

Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates

by
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Introduction

At least since the seventeenth century, rape law has included a formal marital rape exemption.¹ This exemption meant that men could not be charged with raping their wives and, if they were, marriage provided them with a complete defense.² Beginning in the 1970s, feminist reformers set their sights on this antiquated rape doctrine (as well as others that were similarly unfair to women) and worked to eliminate it from the law. As a result, the marital rape exemption has been subjected to about three decades of scholarly criticism.³ Legal academics argued that the marital rape exemption

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1. 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (Robert H. Small ed., 1st Am. ed. 1847) (1736).

2. *Id.* See also *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489 (1857) (“[I]t would always be competent . . . to show, in defence of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife.”).

3. See Rene Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559, 585 (1990–91) (“State legislatures need to abolish the exemption altogether, without simply narrowing the definition of marriage while retaining immunity for rape within marriage, without treating marital rape as a lesser offense, and without imposing extraneous requirements for the prosecution of cases involving marital rape.”); Thomas R. Bearrows, *Transition: Abolishing the Marital Exemption for Rape: A Statutory Proposal*, 1983 U. ILL.

L. REV. 201 (“Despite lengthy debate and severe criticism, the [marital exemption for rape] persists today as an anachronistic reminder of society’s traditional view of women and marriage generally.”); Anne L. Buckborough, *Family Law: Recent Developments in the Law of Marital I*, 1989 ANN. SURV. AM. L. 343, 345 (1990) (“According to the theory of implied consent, marital rape is impossible because all sexual contact within a continuing relationship is presumed to be consensual. Thus, under statutes grounded in the theory of implied consent, nonconsensual sexual intercourse is not a crime in the context of an ongoing sexual relationship.”); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1504 (2000) (“The modern defenders of the marital rape exemption . . . submerge and deny the harm that the rule causes women.”); *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 313 (1977) (“Reasons for maintaining the husband’s immunity [from marital rape convictions are not] sufficient to justify the deprivation which the exemption imposes on wives.”); Charlotte L. Mitra, “. . . *For She Has No Right or Power to Refuse Her Consent*,” 1979 CRIM. L. REV. 558 (“By thus exempting the husband from prosecution for rape on his wife, the law has granted him an immunity which is based solely on status.”); Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 720 (1954) [hereinafter Comment, *Rape and Battery*] (“Clearly the criminal law gives protection to a spouse against the grossest forms of invasion of bodily integrity.”); Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY, 941, 992 (1995) (“While certain states repealed the exemption entirely, other states merely compromised between old and new orthodoxies.”); Katherine M. Schelong, *Domestic Violence and the State: Responses To and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 96 (1994) (“The contemporary treatment of marital rape and domestic violence . . . demonstrates an underlying commitment to female subordination and female difference.”); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 69 (1990) (“The irrationality of marital rape exemptions is not their fundamental flaw. . . . The evil is that they legalize, and hence legitimate, a form of violence that does inestimable damage to all women, not only to those who are raped.”); Emily R. Brown, Note, *Changing the Marital Rape Exemption: I Am Chattel(!); Hear Me Roar*, 18 AM. J. TRIAL ADVOC. 657, 657 (1995) (“While legislatures and courts have been busy creating laws to handle [domestic violence, incest and child abuse], they have been slow in protecting women from perhaps the most damaging form of domestic violence: spousal rape.”) (footnotes omitted); Cassandra M. DeLaMothe, Note, *Liberta Revisited: A Call to Repeal the Marital Exemption for all Sex Offenses in New York’s Penal Law*, 23 FORDHAM URB. L.J. 857, 858 (1996) (“This Note argues that to fully protect victims of spousal sexual assault, the New York Legislature should codify the Liberta decision and repeal the marital exemption for all sex offenses.”); Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 683 (1996) (“[N]ot all recent legislative reform aims to revoke the marital exemption’s ‘raping license.’ Several states have actually extended their exemptions to include non-married, cohabiting couples.”); Linda Jackson, Note, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 185 (1994) (concluding that “marital exemptions, unable to survive the necessary standards of strict scrutiny, are unconstitutional”); Judith A. Lincoln, Note, *Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape*, 35 WAYNE L. REV. 1219, 1224 (1989) (“Other marital rapes occur during a battering episode. The husband engages in some nonconsensual sexual act as part of the abusive process. While the husband can be prosecuted under wife battering statutes, he has also committed the crime of rape and should be prosecuted for that as well.”) (footnotes omitted); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1255 (1986) [hereinafter *To Have and To*

was unconstitutional under the equal protection clause of the Fourteenth Amendment.⁴ They called for the elimination of marital immunity, either by deleting provisions in sexual offense statutes that referred to the marital status of the parties⁵ or by inserting new provisions in those statutes that authorized the prosecution of spouses for rape.⁶

Hold] (“[T]he marital rape exemption serves as both a manifestation of and a vehicle for the continued subordination of women in society.”); Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 353 (1995) [hereinafter Siegel, Note] (“[T]rue equality between women and men can never exist until every state has completely abolished the marital rape exemption.”); Jaye Sitton, Comment, *Old Wine in New Bottles: The “Marital” Rape Allowance*, 72 N.C. L. REV. 261, 264 (1993) (“[T]he Comment argues that complete abolition of all laws distinguishing among rape and sexual assault victims based on their relationship to their assailant is required in order for women to achieve equal protection under the law.”); Abigail Andrews Tierney, Comment, *Spousal Sexual Assault: Pennsylvania’s Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777, 778 (1986) (“[T]his comment suggests complete abolition of spousal immunity and equal application of the rape and involuntary deviate sexual intercourse laws of Pennsylvania to all persons, regardless of their marital statute, as a viable solution to cure the inadequacies of the current spousal sexual assault law.”) (footnotes omitted); Sallie Fry Waterman, Comment, *For Better or Worse: Marital Rape*, 15 N. KY. L. REV. 611, 611 (1988) (arguing that marital rape “needs to be confronted and given political priority until every state is willing to recognize marital rape as a criminal act”).

4. See, e.g., West, *supra* note 3, at 48 (“While virtually every progressive commentator, judge, or legislator . . . who seriously has considered the issue readily has concluded that [marital rape exemptions] violate equal protection, . . . no major upheaval of the law reflects or foreshadows such progressive unanimity.”) (footnotes omitted). In 1990, Professor Robin West proposed that Congress enact a Married Women’s Privacy Act to guarantee protection to every woman against violent sexual assaults. *Id.* at 76. The federal law would “prohibit irrational discrimination against married women in the making and enforcement of rape laws,” guarantee that “states would not perpetuate or insulate the sexualized social, private, or intimate subordination of women by men,” and guarantee that “no state would deny to women protection of the state against private criminality.” *Id.* West viewed Congress, rather than the judiciary, as the proper branch to declare marital rape exemptions unconstitutional. *Id.* at 77. “Unlike the Court, Congress does not recoil inevitably at the prospect of undertaking significant reconstructions of social life. Indeed, this duty is clearly its business.” *Id.* See also Jackson, *supra* note 3, at 207, 216 (arguing that, if strict scrutiny “is applied correctly and consistently, all marital rape exemptions necessarily would be found unconstitutional”).

5. See, e.g., Bearrows, *supra* note 3, at 222–26 (proposing rape statute that would be silent on relationship between perpetrator and victim and would grade offenses based on amount of violence used); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1800 (1992) (proposing that legislatures replace marital and other rape statutes with graded offenses based on the amount of force used); Sitton, *supra* note 3, at 264 (“[C]omplete abolition of all laws distinguishing among rape and sexual assault victims based on their relationship to their assailant is required in order for women to achieve equal protection under the law.”).

6. See, e.g., Eskow, *supra* note 3, at 705 (rape statute should first “set[] forth a definition of rape that neither affirmatively includes nor excludes spouses as potential

Many people believe that reformers won the battle against the marital rape exemption.⁷ This belief is, unfortunately, incorrect. The good news is that twenty-four states and the District of Columbia have abolished marital immunity for sexual offenses.⁸ The bad news

victims, while the second paragraph [would] clarif[y] that marriage is no defense to rape”). Although I prefer non-gender neutral terms because rape within marriage is overwhelmingly a crime that men commit on women, I use the term spouse because the statutes are gender neutral. See DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* 9 (exp. and rev. ed. 1990) (“The term ‘wife rape’ is preferred over ‘marital rape’ or ‘spousal rape’ because it is not gender neutral. The term ‘spousal rape’ in particular seems to convey the notion that rape is something that wives do to husbands, if not as readily as husbands do it to wives, at least sufficiently often that a gender neutral term should be used.”).

7. A number of scholars have even declared victory over the marital rape immunity. One scholar entitled her piece, “The Marital Rape Exemption: Evolution to Extinction,” and another entitled her article, “Accomplishing the Impossible: An Advocate’s Notes From the Successful Campaign to Make Marital and Date Rape a Crime in All 50 U.S. States and Other Countries.” Siegel, Note, *supra* note 3, at 351; Laura X, *Accomplishing the Impossible: An Advocate’s Notes from the Successful Campaign to Make Marital and Date Rape a Crime in All 50 U.S. States and Other Countries*, in 5 VIOL. AG. WOMEN 1064 (1999).

8. ARK. CODE ANN. § 5-14-103 (Michie 1987–2001) (silent on rape, Class Y felony); § 5-14-124 (silent on sexual assault in first degree, Class A felony); § 5-14-125 (silent on sexual assault in second degree, Class B felony); § 5-14-126 (silent on sexual assault in third degree, Class C felony); § 5-14-127 (silent on sexual assault in fourth degree, Class A misdemeanor); COLO. REV. STAT. ANN. § 18-3-409 (West 2002) (“Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense under this part 4 unless such defense is specifically set forth in the applicable statutory section by having the elements of the offense specifically exclude a spouse;” spouses exempt only from statutory rape); DEL. CODE ANN. tit. 11, § 763 (1975–2001) (silent on sexual harassment, unclassified misdemeanor); § 767 (silent on unlawful sexual contact in third degree, Class A misdemeanor); § 768 (silent on unlawful sexual contact in second degree, Class G felony); § 769 (silent on unlawful sexual contact in first degree; Class F felony); § 770 (silent on rape in fourth degree; Class C felony); § 771 (silent on rape in third degree, Class B felony); § 772 (silent on rape in second degree, Class B felony); § 773 (silent on rape in first degree, Class A felony); § 776 (silent on sexual extortion, Class E felony); D.C. CODE ANN. § 22-3019 (2002) (“No actor is immune from prosecution under any section of this subchapter because of marriage or cohabitation with the victim; provided, however, that marriage of the parties may be asserted as an affirmative defense in a prosecution under this subchapter where it is expressly so provided.”); § 22-3024 (“Laws attaching a privilege against disclosure of communications between a husband and wife are inapplicable in prosecutions under subchapter II of this chapter where the defendant is or was married to the victim or where the victim is a child.”); FLA. STAT. ANN. § 794.011 (West 2002) *amended by* 2002 Fla. Sess. Law Serv. Ch. 2002-211 (H.B. 1399) (West) (silent on sexual battery); GA. CODE ANN. § 16-6-1(2) (Harrison 1982–2001) (“The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.”); § 16-6-2 (“The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy.”); IND. CODE ANN. § 35-42-4-1 (West 2002) (silent on rape, Class A or B felony); § 35-42-4-2 (silent on criminal deviate conduct, Class A or B felony); § 35-42-4-8 (silent on sexual battery, Class C or D felony); KY. REV. STAT. ANN. § 510.040 (West 2002) *updated* 2002 Kentucky Laws Ch. 259 (S.B. 25) (silent on rape in first degree); § 510.040 (silent on rape in second degree); § 510.060 (silent on

