 (La. 1974) (statute defining prostitution as a practice by a female not unconstitutional on theory of violation of equal protection of the law); State v. Mertes, 60 Wis. 2d 414, 210 N.W.2d 741 (1973) (statute proscribing prostitution by females not unconstitutional).

195. 85 Misc. 2d 702, 381 N.Y.S.2d 732 (1976).

196. N.Y. PENAL LAW § 130.35 (McKinney 1975), proscribing rape in the first degree: "A *male* is guilty of rape in the first degree when he engages in sexual intercourse with a female: 1. By forcible compulsion . . . ." (emphasis added).

197. 85 Misc. 2d at 706-07, 381 N.Y.S.2d at 738.

198. *Id.* at 707, 381 N.Y.S.2d at 738 (emphasis added). Furthermore, "[s]ince only males can physiologically perpetrate that crime, then the limitation of culpability to males constitutes

able and substantial relationship to the object of the rape statute."[199] Thus, all persons similarly situated were treated alike.

If the purpose of the statute is to guarantee the protection of *females* from rape by males, then discrimination against the female wife-victim is clear. In *Reilly,* the fact that only females may be raped was regarded as a physiological reality.[200] Because no physiological difference exists between married and unmarried females, the exclusion of married women from the protection of rape laws is a denial of equal protection because it does not afford equal treatment to all persons similarly situated.

Nor does the decision in *Griswold v. Connecticut,*[201] which found that married couples have a privacy right to use contraceptives, preclude the protection of wives from rape by their husbands. In *Griswold,* the Supreme Court acknowledged the existence of a constitutionally protected right of "privacy surrounding the marriage relationship."[202] This protected right of privacy included the freedom from state invasion into *consensual* sexual behavior in marriage. In contradistinction, marital rape constitutes *nonconsensual* sexual conduct and arguably the *Griswold* limitation does not control.[203]

In *Eisenstadt v. Baird,*[204] the Court declared that a Massachusetts law forbidding the distribution of contraceptives created dissimilar treatment of married and unmarried persons. The statute accorded different treatment to persons placed in distinct classes on the basis of criteria wholly unrelated to the objective of the statute. The law, proscribing contraceptives for unmarried persons, violated the equal protection clause because the court found that the right of privacy encompassed "the decision whether to bear or beget a child" and was "the right of the *individual,* married or single."[205] From a judicial standpoint, a woman's individual bodily right to have or not to have a child is analogous to a woman's individual bodily right to have or refuse to have sexual intercourse. *Eisenstadt* held that married and unmarried persons were similarly situated and were therefore both guaranteed the individual right to govern their bodily integrity. It is therefore incongruous that married women are given less protection than unmarried women on matters of individual pri-

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a rational classification directly related to the objective of the criminal penalty." *Id.* at 707-08, 381 N.Y.S.2d at 738.

199. *Id.* at 708, 381 N.Y.S.2d at 739.

200. *See* notes 191-92 and accompanying text *supra.*

201. 381 U.S. 479 (1965). *See* notes 167-170 and accompanying text *supra.*

202. 381 U.S. at 486.

203. *See* notes 171-73 and accompanying text *supra.*

204. 405 U.S. 438 (1972).

205. *Id.* at 453.

vacy that control sexual access to their bodies.[206]

VI. Obstacles to the Enforcement of a Marital Rape Statute

A. Fear of Fabricated Accusations

The imposition of a marital rape law has been widely criticized.[207] Legislators and legal commentators argue that the law would result in an avalanche of fabricated accusations by wives. These arguments presume that "scheming" wives will fabricate complaints in order to punish their husbands or to blackmail them into more favorable property settlements upon divorce.[208]