rape in third degree); § 510.070 (silent on sodomy in first degree); § 510.080 (silent on sodomy in second degree); § 510.090 (silent on sodomy in third degree); § 510.100 (silent on sodomy in fourth degree); § 510.110 (silent on sexual abuse in first degree); § 510.120 (silent on sexual abuse in second degree); § 510.130 (silent on sexual abuse in third degree); § 510.140 (silent on sexual misconduct); ME. REV. STAT. ANN. tit. 17-A, § 253 (West 2002) (silent on gross sexual assault, Class A, B or C crime); § 255 (silent on unlawful sexual contact); MASS. GEN. L. ANN. ch. 265, § 22 (West 2002) (silent on rape); § 34 (silent on crime against nature); § 35 (silent on unnatural and lascivious acts); § 3 (silent on drugging persons for sexual intercourse); MO. REV. STAT. § 566.030 (2002) (silent on rape); § 566.040 (silent on sexual assault); § 566.060 (silent on forcible sodomy); § 566.070 (silent on deviate sexual assault); § 566.090 (silent on sexual misconduct in first degree); § 566.100 (silent on sexual abuse); MONT. CODE ANN. § 45-5-502 (2001) (silent on sexual assault); § 45-5-503 (silent on sexual intercourse without consent); § 45-5-505 (silent on deviate sexual conduct); NEB. REV. STAT. § 28-319 (2001) (silent on sexual assault in first degree, Class II felony); § 28-320 (silent on sexual assault in second or third degree, Class III felony and Class I misdemeanor); N.H. REV. STAT. ANN. § 632-A:5 (2002) (“An actor commits a crime under this chapter [sexual offenses] even though the victim is the actor’s legal spouse.”); N.J. STAT. ANN. § 2C:14-5(b) (West 2002) (“No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim.”); N.M. STAT. ANN. § 30-9-11 (Michie 1978–2001) (silent on criminal sexual penetration); § 30-9-12 (silent on criminal sexual contact); N.C. GEN. STAT. § 14-27.8 (2002) (“A person may be prosecuted under this Article whether or not the victim is the person’s legal spouse at the time of the commission of the alleged rape or sexual offense.”); N.D. CENT. CODE § 12.1-20-03 (1999–2001) (silent on gross sexual imposition, Class A or B felony); § 12.1-20-04 (silent on sexual imposition, Class B felony); § 12.1-20-07 (silent on sexual assault, Class C felony or Class A misdemeanor); § 12.1-20-12 (silent on deviate sexual act, Class A misdemeanor); OR. REV. STAT. § 163.355 (2001) (silent on rape in the third degree, Class C felony); § 163.365 (2001) (silent on rape in second degree, Class B felony); § 163.375 (silent on rape in first degree, Class A felony); § 163.385 (silent on sodomy in third degree, Class C felony); § 163.395 (silent on sodomy in second degree, Class B felony); § 163.405 (silent on sodomy in first degree, Class A felony); § 163.408 (silent on unlawful sexual penetration in second degree, Class B felony); § 163.411 (silent on unlawful sexual penetration in first degree, Class A felony); § 163.415 (silent on sexual abuse in third degree, Class A misdemeanor); § 163.425 (silent on sexual abuse in second degree, Class C felony); § 163.427 (silent on sexual abuse in first degree, Class B felony); 18 PA. CONS. STAT. ANN. § 3121 (West 2002) (silent on rape); § 3123 (silent on involuntary deviate sexual intercourse); § 3124.1 (silent on sexual assault); § 3125 (silent on aggravated indecent assault); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (Vernon 2002) (silent on sexual assault and aggravated sexual assault); UTAH CODE ANN. § 76-5-402(2) (1953–2001) (“This section [rape] applies whether or not the actor is married to the victim.”), § 76-5-405 (aggravated sexual assault; includes definition of rape in statute which applies “whether or not the actor is married to the victim”); VT. STAT. ANN. tit. 13, § 3252 (2001) (silent on sexual assault), § 3253 (silent on aggravated sexual assault); W. VA. CODE § 61-8B-3 (1966–2002) (silent on sexual assault in first degree, felony); § 61-8B-4 (silent on sexual assault in second degree, felony); § 61-8B-5 (silent on sexual assault in third degree, felony); § 61-8B-7 (silent on sexual abuse in first degree, felony); § 61-8B-8 (silent on sexual abuse in second degree, misdemeanor); § 61-8B-9 (silent on sexual abuse in third degree, misdemeanor); WIS. STAT. ANN. § 940.225(6) (West 2002) (“A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.”).

is that twenty-six states retain marital immunity in one form or another.⁹ Although in some of these twenty-six states marital

9. ALASKA STAT. § 11.41.425 (Michie 2001) (marriage is a defense to sexual assault in third degree, Class C felony); ARIZ. REV. STAT. ANN. § 13-1407(D) (West 2002) (it is a defense to sexual abuse that person was spouse of other person at time of commission of act; sexual abuse is Class 5 felony); CAL. PENAL CODE § 262(b) (West 2002) (rape of spouse must be reported within one year after date of violation; reporting requirement shall not apply if victim's allegation of offense is corroborated by independent evidence); CONN. GEN. STAT. ANN. § 53a-70a (West 2002) (marital immunity for aggravated sexual assault in the first degree, Class B felony); § 53a-71 (marital immunity for sexual assault in second degree); § 53a-72a (marital immunity for sexual assault in third degree); § 53a-72b (marital immunity for sexual assault in third degree with firearm); § 53a-73a (marital immunity for sexual assault in fourth degree); HAW. REV. STAT. § 707-732 (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (spouses and cohabitants are exempt from sexual assault in third degree, Class C felony, if actor submits other person to sexual contact through strong compulsion or other person is mentally defective); § 707-733 (2001) *note in* H.B. 2560 (spouses and cohabitants are exempt from sexual assault in fourth degree, a misdemeanor, if actor submits other person to sexual contact by compulsion); IDAHO CODE § 18-6107 (Michie 1948-2002) ("No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 3 [force] and 4 [threats of harm or use of intoxicating substance] of section 18-6101."); 725 ILL. COMP. STAT. ANN. § 5/12-18(c) (West 2002) (prosecution of a spouse is barred for criminal sexual assault (§ 5/12-13), aggravated criminal sexual assault (§ 5/12-14), criminal sexual abuse (§ 5/12-15), and aggravated criminal sexual abuse (§ 5/12-17), if not reported to law enforcement within 30 days after offense was committed); IOWA CODE ANN. § 709.4 West 2002 (marital immunity for mentally incapacitated and physically helpless sexual assault); KAN. STAT. ANN. § 21-2517 (2001) (marriage is defense to sexual battery, Class A person misdemeanor); LA. REV. STAT. ANN. § 43 (West 2002) (marital immunity for simple rape); § 43.1 (spouses exempt from sexual battery); MD. CRIM. LAW § 3-316 (West 2002) (spouses can only be prosecuted for rape in first degree, rape in second degree, or sexual offense in third degree if force is used or couple is living separately); MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his or her spouse being under age 16, mentally incapable or mentally incapacitated); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (spouse does not commit criminal sexual conduct in third or fourth degree if actor knows or has reason to know that complainant is mentally impaired, mentally incapacitated, or physically helpless); MISS. CODE ANN. § 97-3-99 (2002) (legal spouse of alleged victim may be found guilty of sexual battery if legal spouse engaged in forcible sexual penetration without consent of alleged victim); NEV. REV. STAT. § 200.373 (2002) (marriage is no defense to charge of sexual assault if assault was committed by force or by threat of force); OHIO REV. CODE ANN. § 2907.0 (West 2002) (spouses exempt from sexual battery, third degree felony); § 2907.05 (spouses exempt from gross sexual imposition, third or fourth degree felony); § 2907.06 (spouses exempt from sexual imposition, first degree misdemeanor); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) *amended by* 2002 Okla. Sess. Law Serv. Ch. 22 (H.B. 2924) (West) (rape of spouse must be accompanied by actual or threatened force or violence, along with apparent power of execution against victim or third person); R.I. GEN. LAWS 1956 § 11-37-2 (1953-2001) (spouses exempt from first degree sexual assault if victim is mentally incapacitated, mentally disabled, or physically helpless); S.C. CODE ANN. 1976 § 16-3-658 (Law. Co-op. 2002) (spouse cannot be prosecuted for criminal sexual conduct in third degree); S.D. CODIFIED LAWS § 22-22-7.4 (Michie 1968-2002) (spouses exempt from sexual contact

immunity for the specific crime of forcible rape is dead, immunity for other sexual offenses thrives.¹⁰ For example, twenty states grant marital immunity for sex with a wife who is incapacitated or unconscious and cannot consent.¹¹ Fifteen states grant marital

without consent with person who is capable of consenting, Class 1 misdemeanor); TENN. CODE ANN. § 39-13-507(d) (West 2002) (spousal sexual battery requires defendant to be armed with weapon, inflict serious bodily injury, or parties must be living separately and filed for divorce); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2(B) (West 2002) (no person shall be found guilty of rape, forcible sodomy, or object sexual penetration unless, at time of alleged offense, spouses were living separate or defendant caused bodily injury to spouse by use of force or violence); WASH. REV. CODE ANN. § 9A.44.060 (West 2002) (spouses exempt from rape in third degree, Class C felony); § 9A.44.100(1)(c) (West 2002) (marital immunity for indecent liberties, Class A or B felony); WYO. STAT. ANN. § 6-2-304 (Michie 1977-2001) (marriage is defense to third degree sexual assault if no injury has occurred); § 6-2-313 (marriage is defense to sexual battery).

Additionally, the statutes of New York and Alabama still contain provisions allowing for marital immunity from most sexual offenses with the exception of rape. The New York Court of Appeals and the Alabama Supreme Court have arguably abolished the marital immunities in these codes, yet the statutes have remained static for almost twenty years. *See* *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (abolishing marital immunity in New York) and *Merton v. State*, 500 So. 2d 1301 (Ala. 1986) (abolishing marital immunity in Alabama).

10. *See infra* notes 68, 75 and accompanying text.

11. ALASKA STAT. § 11.41.420(a)(3) (Michie 2001) (marriage is defense to second degree sexual assault if the victim is incapacitated or unaware the sexual act is being committed); ARIZ. REV. STAT. ANN. § 13-1407 (West 2002) (implied marital immunity when victim is mentally incapacitated because statute requires force for spousal conviction of sexual assault); CONN. GEN. STAT. ANN. § 53a-67(a)(3) (West 2002) (spouses or cohabitants are exempt from sexual assault in fourth degree, which occurs when person intentionally subjects another to sexual contact who is mentally defective, mentally incapacitated or physically helpless); § 53a-71 (spouses and cohabitants are immune from sexual assault in the second degree when the victim is physically helpless); HAW. REV. STAT. § 707-732(d) (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (spouses and cohabitants are exempt from sexual assault in third degree, Class C felony, if victim is mentally defective, mentally incapacitated, or physically helpless); IDAHO CODE § 18-6107 (Michie 1948-2002) (husband cannot be prosecuted for rape if wife is incapable of giving consent or unconscious at time of act); IOWA CODE ANN. § 709.4 (West 2002) (marriage is defense to sexual abuse in third degree if victim is suffering from mental defect or incapacity which precludes giving consent; Class C felony); LA.REV. STAT. ANN. § 43 (West 2002) (express exemption from simple rape which includes situation where victim is incapable of resisting due to an intoxicating substance); MD. CRIM. LAW. § 3-318 (West 2002) (express exemption from rape in second degree and sexual offense in third degree when victim is mentally incapacitated or physically helpless); MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his or her spouse being under age 16, mentally incapable or mentally incapacitated); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (spouse does not commit criminal sexual conduct in third or fourth degree if actor knows or has reason to know that complainant is mentally impaired, mentally incapacitated, or physically helpless); MISS. CODE ANN. § 97-3-99 (2002) (implied marital immunity when victim is mentally incapacitated or physically helpless, as spouses are immune from prosecution for sexual

immunity for sexual offenses unless requirements such as prompt complaint, extra force, separation, or divorce are met.¹² The law in

battery unless husband uses force); NEV. REV. STAT. § 200.373 (2002) (implied marital immunity when victim is mentally or physically incapable as spouses are immune unless husband uses force); OHIO REV. CODE ANN. § 2907.02 (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (spousal immunity if victim is mentally or physically incapable of consent); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) (marital immunity for rape where the victim is incapable of consent through mental illness, unsoundness of mind, intoxicated or unconscious); R.I. GEN. LAWS 1956 § 11-37-2 (1953–2001) (spouses exempt from first degree sexual assault if victim is mentally incapacitated, mentally disabled, or physically helpless); S.C. CODE ANN. 1976 § 16-3-652 (LAW. CO-OP. 2002) (implied marital immunity when the actor causes the victim to become mentally incapacitated or physically helpless by administering a controlled substance); S.D. CODIFIED LAWS § 22-22-7.2 (Michie 1968–2002) (spouses exempt from sexual contact when person is incapable of consenting, Class 4 felony); TENN. CODE ANN. § 39-13-507 (West 2002) (implied marital immunity when victim is mentally incapacitated or physically helpless because spouses are generally exempt from prosecution unless weapon is used or there is bodily injury); VA. CODE ANN. § 18.2-61(A)(ii) (West 2002) (marital immunity when the victim suffers from a mental incapacity or physical helplessness); WASH. REV. CODE ANN. § 9A.44.100(1)(b) (West 2002) (marital immunity for indecent liberties when the victim is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless, Class A or B felony).