Closely scrutinized, these arguments are without merit. The fabrication rationale fails to recognize that rape prosecutions are often more shameful and embarrassing for the victim than the defendant. Because of "[t]he stigma associated with such a sordid incident, the reluctance to face the insinuations of defense attorneys, and the fear of retaliation by the accused," rape is one of the most underreported crimes.[209] These deterrents are certainly as powerful for the wife-rape victim who, theoretically acting in revenge would surely choose a tactic that is less humiliating and embarrassing for herself.[210] Additionally, wives could equally choose prosecution for assault or battery to pressure their husbands into favorable property settlements upon divorce. This fear of inequitable leverage, however, should not suffice in Pennsylvania to deny the availability of prosecution of a husband for rape. Currently in Pennsylvania, the court will, upon request of either party, equitably divide the marital property between the divorcing parties "without regard to marital misconduct in such proportions as the *court* deems just after considering all relevant factors."[211]

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206. For judicial recognition of this right to equal protection, see State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981).

207. Writers have observed that there are "conceptual difficulties involved in making rape a crime between husband and wife." Comment, *Rape and Rape Laws: Sexism in Society and Law,* 61 CALIF. L. REV. 919, 926 (1973) [hereinafter cited as *Rape Laws*]. Another commentator argues that "[a]lthough wives need some form of protection by the criminal law from the injurious consequences of forcible sexual intercourse with their husbands, rape is a category ill-suited to marriage." *Rape and Battery, supra* note 93, at 725.

208. *Rape Laws, supra* note 201, at 935-36.

209. *Marital Rape, supra* note 72, at 315. *See* note 93 *supra.*

210. Although not a statistical sampling of the country, or even of Pittsburgh, our control and Control Battered samples together should be a rough approximation of the general population in Southwestern Pennsylvania. Looking at the percentages of these combined control samples, only 3% of the women reported marital rape and less than 10% reported other forms of violence.

I. Frieze, *Causes and Consequences of Marital Rape* (Univ. of Pittsburgh, 1980) (paper presented at meeting of American Psychological Association) (on file in office of Dickinson Law Review). This report appears to disprove the viability of the fear-of-fabricated-accusations rationale frequently enunciated in support of the retention of the marital exemption. Study results show the *reluctance* of married women to report this crime. *Id.* at 17-30.

211. PA. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1981) (emphasis added).

Moreover, the criminal justice system is designed to test the veracity of all accusations. Every case brought in a court of law is safeguarded by the imposition of the rules of civil and criminal procedure. Although rape by a spouse may be difficult to prove, juries are no less competent to grapple with the credibility of witnesses and the weight of evidence in a spousal-versus a nonspousal-rape case. Indeed, in *Smith,* the court expressly rejected the supposition that the criminal justice system would "completely and utterly fail to operate" in marital rape circumstances.[212]

The fear of prosecutions motivated by vengeance is unwarranted since the law already allows a wife to bring charges against her husband for numerous other offenses. As the court in *Smith* noted, "[c]harges of assault, battery, larceny, fraud, and other offenses may just as easily be the subject of such false accusations between spouses."[213] The chance that a spurious claim may be asserted does not bar a conviction against a husband for any of these offenses. Accordingly, a husband's prosecution for the rape of his wife should not be impeded on this basis.

Moreover, the actual experience of other nations[214] and states that employ the enlightened approach to marital rape law verifies the irrationality of this fear of false claims. Testimony reveals that "[t]he oft-expressed fear that vindictive women will falsely report marital rapes to gain leverage or power over their husbands has, most emphatically, not been Oregon's experience."[215] Nor has this occurred in California, where approximately fifteen charges have been brought in the two years since its marital rape statute became effective.[216] In addition, no onslaught of spurious marital rape complaints has been reported in Sweden in the fifteen years since the

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212. 148 N.J. Super. at 226, 372 A.2d at 389.

213. *Id.* at 225-26, 372 A.2d at 389.

214. Several foreign jurisdictions allow prosecution of a husband for raping his wife. Sweden, for example, altered its statute in 1965 to define rape in terms of a man forcing sexual intercourse on a woman by the use of violence or threat of imminent danger. *See* PENAL CODE OF SWEDEN ch. 6, § 1 (1965). The Danish Criminal Code similarly proscribes rape as intercourse obtained by force. *See also* Geis, *Rape-in-Marriage: Law and Law Reform in England, The United States and Sweden,* 6 ADEL. L. REV. 284, 298 (1978) [hereinafter cited as *Rape-in-Marriage*].