12. ALASKA STAT. § 11.41.432 (Michie 2001) (it is defense to sexual assault when victim is mentally incapable of consenting that offender is married to person and neither party has filed with the court for separation); ARIZ. REV. STAT. ANN. § 13-1406.01(A) (West 2002) (“A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.”); CAL. PENAL CODE § 262 (West 2002) (rape of spouse must be reported within one year after date of violation; reporting requirement shall not apply if victim’s allegation of offense is corroborated by independent evidence); CONN. GEN. STAT. ANN. § 53a-70b (West 2002) (spouses or cohabitants are exempt from sexual assault unless offender uses force or the threat of force); IDAHO CODE § 18-6107 (Michie 1948–2002) (husband can only be prosecuted for rape where wife “resists but her resistance is overcome by force or violence” or “[w]here she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating, narcotic, or anesthetic substance administered by or with the privity of the accused”); 725 ILL. COMP. STAT. ANN. § 5/12-18(c) (West 2002) (prosecution of a spouse is barred for criminal sexual assault (§ 5/12-13), aggravated criminal sexual assault (§ 5/12-14), criminal sexual abuse (§ 5/12-15), and aggravated criminal sexual abuse (§ 5/12-17), if not reported to law enforcement within 30 days after offense was committed); MD. CRIM. LAW § 3-316 (West 2002) (spouse may not be prosecuted under § 3-303 [rape in first degree], § 3-304 [rape in second degree], § 3-307 [sexual offense in third degree] or § 3-308 [sexual offense in fourth degree] unless person committing crime uses force and act is without consent of spouse, or couple has lived apart under written separation agreement or for at least three months before alleged rape or sexual offense. A person may be prosecuted under these statutes if there was decree of limited divorce at time of offense); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.F. 2433) (West) (person does not commit criminal sexual conduct under § 609.342(a) and (b) [criminal sexual conduct in first degree], § 609.343(a) and (b) [criminal sexual conduct in second degree], § 609.344(a), (b), (d), and (e) [criminal sexual conduct in third degree], and § 609.345(a), (b), (d), (e) [criminal sexual conduct in fourth degree], if actor and

more than half the states today makes it harder to convict men of sexual offenses committed against their wives. In so doing, the law in these jurisdictions degrades married women and affords men who sexually assault their wives an unwarranted status preference.¹³

In this Article, I assess the law on marital immunity in state sexual offense statutes today and advocate much needed reform. Structurally and doctrinally, I make two arguments. First: It is past time for all states to eliminate marital immunity that continues to contaminate their sexual offense statutes.¹⁴ Because discrimination

complainant were adults cohabiting in ongoing voluntary sexual relationship at time of alleged offense, or if complainant is actor's legal spouse, unless couple is living apart and one of them has filed for legal separation or dissolution of marriage); MISS. CODE ANN. § 97-3-99 (2002) (person is not guilty of sexual battery if alleged victim is that person's legal spouse and at time of alleged offense such person and alleged victim are not separated and living apart unless force is used); NEV. REV. STAT. § 200.373 (2002) (marriage is no defense to charge of sexual assault if assault was committed by force or by threat of force); OHIO REV. CODE ANN. § 2907.02(G) (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (spouse cannot be charged with rape unless couple is living separate or force is used); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) *amended by* 2002 Okla. Sess. Law Serv. Ch. 22 (H.B. 2924) (West) (rape of spouse must be accompanied by actual or threatened force or violence, along with apparent power of execution against victim or third person); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (crime of spousal sexual battery must be reported within thirty days, § 16-3-658 (person cannot be guilty of criminal sexual conduct in first or second degree if victim is the legal spouse unless couple is living apart); TENN. CODE ANN. § 39-13-507 (West 2002) (spousal rape requires the defendant to be armed with a weapon, cause serious bodily injury, or living apart and one has filed for separate maintenance or divorce); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2(B) (West 2002) (no person shall be found guilty of rape, forcible sodomy, or object sexual penetration unless, at time of alleged offense, spouses were living separate and apart.)

13. Cf. CATHARINE A. MACKINNON, *SEX EQUALITY* 870 (2001) ("In light of the widespread social and legal reluctance to effectively address rape among familiars, the marital rape exclusion can be seen as only the most formal expression of a tendency that extends across the design and deep into the administration of the law to make closeness a proxy for consent."). West, *supra* note 3, at 78 ("The marital exemption, in brief, is simply the most brutal of all possible expressions of the social inclination to trivialize women's interest in physical and sexual security.").

14. Contrary to popular belief, wife rape is actually more common than stranger rape. See RUSSELL, *supra* note 6, at 64 ("[W]e believe that a woman is most likely to be physically forced into having sexual intercourse by her husband.' Hunt was less tentative. 'Incredible as it may seem, *more women are raped by their husbands each year than by strangers, acquaintances or other persons.*'"). Fourteen percent of the married women in one study had been raped by their husbands. RUSSELL, *supra* note 6, at 57 ("Eighty-seven women in our sample of 930 women eighteen years and older were the victims of at least one completed or attempted rape by their husbands or ex-husbands. This constitutes 14 percent of the 644 women who had ever been married (286 of the 930 women had never been married). This means that *approximately one in every seven women who has ever been married in our San Francisco sample was willing to disclose an experience of sexual assault by their husbands that met our quite conservative definition of rape.*") (emphasis in original). Finkelhor and Yllo found:

against married women who are sexually assaulted by their husbands is indefensible, state law should provide no favorable treatment to men who sexually assault their wives. Formal neutrality in rape law on the marital status of the complainant and the defendant—affording no preference to married men who rape their wives—is the bare minimum a state must have to claim fairness to women.

Second: Formal neutrality is not enough. Formal neutrality fails to solve a deeper and more intractable problem spawned by the marital rape exemption. The exemption did more than just protect men from being prosecuted for raping their wives. It presaged the devastating impact that a prior sexual relationship between a defendant and a complainant has on a claim of rape today.¹⁵ Substantial bias against sexually active women who are raped by their intimates takes the form of a common but improper inference of consent to the sex alleged to have been rape based solely on the existence of a prior intimate relationship between the parties.¹⁶ The improper inference of ongoing consent in sexual relationships is a doctrinal problem that affects all intimate rape, regardless of the marital status of the parties.

The Department of Justice estimates that sixty-two percent of adult rapes are committed by intimates—spouses, ex-spouses, boyfriends, or ex-boyfriends.¹⁷ If the criminal law is to redress these

Rape by a stranger is the variety that is most likely to be reported to police, yet 10 percent of the women in our study had been sexually assaulted by their husbands, whereas only 3 percent had been similarly assaulted by a stranger. In addition, rape by a date was reported by 10 percent of the women. Clearly, sexual assaults by intimates, including husbands, are by far the most common type of rape. Thus rape by husbands appears to be one of the forms of sexual coercion that a woman is most likely to experience in her lifetime.

DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6-7 (1985) (“Our survey showed disturbingly high rates of sexual assault by husbands. *Ten percent of the married or previously married women in our sample said that their husbands had ‘used physical force or threat to try to have sex with them.’* We do not know whether all these assaults meet the precise legal definition of rape or attempted rape.”) (emphasis in original).

15. See *infra* notes 235-51 and accompanying text.

16. The bias against rape victims may be called “the culture of acceptance” of date rape or “a special permissiveness regarding male sexual aggression against female social acquaintances.” Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 489 (1991). The stereotypes the culture of acceptance includes are the “aggressive male” (one who actively pursues sexual relations) and the “punished” female (one who “asks for” sex because of how she is dressed or how she communicates nonverbally to males). *Id.* Friedland declared, “an active attempt must be made, at all stages of a trial, to neutralize the latent gender-based prejudice caused by the culture of acceptance.” *Id.* at 491.

17. PATRICIA TJADEN & NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT: FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL

rapes, then it must attack the notion—handed down through generations by the marital rape exemption—that husbands, ex-husbands, boyfriends, and ex-boyfriends have been granted ongoing consent to sexual intercourse simply because of their prior sexual relationships with their victims.

I propose that states adopt a new law on sexual offenses by intimates to correct the improper inference of ongoing consent. This new law would cover sexual conduct between the defendant and the complainant in marriage, cohabitation, dating, or other circumstances. It would declare that the complainant's consent on the instance in question may not be inferred based solely on her consent to the same or different acts with the defendant on other occasions.

Part I of this Article traces the development of the marital rape exemption in this country. It begins with the history of the doctrine under English common law, analyzing the three traditional justifications for the marital rape exemption. It argues that the most enduring justification has been the notion that the marriage contract grants women's ongoing consent to sexual activity with their husbands. It then describes the immunities based on marital status that continue in sexual offense statutes in the 50 states and the District of Columbia. It analyzes the modern justification for these current marital immunities, including the position, advanced by the Model Penal Code and a number of scholars, that men who have sexual relationships with women may presume consent to future sexual intercourse with them. It argues that these modern justifications derive from the traditional notion of ongoing consent.

Part II argues, at a minimum, that the feminist reform agenda begun in the 1970s must be completed. It argues for formal neutrality in rape law on the marital status of the parties so that the law provides no preferential treatment to men who rape their wives. It refutes the ongoing consent ideology by analyzing the commonly held belief that undergirds it: that wife rape is less harmful to victims than stranger rape. After reviewing studies on the matter, it concludes that, contrary to popular belief, wife rape tends to be more violent and psychologically damaging than stranger rape. Abolishing the status preference that men enjoy when they rape their wives is crucial to redressing the harms caused by wife rape.

Part III turns to the development of the broader law on sexual offenses by intimates in this country. It begins by revisiting the history of the marital rape exemption. The marital rape exemption

VIOLENCE AGAINST WOMEN SURVEY 44 (2000). An additional 28% of rapes are committed by acquaintances and relatives who have not been previously intimate with their victims. *Id.*

began at a time when licit sex was confined to marriage and extra-marital sex was proscribed by laws against fornication and adultery. As society de-criminalized non-marital sexual relations in the late twentieth century, statutory marital immunities began to include cohabitants and voluntary social companions within their purview. Around the same time, legislatures began to implement rape shield laws. Despite their general prohibition on the admission of evidence of a complainant's prior sexual history, these laws universally admitted evidence of her prior sexual history with the defendant, regardless of the marital status of the parties. This Part argues that these two legal changes—the inclusion of cohabitants and voluntary social companions within the purview of marital immunities and the admission of evidence of the sexual history between the complainant and the defendant—were both modern manifestations of the ongoing consent ideology.

In light of the development of the law on sexual offenses by intimates, Part IV revisits the issue of formal neutrality on marital status in sexual offense statutes. It analyzes reform proposals that states simply abolish marital immunity in their sexual offense statutes or that states add specific provisions indicating that men may be prosecuted for raping their wives. After reviewing cases from jurisdictions in which the statutes are either silent or contain specific provisions indicating that men may be prosecuted for raping their wives, it argues that both proposals are inadequate because they fail to address the ongoing consent ideology based on intimate relationships that remains embedded in rape law. Thus, not only is the feminist reform agenda for formal neutrality begun in the 1970s unfinished, it is also inadequate.

Part V proposes a new law on sexual offenses by married and unmarried intimates that addresses the improper inference of ongoing consent based on intimate relationships. After reviewing and rejecting alternative proposals, it argues that states should abandon statutory provisions that deal exclusively with marital status. Instead, they should adopt a provision declaring that a prior sexual relationship between the parties, whether in marriage, cohabitation, dating, or another context, does not provide the defendant with a defense to the charged sexual offense. This new provision would also declare that consent may not be inferred when based solely on the complainant's prior consent to the same or another sexual act with the defendant. In contrast to the ongoing consent ideology, this Part offers a normative vision of consent that is temporally constrained and act-specific. It is this more egalitarian normative vision of consent that underlies the new law on sexual offenses by intimates. Finally, Part V applies this new law to the cases previously discussed

and concludes that such an application would effect a just improvement over the status quo.