The Communist Bloc countries of Russia, Poland, and Czechoslovakia view *any* violation of sexual freedom as a violation of the right of self-determination, as an attack on the dignity of man, and thus as an attack on the socialist system. In these nations, the law is applied to the husband as it is applied to any other man. The Criminal Code of Yugoslavia, however, retains the protection if the female is not in "matrimonial union" with the man. *See* Linveh, *On Rape and the Sanctity of Matrimony,* 2 ISRAEL L. REV. 415, 420-21 (1967).

See generally English, *The Husband Who Rapes His Wife,* 126 NEW L.J. 1223 (1976).

215. Testimony of Peter F. Sandrock, Jr., District Attorney for Benton County Oregon, before the California State Senate Judiciary Committee (August 21, 1979). *See Rape in California, supra* note 145, at 250 n.75.

216. D. Finkelhor, Univ. of N.H., Dept. of Soc. (telephone interview conducted on February 2, 1980 with author). *See also* note 43 *supra.*

revision of its criminal code.[217] The fear of spurious claims, therefore, is a questionable justification to continue the spousal immunity.

B. Difficulty of Proving Lack of Consent

A major obstacle to the enforcement of a marital rape statute is the inherent difficulty of proving the wife's lack of consent. When the accused is the husband of the victim, the problems of proof appear insurmountable because generally no witnesses exist.[218] On this basis, however, *all* rapes are difficult to prosecute and prove. In both spousal and nonspousal incidents the dispute involves the victim's credibility versus that of the accused. It is "his word against hers" in other rape cases as well as in marital rape incidents. The lack of witnesses is never a bar to the prosecution of a nonspousal rapist, nor should it be when the assailant is married to his victim.

Visible signs of violence often appear in instances of forced sexual intercourse between spouses; in such cases, problems of proof should not impede the availability of a marital rape statute. Estimates show that a significant number of residents in shelters for battered women "have experienced rape as part of the abuse."[219] The presence of bruises and contusions on the victim militates against the conclusion that the intercourse was consensual. Evidentiary problems also arise in spouse abuse situations but statutes have been enacted in an attempt to protect women from the violence of their husbands.[220] Legislatures should follow this approach to the logical conclusion that evidentiary problems do not justify the complete unavailability of a spousal rape statute. Furthermore, the district attorney, the judge, and the jury, acting in conjunction, are qualified to review all of the evidence to determine the merits of a claim.

C. Interference with the Marital Relationship and the Possibility of Reconciliation

The assertion has been made that intramarital rape prosecutions would prevent reconciliation of marriage partners.[221] It is incongru-

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217. *Rape-in-Marriage, supra* note 208, at 302. Nevertheless the reform was deemed necessary. "Our practical experience does not dictate any alteration in the reform measure. The recommendation of the Sexual Offenses Commission is that sexual attacks in marriage and marriage-like cohabitation should not be excluded from application of the criminal law." *Id.* at 298.

218. *But see* Commonwealth v. Chretien, [1979] 5 FAM. L. REP. (BNA) 2962 (Mass. Sup. Ct. Oct. 16, 1979) (son witnessed attack by father on mother). *See* note 150 and accompanying text *supra.*

219. D. Baldwin, Director, Women in Crisis, Hummelstown, PA (telephone interview with author on January 29, 1981). In addition, Ms. Baldwin reported that proof of nonconsent is obvious in physical abuse cases - evidenced by bruises and injuries. *See generally* GELLES, *supra* note 94, at 91-136; MARTIN, *supra* note 13, at 180-82.

220. *E.g.,* PA. STAT. ANN. tit. 35, §§ 10181-10190 (Purdon Supp. 1981). California, Iowa, and New York follow similar schemes.