The *Appendix of State Sexual Offense Statutes with Marital Immunity* details the current statutes in the 26 states that contain some form of marital immunity.

I. Development of the Marital Rape Exemption

This Part discusses the legal development of the marital rape exemption. It begins by analyzing the history of the marital rape exemption under English common law, arguing that the most enduring traditional justification for the doctrine has been the ongoing consent ideology advanced by Sir Matthew Hale in the seventeenth century. It then turns to the current marital immunities that continue to exist in state statutes, despite the efforts at feminist reform begun in the 1970s. These current immunities fall into three categories: exemptions for certain sexual offenses, separate spousal sexual offense statutes, and extra requirements for spousal sexual offenses. As a final measure of analysis, this Part turns to the modern justifications that the drafters of the Model Penal Code and others have advanced for both the ancient and modern versions of marital immunity for sexual offenses. It argues that these modern justifications ultimately depend upon Hale's ongoing consent ideology.

A. History of the Marital Rape Exemption

The traditional definition of rape under English common law was unlawful sexual intercourse with a female without her consent.¹⁸ In his leading treatise on criminal law, Rollin Perkins explained that the marital rape exemption was built into the definition of the crime through the word *unlawful*.¹⁹ Any sexual intercourse, even forced, between a husband and his wife was *lawful*, and thus excluded under the definition of rape.²⁰ Perkins wrote, "the true reason why the husband, who has sexual intercourse with his wife against her will, is not guilty of rape is that such intercourse is not unlawful. . . . Sexual intercourse between husband and wife is sanctioned by law; all other sexual intercourse is unlawful."²¹ Three major justifications existed for the designation of all sexual intercourse between husband and

18. ROLLIN PERKINS, CRIMINAL LAW 110 (1982).

19. *Id.* at 115.

20. *Id.*

21. *Id.* I will return to Perkins' designation of "all other sexual intercourse" as "unlawful." See *infra* Part III.A.

wife as lawful under English common law: the property theory, the unity theory, and the ongoing consent theory.²²

Under the property theory, women were considered to be the property of men. Rape was a transgression against the man who owned the woman as his property, not against the woman herself.²³ The rape of an unmarried woman transgressed against her father and the rape of a married woman transgressed against her husband.²⁴ The rape of a married woman by her husband himself was not a transgression at all because a man was allowed to treat his chattel as he deemed appropriate.²⁵ Because the rape of a married woman was a violation of her husband's property, "prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property."²⁶

The second justification in English common law for the marital rape exemption was the unity theory, a derivative of the feudal doctrine of coverture, in which a woman's independent legal identity was abolished at marriage, becoming subsumed within her husband's identity.²⁷ Sir William Blackstone explained the unity theory in his treatise on English common law: "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

22. *State v. Smith*, 426 A.2d 38, 43–44 (N.J. 1981).

23. Schelong, *supra* note 3, at 87. See also RUSSELL, *supra* note 6, at 3 ("The idea that females are the property of males is the key to understanding the history of extramarital rape and the laws pertaining to it."); Michael Freeman, *But If You Can't Rape Your Wife Who[m] Can You Rape?: The Marital Rape Exemption Re-examined*, 15 FAM. L. Q. 1, 8 (1981). This idea of women as property existed in Biblical and Roman law. In Biblical law, rape was a crime committed against a husband's or a father's property interest, not against the woman. Schelong, *supra* note 3, at 85. See also *Deuteronomy* 22:28–29 (King James) ("If a man finds a damsel that is a virgin, which is not betrothed, and lay hold on her and lie with her, he had to marry her 'because he hath humbled her,' and he had to pay her father fifty shekels of silver, which was the bride price. The bride price compensated the father for the loss of his daughter's virginity."). See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002). The first law of marriage from Romulus of Rome in Eighth Century B.C. stated that "obliged married women" had "no other refuge [but] to conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions." RAQUEL KENNEDY BERGEN, *WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS* 8 (1996) [hereinafter BERGEN, *WIFE RAPE*].

24. Schelong, *supra* note 3, at 87. See also BERGEN, *WIFE RAPE*, *supra* note 23, at 3 ("Rape laws were originally enacted as property laws, to protect a man's property (a daughter or a wife) from other men, not as laws to protect women or their rights to control their bodies.").

25. Sitton, *supra* note 3, at 265.

26. *Id.*

27. Schelong, *supra* note 3, at 86.

and consolidated” into her husband’s legal existence.²⁸ Under the unity theory, a husband was legally responsible for his wife’s conduct and was able to physically punish her if she resisted his authority.²⁹ Blackstone explained that a man could:

give his wife moderate correction, for, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children.³⁰

Once man and woman had been unified by marriage, a wife could not “enter into a contract, sue or be sued, own personal property, make a will, or deny her husband’s sexual advances.”³¹ Since the husband and wife were considered one legal being, “a man could no more be charged with raping his wife than be charged with raping himself.”³²

Although powerful in their day, the justifications for the marital rape exemption provided by the property and unity theories did not ultimately have the legal staying power that the ongoing consent theory garnered. In the late 1600s, the Chief Justice in England, Lord Matthew Hale, articulated what would become the most popular justification in modern jurisprudence for the marital rape exemption.³³ Hale understood marriage as granting a wife’s ongoing consent to sexual intercourse.³⁴ He wrote, “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by

28. 1 WILLIAM BLACKSTONE, COMMENTARIES *442. See also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122 (1996).

29. Siegel, *supra* note 23, at 2123. See also Schelong, *supra* note 3, at 86. In essence, the right of chastisement allowed a husband to beat his wife.

30. BLACKSTONE, *supra* note 28 at *444. See also Siegel, *supra* note 28, at 2123. Blackstone’s analysis “served as a guide . . . to the legal implications of marriage” in American courts. Linda Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic, 1776–1848*, in 10 WOMEN, THE LAW, AND THE CONSTITUTION 397, 400 (Kermit L. Hall ed., 1987). The first American edition of Blackstone’s *Commentaries* was published as early as 1771. *Id.* at 400 n.7. In fact, laws limiting a married woman’s legal position in colonial America closely followed English common law and the concepts of coverture and the unity theory. At marriage, a woman’s legal existence disappeared. She could not own property, make contracts or sue on her own behalf. Linda Grant DePauw, *Women and the Law: The Colonial Period*, in 10 WOMEN, THE LAW, AND THE CONSTITUTION 259, 260 (Kermit L. Hall, ed. 1987). “Indeed, she could not even commit a crime; the law assumed that whatever she did was under compulsion from her husband.” *Id.*

31. Schelong, *supra* note 3, at 86. See also Siegel, *supra* note 28, at 2122.

32. Augustine, *supra* note 3, at 561.

33. HALE, *supra* note 1, at 629.

34. FINKELHOR & YLLO, *supra* note 14, at 90 (“Under the ideology of obligation, husband and wife are melded together in a unitary bond. Sex is part of the sacred glue of this union. An implicit bargain exists by which wives make themselves sexually available to husbands in return for being supported.”).

their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”³⁵ A man could not, however, force his wife to have sex with a third party: “for tho she hath given her body to her husband, she is not to be prostituted by him to another.”³⁶ By giving “her body” sexually to her husband, a woman thereby gave her ongoing contractual consent to conjugal relations with him in the future.³⁷ This ongoing consent ideology permeates rape law even today.

Scholars have noted that Hale’s assertions on marital rape were accepted without question as law in English courts and later in American courts, despite the fact that Hale cited no legal authority for his position. After reviewing this history, the New Jersey Supreme Court, for example, concluded that “the marital rape exemption rule expressly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some 300 years ago.”³⁸ Despite the bareness of his declaration, Hale has been the most commonly cited source for marital immunity in sexual offense statutes in both England and the United States.³⁹ For example, Rollin Perkins cited Hale as his source for the marital rape exemption in his criminal law treatise.⁴⁰

From the seventeenth century throughout the nineteenth century, the marital rape exemption was not questioned. Hale’s ongoing consent theory of marital sexual relations remained the judicially recognized foundation for the doctrine throughout this

35. *Id.* See also Schelong, *supra* note 3, at 87–88. One scholar, in analyzing why Hale’s statement was so readily accepted into seventeenth century law, reasoned that Hale “may simply have been enunciating the overall reality of seventeenth century English law for married women.” Augustine, *supra* note 3, at 561. Augustine was referring to the theory that women were the property of their husbands.

36. HALE, *supra* note 1, at 628.

37. *State v. Smith*, 426 A.2d 38, 41 (N.J. 1981). John Stuart Mill, in the 1860s, argued that a female slave being raped by her master was considered outrageous by society yet it was still perceived that a wife had a duty “never to reject her husband’s sexual demands.” MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, & THE LAW IN VICTORIAN ENGLAND, 1850–1895*, 157 (1989). Mill said, “[H]owever brutal a tyrant [a wife] may unfortunately be chained to—though she may know that he hates her, though it may be his daily pleasure to torment her, and though she may feel it impossible not to loathe him—he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.” *Id.*

38. *State v. Smith*, 426 A.2d 38, 41 (N.J. 1981).

39. Augustine, *supra* note 3, at 560–61. See also Hasday, *supra* note 3, at 1396–98; FINKELHOR & YLLO, *supra* note 14, at 163–67. One reason for this broad acceptance, suggested by Professor Jill Elaine Hasday of the University of Chicago, is that Hale’s position was “grounded in principles of marital status law and common law coverture.” Hasday, *supra* note 3, at 1397.

40. PERKINS, *supra* note 18, at 115.

time.⁴¹ Appellate cases that mentioned the doctrine did so in passing, usually in dictum while resolving other issues.⁴² In 1857, for example, a Massachusetts court held that, although it was not necessary for a complainant to allege that she was not the wife of the defendant in order to lodge a valid complaint of rape,⁴³ “it would always be competent for a party indicted to show, in defence of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife.”⁴⁴

Around the same time, women did begin to allege that rape by their husbands constituted cruelty that should give them cause for divorce.⁴⁵ Based on the ongoing consent ideology, however, courts rejected this argument. In an 1845 case, *Shaw v. Shaw*,⁴⁶ for example, the Connecticut Supreme Court of Errors refused to find that a man who forced his wife to have sexual intercourse against her will had engaged in intolerable cruelty. The court decided, “even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. . . . Here the act in it self [sic] was a lawful act [between husband and wife]—in ordinary circumstances, not injurious nor dangerous.”⁴⁷ The *Shaw* case reveals one way that the ongoing

41. *People v. DeStefano*, 467 N.Y.S.2d 506, 510 (1983) (recognizing Hale’s enunciation of spousal exemption from rape as source for exemption in United States). This recognition existed despite the fact that the statement “should not have been considered a binding and definitive statement of the common law.” *Id.* The court noted that Hale’s statement was made “without citation,” implying that it was not supported by law and therefore never should have been adopted. *Id.* The reality of the widely accepted marital rape immunity was that “women subject to forced sex in marriage did not have the option of seeking criminal prosecution.” Hasday, *supra* note 3, at 1406.

42. Hasday, *supra* note 3, at 1393. See, e.g., *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489 (1857). The issue in that case was not whether a man could commit rape on his own wife; instead, the defense used Hale’s statement to show what was accepted law and to show what the complainant must allege, i.e., that she was not the wife of the defendant. Hasday was unable to locate any nineteenth-century prosecutions of a husband raping his wife. Hasday, *supra* note 3, at 1406.

43. *Fogerty*, 74 Mass. (8 Gray) at 489. But see *People v. Fathers*, 153 N.E. 704 (Ill. 1926) (“In an indictment for the crime of rape without force, an allegation that the prosecutrix was not the wife of the accused person is essential. The omission of that allegation in such an indictment is fatal. . . .”).

44. *Fogerty*, 74 Mass. (8 Gray) at 489. The *Fogerty* case was the first United States case to judicially recognize Hale’s “implied consent” theory. See *DeStefano*, 467 N.Y.S.2d at 510. Some rape convictions were reversed because the complainant failed to show that she was not the wife of the defendant. Hasday, *supra* note 3, at 1393–94.

45. Hasday, *supra* note 3, at 1394. At this point, some states allowed battered wives to obtain a divorce on cruelty grounds, but the wives had to prove “extreme” and “repeated cruelty” in order to succeed. See Siegel, *supra* note 28, at 2132.

46. *Shaw v. Shaw*, 17 Conn. 189 (1845). Mrs. Shaw was petitioning for divorce on the grounds that her husband forced her to have intercourse with him, endangering her health in the process.

47. *Id.* Despite the fact that courts rejected the argument in the mid-nineteenth century, by the late nineteenth century most courts granted divorce petitions for cruelty

based on a husband subjecting his wife to sexual demands when those demands threatened her health. Hasday, *supra* note 3, at 1467. Professor Hasday observed, "The legal possibility of exit may have given some wives more leverage in negotiating the terms of marital intercourse; yet it did not do more than that to protect wives from their husbands' sexual demands while the marriage lasted. . . . Until divorce, Hale's theory of irrevocable consent remained in place." *Id.* at 1468. Making divorce somewhat more available on these grounds did not dispel the reality that divorce was not an appealing or easily attainable solution for most women. *Id.* Success in a divorce petition required wives to demonstrate both "that their husband's unwanted demands were unusual, either quantitatively excessive or particularly brutal; . . . and that these demands had jeopardized their health." *Id.* at 1469. Marital rape, as an act by itself, did not qualify as cause. For a discussion on cases that represented the limits on divorce for sexual cruelty, see *id.* at 1471-74. Obtaining a divorce for sexual cruelty reasons was often highly embarrassing and even if a woman was successful in doing so, she "lacked real socioeconomic alternatives to marriage." *Id.* at 1468. One development in the late nineteenth century, made in divorce petition cases pursued by the *husband*, proved to be a victory for married women, albeit a narrow one. In these cases, the wife continued to "perform domestic and childcare services" but refused to engage in sexual intercourse with her husband. *Id.* "These wives refused to submit to marital intercourse because they did not want to have any more children or because they no longer loved their husbands." *Id.* at 1476 (footnotes omitted). Husbands' petitions to divorce their wives for desertion or cruelty on the grounds that they refused all marital intercourse were denied by the majority of the courts. *Id.* at 1475. Judgments for the wives were crucial in these cases because alimony and dower were not available to wives who were held responsible for the divorce. *Id.* More importantly, these decisions demonstrated some acceptance by the courts of a woman's refusal to engage in marital intercourse, even if it was just to show that it was not a valid reason for divorce. *Id.* Courts found that other aspects of wifely obligations were more essential, denial of which were stronger reasons for divorce than refusing marital intercourse. One obligation a woman had was to live in the same household as the husband and to provide domestic services to the husband and children. *Id.* at 1477-78.

Women's formal marital status in the United States under the unity theory began to change with the implementation of Married Women's Property Acts, which gave women the right to own property, sue and be sued, and work outside the home without their husband's permission. Schelong, *supra* note 3, at 91; see also Siegel, *supra* note 28, at 2128. Women's rights advocates of this era, of course, condemned husbands' rights to chastise their wives. Schelong, *supra* note 3, at 91. By the 1870s, a man's right to physically chastise his wife was no longer accepted in U.S. law. Siegel, *supra* note 28, at 2129. "Thus, when a wife beater was charged with assault and battery, judges refused to entertain his claim that a husband had a legal right to strike his wife; instead they denounced the prerogative, and allowed the criminal prosecution to proceed." *Id.* at 2129-30. A woman's right to have control over marital intercourse was one of the major reforms that feminists in the mid-1800s rallied for. In fact, Elizabeth Cady Stanton, a prominent feminist of this time, perceived this right to be the most important achievement for which women should fight. Hasday, *supra* note 3, at 1419. Stanton was "convinced that a wife's right to refuse her husband's sexual demands was the bedrock foundation needed to support equality." *Id.* at 1422. Feminists were concerned with the reasons why married women submitted to unwanted sex with their husbands, whether it was by force or a lack of a plausible alternative. See *id.* at 1416. The phrase "legalized prostitution" was used to represent married women who consented to sex because of their economic and social dependence on their husbands. *Id.* "[T]he wife who was structurally compelled to have sex when she did not desire the act or its reproductive consequences was different only in name from the woman without any available option but to sell her body to strange men on

consent theory derived in criminal rape law made an incursion into the civil sphere of divorce law.

In an 1890 case, a man forced a third party to rape his wife “under menace of death to both parties in case of refusal, and supporting his threat by a loaded gun held over the parties.”⁴⁸ The Supreme Court of North Carolina stated, “It is true that [a husband] may enforce sexual connection [on his wife]; and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of rape. But it is too plain for argument that this privilege is a personal one, only.”⁴⁹ Citing Hale’s analysis of accomplice rape, the North Carolina court decided, “If . . . the husband aids and abets another to ravish his wife, he may be convicted as if he were a stranger.”⁵⁰

It was not until early in the twentieth century that a man was first prosecuted for attempting to rape his wife.⁵¹ These early prosecutions were unsuccessful. For example, in 1905, the Court of Criminal

the street.” *Id.* at 1416–17. *See also id.* at 1427–33 (discussing idea of marriage as legalized prostitution). Wives “acquiesced to marital intercourse because they had no practical alternative, nowhere else to go and no other means of negotiating their marital relationship.” *Id.* at 1428. A woman’s right to her own body and the woman’s reproductive role in the family were inseparable. Because women naturally carried the reproductive responsibilities, “[g]iving women the right ‘to decide when she shall become a mother, how often [and] under what circumstances’ was only just[.]” *Id.* at 1426. At that time, a woman’s primary responsibility was raising her children; feminists believed that women should be entitled to control how much of their time they spent doing so. *See id.*

Nevertheless, even when courts renounced the chastisement doctrine, they often refused to enforce charges of assault against husbands, relying on the trope of marital privacy. *Id.* at 2154. *See State v. Rhodes*, 61 N.C. (Phil. Law) 453 (1868) (holding that the defendant was not guilty for whipping his wife “because the evil of publicity would be greater than the evil involved in the trifles complained of; and because they ought to be left to family government”). *See also State v. Hussey*, 44 N.C. (Busb.) 123 (1852) (a slap on the cheek qualifies as assault and battery in law but “cannot apply to persons in the marriage state, [for] it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public; and spread discord and misery, contention and strife, where peace and concord ought to reign.”). When faced with such a case, for example, the Supreme Court of North Carolina in 1868 decided that it would “not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence.” *Rhodes*, 61 N.C. (Phil. Law) 453 (“[W]hen trifles are taken hold of by the public, and the parties are exposed and disgraced, . . . that which ought to be forgotten in a day, will be remembered for life.”).

48. *State v. Dowell*, 11 S.E. 525 (N.C. 1890). Because the facts are so violent, the most we can infer from this case is that, at least for the most violent accomplice rapes, men could be liable for raping their wives.

49. *Id.* *See also People v. Chapman*, 28 N.W. 896 (Mich. 1886) (holding that a husband who arranged for another man to seduce his wife could be convicted of rape when the seducement resulted in rape).

50. *See Dowell*, 11 S.E. at 525. A man could be convicted of assault with intent to commit the rape of his wife by forcing another man, at gunpoint, to attempt sexual intercourse with his wife. *Id.*

51. *See Hasday, supra* note 3, at 1393–94.

Appeals of Texas heard the appeal of *Frazier v. State*.⁵² Before Frazier attempted to rape his wife Emma, she tried to divorce him, but the court refused her request.⁵³ Emma remained in the house but slept in a separate room.⁵⁴ She accused Frazier of entering her room and assaulting her with the intent to rape.⁵⁵ Frazier was convicted at trial, but the appellate court reversed, because the two parties were married, Frazier could not be found guilty of the crime.⁵⁶ The court focused on the fact that Emma “performed the ordinary duties devolving upon the wife in regard to household matters, doing the cooking and such kindred things, and they all ate at the same table.”⁵⁷ Emma’s desire for a divorce made no difference; Frazier still had the right to force her to have sexual intercourse.⁵⁸

Claims regarding marital rape also continued to be unsuccessful in the civil divorce context. In 1921, for example, the Supreme Court of Alabama resolved a case in which the wife had withdrawn from sexual relations with her husband in order to stop having children.⁵⁹ The husband proceeded to force her to engage in sexual intercourse against her will.⁶⁰ The wife then left the home “to avoid further instances of that character.”⁶¹ The Alabama court held that a wife who left her husband under these circumstances had abandoned the marriage without cause; therefore, she could not collect alimony or obtain custody of her child.⁶² The wife’s denial of sex could not “be excused, much less justified, and she was by her own admission guilty of a grave breach of marital duty.”⁶³ The breach of marital duty was

52. 86 S.W. 754 (Tex. 1905).

53. *Id.* at 754.

54. *Id.* at 755.

55. *Id.* She fought him off so he could not complete this attempt. *Id.*

56. *Id.* (“[A]ll the authorities hold that a man cannot himself be guilty of actual rape upon his wife; one of the main reasons being the matrimonial consent which she gives when she assumes the marriage relation, and which the law will not permit her to retract in order to charge her husband with the offense of rape.”).

57. *Id.* The court also noted that Mr. Frazier “supported the family, provided for their wants, [and] attended to the business about the place and farm.” *Id.*

58. *Id.* (“[W]herever the question has been adjudicated . . . the husband himself cannot be himself guilty of actual rape upon his wife.”).

59. Anonymous, 89 So. 462 (Ala. 1921).

60. *Id.* at 463.

61. *Id.*

62. *Id.* In the beginning of the twentieth century, domestic relations courts were established to handle domestic violence disputes. Instead of seeking to punish the assaulter, however, these courts “urged couples to reconcile, providing informal or formal counseling designed to preserve the relationship whenever possible.” *Id.* at 464. The court conceded that the marital right of a husband to have sexual relations with his wife was “not absolute, but is qualified by considerations of health and decency.” *Id.*

63. *Id.* See also Siegel, *supra* note 28, at 2170 (“Battered wives were discouraged from filing criminal charges against their husbands, urged to accept responsibility for their role in provoking the violence, and encouraged to remain in the relationship and rebuild it

the wife's refusal to abide by her ongoing consent to sexual intercourse, not the man's rape.

Until the mid-1970s in this country, there were no serious legal challenges to the marital rape exemption, and Hale's ongoing consent theory continued to justify the doctrine.⁶⁴

B. Current Marital Immunity for Sexual Offenses

In the mid-1970s, feminist reformers began to challenge the marital rape exemption in courts and in state legislatures. Over the next three decades, they were successful in twenty-four states and the District of Columbia, in which marital immunity was abolished for sexual offenses.⁶⁵ In the remaining twenty-six states, marital immunity remains in one form or another.⁶⁶

Many legal scholars who have researched and commented upon the marital immunity have focused on state provisions regarding forcible rape.⁶⁷ They have ignored or given short shrift to provisions on sexual assault, criminal sexual contact, aggravated sexual abuse, and other sexual offenses.⁶⁸ To understand fully the way that marital

rather than attempt to separate or divorce.") As recently as the mid-1970s, police officers were trained to handle "family disturbances" as "personal matters requiring no direct police action." *Id.* at 2171. The Oakland Police Department's 1975 Training Bulletin stated, "[n]ormally, officers should adhere to the policy that arrests shall be avoided. . .but [when] one of the parties demands arrest, you should attempt to explain the ramifications of such action . . . and encourage the parties to reason with each other." *Id.*

64. *People v. DeStefano*, 467 N.Y.S.2d 506, 511 (N.Y. 1983).

65. See statutes listed *supra* note 8.

66. See statutes listed *supra* note 9.

67. See, e.g., Hasday, *supra* note 3, at 1496; RUSSELL, *supra* note 6, at 376.

68. For example, some scholars divided states into two categories: those with a partial marital rape exemption and those with no marital rape exemption, an approach that tended to ignore marital immunities for sexual crimes other than rape. See, e.g., RUSSELL, *supra* note 6, at 376; Laura X, *supra* note 7, at 1064. Diana Russell, for example, listed those states that allowed a spouse to be prosecuted for rape but did not examine the sexual offense statutes other than rape. In Alaska, Russell notes, "Husbands can be charged for rape of wife." RUSSELL, *supra* note 6, at 376. This statement is somewhat misleading because Alaska provides marital immunity for sexual penetration or sexual contact when the victim is mentally incapacitated and cannot consent. See ALASKA STAT. § 11.41.425 (Michie 2001) (marriage is defense to sexual assault in third degree; sexual assault in the third degree is when an offender "engages in sexual contact with a person who the offender knows is mentally incapable; incapacitated; or unaware that a sexual act is being committed," a Class C felony); § 11.41.420 (3) (marriage is a defense to sexual assault in the second degree if the offender "engages in sexual penetration with a person who the offender knows is mentally incapable; incapacitated; or unaware that sexual act is being committed.").