221. *See, e.g., Rape and Battery, supra* note 93, at 725.

ous, however, to assert that a relationship traumatized by spousal rape will be less reconcilable if the victim-spouse is denied the protection of the criminal law. Whenever a woman is forcibly sexually assaulted by her husband, marital disharmony is already apparent and will likely continue whether or not she is able to prosecute her spouse for such behavior.[222] Moreover, the cause of the marital discord is the perpetration of the spousal rape, not the possibility of prosecution. The logical impediment to reconciliation, therefore, is the occurrence of the forced intercourse, not the resulting prosecution.

When rape and domestic violence occur in a marriage, marital conflict already exists. A criminal action is not likely to worsen such situations. If this were the result, prosecution for other domestic crimes would also be denied. Ironically, women and children now enjoy greater administrative, legal, and judicial protection from beatings by husbands and parents.[223] Marital rape victims should certainly be afforded the same right to bring a cause of action to address their injury. The availability of reconciliation between spouses who have experienced marital rape is equally as great with and without such a statute.[224] The statutes do not require that a woman bring charges or testify against her husband;[225] rather, the decision is optional. The crux of the matter is the option. Every married woman should be able to independently decide whether the charge would contribute to the destruction of the marriage. Prosecutions for other domestic crimes are permitted without concern that the result may be an impediment to reconciliation. Denial of the ability to prosecute for spousal rape on this basis is anomalous.

VII. Alternatives

A. Protection from Abuse Acts

Pursuant to the Protection from Abuse Act,[226] an abused spouse in Pennsylvania may institute a civil action, but not eliminate the possibility of criminal sanctions, by filing a petition alleging abuse by the defendant. Abuse is defined as the attempt to cause, or the

222. In his research, Finhelhor, *supra* at note 93, found that some interviewees submitted to unwanted sexual intercourse because they have been forced in the past and realized it was useless to resist. Additionally, wives reported that their husbands would simply beat them to cause submission. *Id.* at 4. These reports substantiate the continuity of marital disharmony in the absence of prosecution.

223. *See* notes 189 & 214 and accompanying text *supra.*

224. *See, e.g.,* TIME, Jan. 8, 1979 at 61 (reporting reconciliation between John and Greta Rideout less than two weeks after husband was found not guilty of raping his wife). *See* notes 163-64 and accompanying text *supra.*

225. Some statutes, however, impose deadlines for reporting marital rape. *See, e.g.,* CAL. PENAL CODE § 262(b) (West Supp. 1981) (no arrest or prosecution unless violation reported within 30 days of the occurrence).

226. PA. STAT. ANN. tit. 35, §§ 10181-10190 (Purdon Supp. 1981).

intentional and reckless causation of bodily injury, with or without a deadly weapon.[227] To receive a protection order, it is sufficient to show that the spouse has been placed in fear of imminent serious bodily harm by physical menace.[228] Family or household members[229] included in the Act are wives, husbands, unmarried couples living together and separated couples.

Although the Protection from Abuse Act is an ostensibly viable alternative for a marital rape victim, it has several critical weaknesses. Specifically, the Act does not address the forced sexual intercourse action. The Act focuses on bodily injury, not the injury sustained in rape, which differs in nature and seriousness.[230] The suffering of abused wives is not to be minimized, but the marital rape victim's injury, which often includes a physical component, is more debasing. Sex crimes, especially rape, are a grave societal concern because "the woman may suffer permanent emotional reprecussions, and the psychological consequences for the victim are impossible to calculate."[231]

Rape has been described as the "supreme insult to feminine integrity;"[232] accordingly, punishment for this crime is universally stringent.[233] The meting of severe punishment evidences legislative recognition of the inherently greater degree of injury suffered by the individual and society when rape occurs.[234] Indeed, "[r]ape subjugates and humiliates the woman, leaving her with little retaliatory capability save that provided by law — to charge her attacker so that a civilized society may lawfully exact a just penalty or punishment for the *trespass committed.*"[235] Although the Protection from Abuse

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227. PA. STAT. ANN. tit. 35, § 10182(i) (Purdon Supp. 1981).