Sitton, *supra* note 3, at 262. A few authors have examined the marital rape immunity as it pertains to sexual crimes other than rape. Lisa Eskow, for example, discussed those states that limited the prosecution of marital sexual offenses, but she did not examine the specific statutes of each state. Eskow, *supra* note 3, at 682. Other scholars have attempted

immunity works in a state, however, it is necessary to examine all of the states' sexual offense provisions. For example, the Model Penal Code includes six separate marital immunities for sexual offenses: for forcible rape, gross sexual imposition, forcible deviate sexual intercourse, corruption of minors, sexual assault, and indecent exposure.⁶⁹

Legal scholars have not systematically critiqued the twenty-six state statutes that currently provide some form of marital immunity for nonconsensual sexual offenses. The states that retain marital immunity fall into three, non-mutually exclusive categories: those that exempt spouses from sexual offenses other than forcible rape, those that maintain separate spousal sexual offense statutes, and those that impose extra requirements for the prosecution of marital rape. The following sections will address each in turn.

(1) *Marital Immunity for Certain Sexual Offenses*

Twenty states exempt men from sexual offense charges when their wives are mentally incapacitated or physically helpless.⁷⁰

to examine the marital rape immunity throughout criminal sexual conduct statutes, but their research offered only a selected example of states and the conduct they prohibited, rather than comprehensive analysis. See, e.g., Hasday, *supra* note 3, at 1496; Sitton, *supra* note 3, at 277–81; Siegel, Note, *supra* note 3, at 364–69; West, *supra* note 3, at 46–48.

Richard Posner examined the presence of marital immunity in the sexual offense statutes of the fifty states. RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 35–43 (1996). However, his chronicle may not accurately reflect the true existence or absence of marital immunity in state statutory law. E.g., for Minnesota, Posner declared “No Exemptions.” A closer reading, however, reveals that marital exemptions exist for certain sexual offenses if the victim is incapable of consenting. MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (spouse does not commit criminal sexual conduct in third or fourth degree if actor knows or has reason to know that complainant is mentally impaired, mentally incapacitated, or physically helpless).

69. MODEL PENAL CODE §§ 213.0(3); 213.1(1); 213.2(1); 213.3(1); 213.4; 213.5 (2001).

70. ALASKA STAT. § 11.41.420(a)(3) (Michie 2001) (marriage is defense to second degree sexual assault if the victim is incapacitated or unaware the sexual act is being committed); ARIZ. REV. STAT. ANN. § 13-1407 (West 2002) (implied marital immunity when victim is mentally incapacitated because statute requires force for spousal conviction of sexual assault); CONN. GEN. STAT. ANN. § 53a-67 (West 2002) (spouses or cohabitants are exempt from sexual assault in fourth degree, which occurs when person intentionally subjects another to sexual contact who is mentally defective, mentally incapacitated or physically helpless); § 53a-71 (spouses and cohabitants are immune from sexual assault in the second degree when the victim is physically helpless); HAW. REV. STAT. § 707-732(d) (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (spouses and cohabitants are exempt from sexual assault in third degree, Class C felony, if victim is mentally defective, mentally incapacitated, or physically helpless); IDAHO CODE § 18-6107 (Michie 1948–2002) (husband cannot be prosecuted for rape if wife is incapable of giving consent or unconscious at time of act); IOWA CODE ANN. § 709.4 (West 2002) (marriage is defense to sexual abuse in third degree if victim is suffering from mental defect or incapacity which precludes giving consent; Class C felony); LA. REV. STAT. ANN. § 43 (West 2002) (express

“Mentally incapacitated” is usually defined as so drugged or intoxicated that one cannot give valid consent.⁷¹ “Physically helpless” is usually defined as unconscious, which includes unconsciousness due to drugging or a coma, for example.⁷² In these twenty states, penetrating a woman who cannot consent because she is drugged or unconscious is a crime if the man is not married to the victim. However, it is not a crime if the man is married to the victim.

In three of these states—Ohio, Oklahoma, and South Carolina—men are even immune from charges when they *themselves* administer the drugs, intoxicants, or controlled substances to render their wives

exemption from simple rape which includes situation where victim is incapable of resisting due to an intoxicating substance); MD. CRIM. LAW. § 3-318 (West 2002) (express exemption from rape in second degree and sexual offense in third degree when victim is mentally incapacitated or physically helpless); MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his or her spouse being under age 16, mentally incapable or mentally incapacitated); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (spouse does not commit criminal sexual conduct in third or fourth degree if actor knows or has reason to know that complainant is mentally impaired, mentally incapacitated, or physically helpless); MISS. CODE ANN. § 97-3-99 (2002) (implied marital immunity when victim is mentally incapacitated or physically helpless, as spouses are immune from prosecution for sexual battery unless husband uses force); NEV. REV. STAT. § 200.373 (2002) (implied marital immunity when victim is mentally or physically incapable as spouses are immune unless husband uses force); OHIO REV. CODE ANN. § 2907.02 (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (spousal immunity if victim is mentally or physically incapable of consent); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) (marital immunity for rape where the victim is incapable of consent through mental illness, unsoundness of mind, intoxicated or unconscious); R.I. GEN. LAWS 1956 § 11-37-2 (1953–2001) (spouses exempt from first degree sexual assault if victim is mentally incapacitated, mentally disabled, or physically helpless); S.C. CODE ANN. 1976 § 16-3-652 (Law. Co-op. 2002) (implied marital immunity when the actor causes the victim to become mentally incapacitated or physically helpless by administering a controlled substance); S.D. CODIFIED LAWS § 22-22-7.2 (Michie 1968–2002) (spouses exempt from sexual contact when person is incapable of consenting, Class 4 felony); TENN. CODE ANN. § 39-13-507 (West 2002) (implied marital immunity when victim is mentally incapacitated or physically helpless because spouses are general exempt from prosecution unless weapon is used or there is bodily injury); VA. CODE ANN. § 18.2-61(A)(ii) (West 2002) (marital immunity when the victim suffers from a mental incapacity or physical helplessness); WASH. REV. CODE ANN. § 9A.44.100(1)(b) (West 2002) (marital immunity for indecent liberties when the victim is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless, Class A or B felony).

71. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520a(h) (definition of mentally incapacitated is when victim “is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent”).

72. *See, e.g.*, S.C. CODE ANN. 1976 § 16-3-652 (Law. Co-op. 2002) (physically helpless is defined as unconscious, asleep, or “for any other reason physically unable to communicate unwillingness to an act”).

mentally incapacitated.⁷³ In eight other states, men are immune from charges when their wives are rendered incapable of consenting due to drugs or intoxicants administered *without consent*, which may include when a husband administers intoxicants without his wife's consent.⁷⁴

73. See OHIO REV. CODE ANN. § 2907.02(a) (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (rape includes when “for the purpose of preventing resistance, the offender substantially impairs the other person’s judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception”); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) (“Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator” where the victim is “incapable through mental illness or any other unsoundness of mind; . . . [w]here the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit; . . . [or] [w]here the victim is at the time unconscious of the nature of the act.”); S.C. CODE ANN. § 16-3-652 (Law. Co-op. 2002) (criminal sexual conduct in first degree includes when “the actor causes the victim, without the victim’s consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering . . . a controlled substance.”).

Likewise, in South Carolina, a man is explicitly immune from charges even when he caused his wife to be unconscious. S.C. CODE ANN. 1976 § 16-3-652 (Law. Co-op. 2002) (sexual conduct in first degree includes when actor causes victim to become physically helpless, defined as unconscious, asleep or “for any other reason physically unable to communicate unwillingness to an act”).

74. MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his spouse being mentally incapacitated); § 750.520a(h) (definition of mentally incapacitated is when “person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance *administered to that person without his or her consent*”) (emphasis added); CONN. GEN. STAT. § 53a-65 (5) (West 2002) (definition of mentally incapacitated is when “person is rendered temporarily incapable of appraising or controlling such person’s conduct owing to the influence of a drug or intoxicating substance *administered without such person’s consent*”) (emphasis added); MD. CRIM. LAW § 3-301(C) (West 2002) (mentally incapacitated defined as “an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual *without the individual’s consent* . . . is rendered substantially incapable of . . . [a]ppraising the nature of the individual’s conduct”) (emphasis added); MINN. STAT. ANN. § 609-341, (West 2002), *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (mentally incapacitated defined as “person under the influence of alcohol, a narcotic, anesthetic, or any other substance, *administered to that person without the person’s agreement*”) (emphasis added); R.I. GEN. LAWS 1956 § 11-37-1(5) (1953–2001) (mentally incapacitated defined as a “person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance *administered to that person without his or her consent*”) (emphasis added); MISS. CODE ANN. § 97-3-97(C) (2002) (mentally incapacitated defined as “one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting due to the influence of any drug, narcotic, anesthetic, or other substance *administered to that person without his or her consent*”) (emphasis added); HAW. REV. STAT. § 707-700 (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (mentally incapacitated defined as person who is “rendered temporarily incapable of appraising or controlling the person’s conduct owing to the influence of a substance *administered to the person without the person’s consent*”); TENN. CODE ANN. § 39-13-501(4) (West 2002)

Additionally, twelve states grant men immunity when they commit various nonconsensual sexual offenses against their wives, including gross sexual imposition, sexual abuse, sexual assault, sexual battery, sexual contact, and sexual misconduct.⁷⁵

(2) *Separate Statutes for Marital Sexual Offenses*

Six states have statutes that separate rape or sexual assault by spouses from rape or sexual assault committed by others.⁷⁶ Arizona,

(mentally incapacitated defined as “person [who is] rendered temporarily incapable of appraising or controlling the person’s conduct due to the influence of a narcotic, anesthetic or other substance administered to that person without the person’s consent”).

Louisiana’s rape statute does not include marital immunity “when the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim.” However, there is marital immunity when someone other than the offender administers the substance. LA. R.S. 14:43 (A)(1)-(2).

Likewise, one Mississippi court has held that when a husband deliberately causes his wife’s unconsciousness by administering drugs, he is not immune to prosecution, as drugging the victim consists of the use of force. *See Trigg v. State*, 759 So. 2d 448 (Miss. Ct. App. 2000).

75. ALASKA STAT. § 11.41.425 (Michie 2001) (marriage is defense to sexual assault in third degree, Class C felony); ARIZ. REV. STAT. ANN. § 13-1407(D) (West 2002) (it is defense to sexual abuse that person was spouse of other person at time of commission of act; sexual abuse is Class 5 felony); CONN. GEN. STAT. ANN. § 53a-70a (West 2002) (marital immunity for aggravated sexual assault in the first degree, Class B felony); § 53a-71 (marital immunity for sexual assault in second degree); § 53a-72a (marital immunity for sexual assault in third degree); § 53a-72b (marital immunity for sexual assault in third degree with firearm); § 53a-73a (marital immunity for sexual assault in fourth degree); HAW. REV. STAT. § 707-732 (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (spouses and cohabitants are immune from sexual assault in third degree, Class C felony, if actor submits other person to sexual contact through strong compulsion or other person is mentally defective); § 707-733 (2001) *note in* H.B. 2560 (spouses are exempt from sexual assault in fourth degree, a misdemeanor, if actor submits other person to sexual contact by compulsion); KAN. STAT. ANN. § 21-3517 (2001) (marriage is defense to sexual battery, Class A person misdemeanor); LA. REV. STAT. ANN. § 43 (West 2002) (spouses exempt from simple rape); MINN. STAT. ANN. § 609.349 (West 2002) (spouses exempt from criminal sexual conduct in third and fourth degree); OHIO REV. CODE ANN. § 2907.03 (West 2002) (spouses exempt from sexual battery, third degree felony); § 2907.05 (spouses exempt from gross sexual imposition, third or fourth degree felony); § 2907.06 (spouses exempt from sexual imposition, first degree misdemeanor); S.C. CODE ANN. 1976 § 16-3-658 (Law. Co-op. 2002) (spouse cannot be prosecuted for criminal sexual conduct in third degree); S.D. CODIFIED LAWS § 22-22-7.4 (Michie 1968–2002) (spouses exempt from sexual contact without consent with person who is capable of consenting, Class 1 misdemeanor); WASH. REV. CODE ANN. § 9A.44.060 (West 2002) (spouses exempt from rape in third degree, Class C felony); § 9A.44.100(1)(c) (West 2002) (marital immunity for indecent liberties, Class A or B felony); WYO. STAT. ANN. § 6-2-304 (Michie 1977–2001) (spouses are exempt from sexual assault in third degree, punishable by not more than 15 years); § 6-2-313 (marriage is defense to sexual battery).

76. ARIZ. REV. STAT. ANN. § 13-1406.01(A) (West 2002) (“A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral

South Carolina, Tennessee, and Virginia mandate lesser penalties for spousal rape than for other rapes regardless of the force used or injury caused.⁷⁷ These states downgrade the severity of the crime by statute. In Arizona, sexual assault is a Class 2 felony, receiving from 5.25 to 14 years, while spousal sexual assault is a Class 6 felony, which judges have the discretion to treat as a *misdemeanor* for punishment purposes.⁷⁸ In Arizona and Virginia, lessened penalties for spousal sexual offenses can be diminished further at the discretion of the judge, who can mandate counseling instead of jail time.⁷⁹ In

sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.”); CAL. PENAL CODE § 262 (West 2002) (rape of spouse occurs when perpetrator accomplishes sexual intercourse against the person’s will by force or violence, or when the person is prevented from resisting by any intoxicating or controlled substance, or when the person is unconscious at the time of the act); CONN. GEN. STAT. ANN. § 53a-70b(b) (West 2002) (“No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.”); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (“Sexual battery, when accomplished through the use of aggravated force by one spouse against the other spouse if they are living together constitutes the felony of spousal sexual battery.”); TENN. CODE ANN. § 39-13-507(d) (West 2002) (spousal sexual battery occurs when one spouse subjects the other to unlawful sexual penetration where the defendant is armed with a weapon or causes seriously bodily injury to the victim); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2:1 (West 2002) (marital sexual assault occurs when the perpetrator engages in sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with his or her spouse against the spouse’s will by force or a present threat of force).

77. Compare ARIZ. REV. STAT. ANN. § 13-1406.01(B) (West 2002) (first offense sexual assault of spouse is Class 6 felony) with § 13-1406(B) (sexual assault is Class 2 felony); compare S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (spousal sexual battery mandates sentence of not more than ten years) with § 16-3-652 (criminal sexual conduct in first degree mandates sentence of not more than thirty years) and § 16-3-654 (criminal sexual conduct in third degree is punishable by imprisonment for not more than ten years); compare TENN. CODE ANN. § 39-13-507(c)(1)(C)(2) (West 2002) (aggravated spousal rape is Class B felony) and § 39-13-507(b)(2)(A) (spousal rape is Class C felony) with § 39-13-502(b) (aggravated rape is Class A felony) and § 39-13-503(b) (rape is Class B felony); compare VA. CODE ANN. § 18.2-67.2:1 (West 2002) (marital sexual assault, punishable by confinement in state correctional facility for term of not less than one year nor more than twenty years) with § 18.2-61 (rape, punishable by confinement in state correctional facility for life or for any term not less than five years).

78. Compare ARIZ. REV. STAT. ANN. § 13-1406 (West 2002) (sexual assault is a class 2 felony) with § 13-1406.01 (sexual assault of a spouse is a class 6 felony).

79. ARIZ. REV. STAT. ANN. § 13-1406.01(B) (West 2002) (sexual assault of spouse is Class 6 felony; the judge has discretion to enter judgment for conviction of Class 1 misdemeanor with mandatory counseling); VA. CODE ANN. § 18.2-61(C) (West 2002) (“[A]ll or part of any sentence imposed for a violation of subsection B [spousal rape] may be suspended upon the defendant’s completion of counseling or therapy . . . [i]f the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.”); § 18.2-61(D), § 18.2-67.1(D), 18.2-67.2(C) (“Upon a finding of guilt under subsection B [spousal rape, forcible sodomy, object sexual

Tennessee, sexual offenses of every type are downgraded for spouses. Aggravated rape is a Class A felony, but aggravated spousal rape is a Class B felony; rape is a Class B felony, but spousal rape is a Class C felony. Aggravated sexual battery is a Class B felony, while spousal sexual battery with the same aggravated circumstances is only a Class D felony.⁸⁰ In South Carolina, criminal sexual conduct in the first degree is punishable by not more than thirty years of imprisonment, while spousal sexual battery,⁸¹ the same crime by a spouse, is punished by not more than ten years.

(3) *Extra Requirements for Marital Sexual Offenses*

A number of states require the victim and the prosecutor to satisfy additional criteria in order to pursue instances of marital sexual assault. While these states allow for the prosecution of spousal sexual assault, statutes make the prosecutions more difficult to pursue. There are three types of non-mutually exclusive criteria that states have imposed: reporting requirements,⁸² the separation or

penetration] . . . the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy. . . . If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed . . . , the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.”).

80. Compare TENN. CODE ANN. § 39-13-502 AGGRAVATED RAPE (West 2002) with TENN. CODE ANN. § 39-13-507 SPOUSAL EXCLUSION (West 2002); compare TENN. CODE ANN. § 39-13-503 RAPE (West 2002) with TENN. CODE ANN. § 39-13-507 SPOUSAL EXCLUSION (West 2002); compare TENN. CODE ANN. § 39-13-504 AGGRAVATED SEXUAL BATTERY (West 2002) with TENN. CODE ANN. § 39-13-507 SPOUSAL EXCLUSION (West 2002).

81. Compare S.C. CODE ANN. 1976 § 16-3-652 (Law. Co-op. 2002) (criminal sexual conduct in first degree punishable by imprisonment for not more than thirty years) with S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (spousal sexual battery punishable by imprisonment of not more than ten years).

82. CAL. PENAL CODE § 262 (West 2002) (rape of spouse must be reported within one year after date of violation; reporting requirement shall not apply if victim’s allegation of offense is corroborated by independent evidence); ILL. COMP. STAT. ANN. 725 § 5/12-18(c) (West 2002) (prosecution of a spouse is barred for criminal sexual assault (§ 5/12-13), aggravated criminal sexual assault (§ 5/12-14), criminal sexual abuse (§ 5/12-15), and aggravated criminal sexual abuse (§ 5/12-17), if not reported to law enforcement within 30 days after offense was committed); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (crime of spousal sexual battery must be reported within thirty days).

divorce of the couple at the time of the assault,⁸³ and additional requirements of force or violence.⁸⁴

83. ALASKA STAT. § 11.41.432 (Michie 2001) (it is defense to sexual assault when victim is mentally incapable of consenting that offender is married to person and neither party has filed with the court for separation); HAW. REV. STAT. § 707-700 (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (married does not include spouses living apart); KAN. STAT. ANN. § 21-3501 (2001) (person is not considered spouse if couple if living apart or either spouse has filed for separation or divorce or for relief under protection from abuse act); LA. REV. STAT. ANN. § 43 (West 2002) (person not considered spouse if judgment of separation exists or if parties are living apart and offender knows that temporary restraining order has been issued); MD. CRIM. LAW § 3-316 (West 2002) (spouse may not be prosecuted under § 3-303 [rape in first degree], § 3-304 [rape in second degree], § 3-307 [sexual offense in third degree] or § 3-308 [sexual offense in fourth degree] unless person committing crime uses force and act is without consent of spouse, or couple has lived apart under written separation agreement or for at least three months before alleged rape or sexual offense. A person may be prosecuted under these statutes if there was decree of limited divorce at time of offense); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.F. 2433) (West) (person does not commit criminal sexual conduct under § 609.342(a) and (b) [criminal sexual conduct in first degree], § 609.343(a) and (b) [criminal sexual conduct in second degree], § 609.344(a), (b), (d), and (e) [criminal sexual conduct in third degree], and § 609.345(a), (b), (d), (e) [criminal sexual conduct in fourth degree], if actor and complainant were adults cohabiting in ongoing voluntary sexual relationship at time of alleged offense, or if complainant is actor's legal spouse, unless couple is living apart and one of them has filed for legal separation or dissolution of marriage); MISS. CODE ANN. § 97-3-99 (2002) (person is not guilty of sexual battery if alleged victim is that person's legal spouse and at time of alleged offense such person and alleged victim are not separated and living apart unless force is used); OHIO REV. CODE ANN. § 2907.02(G) (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (spouse cannot be charged with rape unless couple is living separate or force is used); R.I. GEN. LAWS 1956 § 11-37-1 (1953–2001) (married does not include spouses who are living apart and decision for divorce has been granted); S.C. CODE ANN. 1976 § 16-3-658 (Law. Co-op. 2002) (person cannot be guilty of criminal sexual conduct in first or second degree if victim is the legal spouse unless couple is living apart); TENN. CODE ANN. § 39-13-507 (West 2002) (spousal rape requires the defendant to be armed with a weapon, cause serious bodily injury, or living apart and one has filed for separate maintenance or divorce); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2(B) (West 2002) (no person shall be found guilty of rape, forcible sodomy, or object sexual penetration unless, at time of alleged offense, spouses were living separate and apart); WASH. REV. CODE ANN. § 9A.44.010 (West 2002) (married does not include a person who is living separate from spouse and who has filed for legal separation or dissolution of marriage).

84. ARIZ. REV. STAT. ANN. § 13-1406.01(A) (West 2002) (“A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.”); CONN. GEN. STAT. ANN. § 53a-70b (West 2002) (spouses or cohabitants are exempt from sexual assault unless offender uses force or the threat of force); IDAHO CODE § 18-6107 (Michie 1948–2002) (husband can only be prosecuted for rape where wife “resists but her resistance is overcome by force or violence” or “[w]here she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating, narcotic, or anesthetic substance administered by or with the privity of the accused”); MD. CRIM. LAW § 3-316 (West 2002) (spouses can only be prosecuted for rape in first degree,

The first criterion is a stringent reporting requirement.⁸⁵ In California, wife rape must be reported within one year of the date of the incident, unless the wife's allegation is corroborated by independent, admissible evidence.⁸⁶ Other rape victims in California have no similar reporting requirement.⁸⁷ Illinois bars the prosecution of a spouse for criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, and aggravated criminal sexual abuse if the incident is not reported to law enforcement officials within 30 days.⁸⁸ Other rape victims in Illinois face no similar reporting

rape in second degree, or sexual offense in third degree if force is used or couple is living separately); MISS. CODE ANN. § 97-3-99 (2002) (legal spouse of alleged victim may be found guilty of sexual battery if legal spouse engaged in forcible sexual penetration without consent of alleged victim); NEV. REV. STAT. § 200.373 (2002) (marriage is no defense to charge of sexual assault if assault was committed by force or by threat of force); OHIO REV. CODE ANN. § 2907.02(G) (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (marriage or cohabitation is no defense to rape if offender uses force or threat of force); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) *amended by* (2002 Okla. Sess. Law Serv. Ch. 22 (H.B. 2924) (West) (rape of spouse must be accompanied by actual or threatened force or violence, along with apparent power of execution against victim or third person); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (spousal sexual battery requires aggravated force, defined as "use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature"); TENN. CODE ANN. § 39-13-507(d) (West 2002) (spousal sexual battery requires defendant to be armed with weapon, inflict serious bodily injury, or parties must be living separately and filed for divorce); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2(B) (West 2002) (no person shall be found guilty of rape, forcible sodomy, or object sexual penetration unless, at time of alleged offense, the parties were living separately or defendant caused bodily injury to spouse by use of force or violence).