228. PA. STAT. ANN. tit. 35, § 10182(ii) (Purdon Supp. 1981).

229. PA. STAT. ANN. tit. 35, § 10182 (Purdon Supp. 1981).

230. *See* notes 121, 162 and accompanying text *supra. See also* Frieze, *supra* note 207, at 30-34. "[T]here appeared to be a number of types of reactions of the women to their marital rape experiences. Most directly, the majority of the women felt anger or some other form of husband-blaming affect about the rape experiences. . . . However, the women who reported being raped often were the most *self-blaming* contrary to what we might have expected." *Id.* at 30.

231. State v. Smith, 148 N.J. Super. 219, 226, 372 A.2d 386, 390 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981).

232. *Rape and Battery, supra* note 93, at 724.

233. The fear of the psychopathic rapist . . . [has] no doubt . . . [produced] the severe sentences that the law stands ready to impose for rape. A number of states provide for death as a possible or mandatory penalty for rape, although *Furman v. Georgia* now prevents execution under some of these statutes. Other states provide for sentences up to life imprisonment. Comparisons with crimes of comparable magnitude show that rape carries very high penalties.

Comment, *Rape and Rape Laws: Sexism in Society and Law,* 61 CALIF. L. REV. 919, 926 (1973).

234. *Id.*

235. State v. Smith, 148 N.J. Super. 219, 226, 372 A.2d 386, 390 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981) (emphasis added).

Act safeguards the personal safety of a spouse, only a marital rape law can protect against the outrage a woman suffers when she is sexually violated. The marital rape victim should not be forced to compromise when she seeks legal redress.

B. Abolition of Interspousal Tort Immunity

Until recently in Pennsylvania, a spouse was unable to sue or recover on a tort claim from the other spouse while the parties were married.[236] Other jurisdictions, however, completely retain the interspousal immunity.[237] Several states abrogate the immunity only in certain types of tort actions.[238] The marital status of the parties at the time of the actionable conduct, as well as at the time of suit, governs the availability of an interspousal tort suit in other states.[239] Apart from the preservation of family harmony, a major concern of courts that refuse to broaden this ability to sue is whether a tort claim suit can be truly adversary between husband and wife.[240]

The family harmony and fraudulent complaint arguments have been refuted as rational justifications for the retention of the marital exemption.[241] They may also be disclaimed as adequate justifications for retaining spousal tort immunity. Indeed, a growing number of American jurisdictions have abolished this defense in *all* interspousal tort cases.[242] It is inequitable, however, to allow a woman to sue her husband only for damages when rape occurs within the marital relationship. Thus, the abolition of interspousal tort immunity is an inadequate alternative.

Furthermore, in nonspousal rape situations the nonspousal rape victim is guaranteed that criminal charges may be brought against her assailant. The victim may also institute a civil action against the

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236. *See* note 187 and accompanying text *supra*.

237. The following states are among the jurisdictions that retain the common law interspousal immunity rule: Delaware, Florida, Georgia, Louisiana, and Ohio.

238. *See, e.g.,* Haymonon v. Coca Cola Bottling Co., 375 Mass. 768, 378 N.E.2d 442 (1978); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Digby v. Digby, 388 A.2d 1 (R.I. 1978). These courts have abolished interspousal immunity in automobile negligence actions. *See also* Smith v. Smith, 205 Or. 286, 287 P.2d 572 (1955); Bounds v. Caudle, 560 S.W.2d 925 (Tex. 1977), in which interspousal immunity is abolished in intentional tort actions.

239. *See, e.g.,* Gaston v. Pittman, 413 F.2d 1031 (5th Cir. 1969) (divorced woman can sue former husband for tort committed prior to marriage); Windauer v. O'Connor, 107 Ariz. 267, 485 P.2d 1157 (1971) (spouse may sue after divorce); Ennis v. Truhitte, 306 S.W.2d 549 (Mo. 1957) (spouse may sue after divorce for tort committed during marriage).

240. The following courts have reasoned that the immunity is necessary to an interspousal suit: Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979); Williams v. Ray, 146 Ga. App. 333, 246 S.E.2d 387 (1978); Thomas v. Hemon, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969); Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963).

241. *See Marital Rape, supra* note 72, at 315-16.

242. *See, e.g.,* Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979); Maestas v. Overton, 87 New Mexico, 213, 531 P.2d 947 (1975); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Hack v. Hack, No. 81-516 (Pa. Supreme Court, filed July 14, 1981); Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973); Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972).

rapist,[243] allowing her to recover damages for the humiliation and pain incurred. The marital rape victim in Pennsylvania, however, is afforded neither right.

The abolition of tort immunity, to permit a wife to sue her husband for damages for injuries inflicted during a marital rape, is still ineffective as a single remedy. If a married woman encounters difficulties in proving lack of consent under a marital rape statute, she will encounter the same problem of proof when she sues to recover damages. In either instance, she cannot escape the burden of proving her nonconsent. Although the burden of proof may be lighter in the civil action than in the criminal prosecution, that difference is not sufficient justification to bar an alternative cause of action.

Moreover, the real harm[244] imposed by an act of rape is not protected by assault and battery actions.[245] No physical manifestation of an injury results when a rape victim submits to threats of immediate bodily harm. Thus, in such a situation, a wife is outside the protection of assault and battery statutes. Assault and battery laws are therefore inadequate because they fail to protect victims from a "qualitatively different"[246] kind of harm.

C. Divorce

For some women, the logical consequence of rape within marriage is divorce. If the wife cannot endure such behavior, the divorce court may be a more appropriate forum for her complaint than a criminal trial. The crucial point is that the option to divorce her spouse or to prosecute under a marital rape statute should be available to the woman. The primary concern is that a woman has been forcibly subjected to sexual intercourse against her will. When this action occurs within a marriage, a woman may choose to terminate the marital relationship. It is inconceivable, however, that divorce should be the only possible remedial action to redress the harm suffered by the wife-rape victim.

When a woman is assaulted, battered, defamed or defrauded by her husband, she is not restricted to divorce as her sole remedy. It is inapposite to maintain that divorce is the *only* solution when a wife is raped: "It is small comfort to a married woman whose husband has forcibly ravished her against her will to know that she may resort

243. *See, e.g.,* Shaw v. Fletcher, 137 Fla. 519, 188 So. 135 (1939); Horby v. King, 13 N.J. Super. 395, 80 A.2d 476 (1951).

244. *See* note 190 and accompanying text *supra.*

245. "Assault and battery suit alternatives are not sufficient to vindicate the rape action." D. Baldwin, Director, Women in Crisis, Hummelstown, PA (telephone interview with author on January 29, 1981). *See* notes 187-190 and accompanying text *supra.*

246. *See Marital Rape, supra* note 72, at 316. *See also* notes 121 and 122 and accompanying text *supra.*

to the matrimonial courts to recapture or retrieve her right to sexual privacy."[247] Clearly, divorce does not compensate or vindicate the injuries of the victim. Furthermore, divorce lacks a deterrent effect and is therefore an untenable solution.

VIII. Conclusion

Rape is essentially a crime of physical and moral effrontery. Legal barriers, however, present a dilemma for women who are victims of marital rape. The law is currently in a state of turmoil. A handful of states have entered a new area and recognized that the common law rationales for spousal immunity are outmoded. The traditional view that a husband cannot be prosecuted for the rape of his wife remains in the law of Pennsylvania and in the law of the majority of jurisdictions. Furthermore, previously unprotected classes of defendants, including unmarried cohabitants and voluntary social companions are increasingly granted the protection of the marital exemption.

Although the crime of rape has a uniquely individual impact, the affront is not exclusively personal. All crimes offend society. The seriousness of spousal rape is not diminished because it occurs in the context of a marital or cohabital relationship. Thus, to allow an otherwise criminal act to remain unpunished is a threat to the moral principles that underlie society and the criminal law.

MELINDA S. DICARLO

247. State v. Smith, 148 N.J. Super. 219, 227, 372 A.2d 386, 390 (L. Div. 1977), *aff'd per curiam,* 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981).