85. Reporting requirements are not statutes of limitations. Reporting requirements indicate the time within which a complainant must inform the authorities of an offense. If a complainant fails to report the offense within that time, the offense is not legally cognizable. The statute of limitations is the time within which a prosecutor must charge an offender. If the prosecutor fails to charge an offender within that prescribed amount of time, the claim is presumed to be stale and so should no longer be pursued legally. *See* CAL. PENAL CODE § 800 (providing statute of limitations is six years after date of the commission of offense for offenses punishable by imprisonment for eight years). Section 800 applies to spousal rape. CAL. PENAL CODE § 262(b). "However, no prosecution shall be commenced under [section 262 rape of a spouse] unless the violation was reported to medical personnel, a member of the clergy, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting agency, a law enforcement officer, or a firefighter within one year after the date of the violation." *Id.*

86. CAL. PENAL CODE § 262 (West 2002) (rape of spouse must be reported within one year after date of violation; reporting requirement shall not apply if victim's allegation of offense is corroborated by independent evidence).

87. CAL. PENAL CODE § 261 (West 2002).

88. ILL. COMP. STAT. ANN. 720 § 5/12-18(c) (West 2002) (prosecution of a spouse is barred for criminal sexual assault (§ 5/12-13), aggravated criminal sexual assault (§ 5/12-14), criminal sexual abuse (§ 5/12-15), and aggravated criminal sexual abuse (§ 5/12-17), if not reported to law enforcement within 30 days after offense was committed).

requirement.⁸⁹ Similarly, in South Carolina, the crime of spousal sexual battery must be reported to officials within 30 days in order to be prosecuted.⁹⁰ Other criminal sexual conduct victims in South Carolina, by contrast, face no such reporting requirement.⁹¹

The second criterion is the requirement of separation or divorce. Thirteen states—Alaska, Hawaii, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Ohio, South Carolina, Tennessee, Rhode Island, Washington, and Virginia—require that a couple be separated or divorced at the time of the assault before certain sexual offense prosecutions may proceed.⁹² In Minnesota, Tennessee, Washington, and Rhode Island, the parties must be living apart and have filed for legal divorce or separation.⁹³ In Maryland, there must be a limited divorce decree between the parties to avoid marital immunity.⁹⁴ In Alaska and Kansas, one party must have filed for legal separation, divorce, or dissolution of the marriage to avoid marital immunity.⁹⁵ In Hawaii, Mississippi, Ohio, Virginia, Kansas, and South Carolina, marital immunity does not apply to spouses who are living apart.⁹⁶ In

89. *Id.*

90. S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (crime of spousal sexual battery must be reported within thirty days).

91. S.C. CODE ANN. 1976 §§ 16-3-652, 16-3-653, 16-3-654 (Law. Co-op. 2002).

92. *See supra* note 83. This requirement is not imposed, however, if the spouse uses force to accomplish the act.

93. MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.F. 2433) (West) (term legal spouse does not include when couple is living apart and one has filed for legal separation or dissolution of marriage); R.I. GEN. LAWS 1956 § 11-37-1 (1953–2001) (married does not include spouses who are living apart and decision for divorce has been granted); TENN. CODE ANN. § 39-13-507(d) (West 2002) (spousal sexual battery requires defendant to be armed with weapon, inflict serious bodily injury, or parties must be living separately and filed for divorce); WASH. REV. CODE ANN. § 9A.44.010 (West 2002) (married does not include a person who is living separate from spouse and who has filed for legal separation or dissolution of marriage).

94. MD. CRIM. LAW § 3-318 (West 2002) (spouses are exempt from prosecution unless at time of crime spouses have lived apart under decree of limited divorce).

95. ALASKA STAT. § 11.41.432(a) (Michie 2001) (person not considered married if either party has filed for separation or divorce); KAN. STAT. ANN. § 21-3501(3) (2001) (person is not considered spouse if couple is living apart or either spouse has filed for separation or divorce or for relief under protection from abuse act).

96. HAW. REV. STAT. § 707-700 (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (married does not include spouses living apart); KAN. STAT. ANN. § 21-3501 (2001) (person is not considered spouse if couple is living apart or either spouse has filed for separation or divorce or for relief under protection from abuse act); MISS. CODE ANN. § 97-3-99 (2002) (person is not guilty of sexual battery if alleged victim is that person's legal spouse and at time of alleged offense such person and alleged victim are not separated and living apart unless force is used); OHIO REV. CODE ANN. § 2907.02 (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (spouse cannot be charged with rape unless parties are living separate and apart); S.C. CODE ANN. 1976 § 16-3-658 (Law. Co-op. 2002) (person cannot be guilty of criminal sexual conduct if victim is spouse unless they are living apart); VA. CODE ANN. § 18.2-67.1, § 18.2-67.2

Kansas, filing for relief under a protection from abuse order will avoid marital immunity.⁹⁷ In Louisiana, a legal judgment of separation or separation plus a restraining order must have already been rendered to avoid marital immunity.⁹⁸

The third criterion is an extra requirement of force. Eleven states—Arizona, Connecticut, Idaho, Maryland, Mississippi, Nevada, Ohio, Oklahoma, South Carolina, Tennessee, and Virginia—do not recognize spousal rape or spousal sexual assault unless the offender uses force, violence, duress, or threats of great bodily harm.⁹⁹ Additionally, Iowa, Louisiana, Minnesota, and Rhode Island have an implied requirement of force because these states exempt spouses from every non-forcible sexual crime.¹⁰⁰ These states require physical

(West 2002) (exemption from forcible sodomy and object penetration if spouses are living apart).

97. KAN. STAT. ANN. § 21-3501 (2001) (person is not considered spouse if couple is living apart or either spouse has filed for separation or divorce or for relief under protection from abuse act).

98. LA. REV. STAT. ANN. § 43 (West 2002) (person not considered spouse if judgment of separation exists or if parties are living apart and offender knows that temporary restraining order has been issued).

99. ARIZ. REV. STAT. ANN. § 13-1406.01(A) (West 2002) (“A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.”); CONN. GEN. STAT. ANN. § 53a-70b (West 2002) (spouses or cohabitants are exempt from sexual assault unless offender uses force or the threat of force); IDAHO CODE § 18-6107 (Michie 1948–2002) (husband can only be prosecuted for rape where wife “resists but her resistance is overcome by force or violence” or “[w]here she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating, narcotic, or anesthetic substance administered by or with the privity of the accused”); MD. CRIM. LAW § 3-316 (West 2002) (spouses can only be prosecuted for rape in first degree, rape in second degree, or sexual offense in third degree if force is used or couple is living separately); MISS. CODE ANN. § 97-3-99 (2002) (legal spouse of alleged victim may be found guilty of sexual battery if legal spouse engaged in forcible sexual penetration without consent of alleged victim); NEV. REV. STAT. § 200.373 (2002) (marriage is no defense to charge of sexual assault if assault was committed by force or by threat of force); OHIO REV. CODE ANN. § 2907.02(G) (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (marriage or cohabitation is no defense to rape if offender uses force or threat of force); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) *amended by* (2002 Okla. Sess. Law Serv. Ch. 22 (H.B. 2924) (West) (rape of spouse must be accompanied by actual or threatened force or violence, along with apparent power of execution against victim or third person); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (spousal sexual battery requires aggravated force, defined as “use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature”); TENN. CODE ANN. § 39-13-507(d) (West 2002) (spousal sexual battery requires defendant to be armed with weapon, inflict serious bodily injury, or parties must be living separately and filed for divorce); VA. CODE ANN. § 18.2-61 (West 2002) (rape), § 18.2-67.1 (forcible sodomy), § 18.2-67.2 (object sexual penetration).

100. IOWA CODE ANN. § 709.4 (West 2002) (sexual abuse in third degree only offense with marital immunity for non-force part of provision); LA. REV. STAT. ANN. § 43 (West

force rather than other forms of coercion that would suffice for the rape of a stranger. For example, in Arizona, Connecticut, Idaho, Nevada, Oklahoma, and Virginia, the use or threatened use of force is required, whereas nonconsent or inability to consent would suffice if the parties were not married.¹⁰¹

In some states, this force requirement is not satisfied by the kind of coercion that would suffice if the parties were strangers. It is only satisfied by serious physical force resulting in substantial injuries.¹⁰² In South Carolina, for example, spousal sexual battery requires aggravated force, defined as the use or threatened use of a weapon or the use of or threatened use of physical force or physical violence of a high and aggravated nature, yet criminal sexual conduct for non-spouses includes coercion without these aggravating circumstances.¹⁰³ Moreover, the punishment for spousal sexual battery (not more than ten years), which requires aggravated violence, is identical to criminal sexual conduct for non-spouses in the third degree (not more than ten years), which requires no aggravated violence.¹⁰⁴

In Tennessee, a man cannot be prosecuted for sexual battery against his wife unless he is armed with a weapon or inflicted serious bodily injury on her.¹⁰⁵ Even with the requirement of a weapon or bodily injury, Tennessee still prosecutes spousal sexual battery only as a Class D felony,¹⁰⁶ while aggravated sexual battery, with the same aggravating circumstances, is a Class B felony.¹⁰⁷

C. Modern Justifications

Although the marital rape exemption has been subjected to widespread academic criticism in the past three decades, a number of contemporary legal scholars continue to defend the doctrine. The

2002) (simple rape has marital immunity and does not include force); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (exempts spouses from prosecution for offenses other than forcible offenses); R.I. GEN. LAWS 1956 § 11-37-2 (1953–2001) (implied requirement of force because spousal immunity from rest of sexual assault provision).

101. ARIZ. REV. STAT. ANN. § 13-1406.01 (West 2002); CONN. GEN. STAT. ANN. § 53a-70b (West 2002); IDAHO CODE § 18-6107 (Michie 1948–2002); NEV. REV. STAT. § 200.373 (2002); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) *amended by* 2002 Okla. Sess. Law Serv. Ch. 22 (H.B. 2924) (West); VA. CODE ANN. § 18.2-67.2:1 (West 2002).

102. “Indications exist that marital rapes often must be substantially more physically assaultive than comparable acts by strangers in order to produce prosecution or conviction.” MACKINNON, *supra* note 13, at 863.

103. *Compare* S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) *with* S.C. CODE ANN. 1976 § 16-3-654 (Law. Co-op. 2002).

104. *Id.*

105. TENN. CODE ANN. § 39-13-507(d)(1)(A) & (B) (West 2002).

106. TENN. CODE ANN. § 39-13-507(d)(2)(A) (West 2002).

107. TENN. CODE ANN. § 39-13-504(b) (West 2002).

three categories in which marital immunity persists—marital immunity for certain sexual offenses, separate marital sexual offense statutes, and extra requirements for marital sexual offenses—rest on three controversial assumptions about why marital sexual offenses should be treated differently. First and foremost, the requirement of separation or divorce in thirteen states before certain sexual offenses are legally cognizable rests on the classic assumption of ongoing consent in a marriage. Without separation or divorce, there is no nonconsent associated with the sexual interaction and, hence, no crime. Second, the marital exemption for mentally incapacitated rape, unconscious rape, and sexual offenses without extra force in more than twenty states rests on the assumption that, because of the “implied authorization” granted by marriage, spousal sexual offenses that do not involve serious physical force are not important enough or harmful enough for the justice system to criminalize.¹⁰⁸ Third, the downgrading of spousal offenses across the board in seven states, the application of lesser penalties to spousal sexual offenses, and the refusal to prosecute spousal sexual offenses without prompt complaint rests on the assumption that spousal sexual offenses in general are not important enough or harmful enough for the justice system to criminalize. This justification, too, stems from the ongoing consent ideology. I will address each of these notions in turn.

First, the requirement of separation or divorce before certain sexual offenses are legally cognizable in thirteen states flows directly from Hale’s theory of ongoing consent. A number of scholars have argued that a woman who has previously consented to sexual intercourse with a man should be assumed to have given her ongoing consent to future sexual acts. The 1962 Commentary to the Model Penal Code’s comprehensive marital rape exemption, for example, mirrors Hale’s analysis on ongoing consent:

[M]arriage . . . while not amounting to a legal waiver of the woman’s right to say “no,” does imply a kind of *generalized consent* that distinguishes some versions of the crime of rape from parallel behavior by a husband. The relationship itself creates a *presumption of consent*, valid until revoked.¹⁰⁹

More than three decades later, some scholars continue to advance a similar argument. For example, when advancing a position to increase convictions of acquaintance rapists, John Ingram argues that a man who has a sexual relationship with a woman may presume that he has consent to future sex with her:

Parents habitually kiss their young children at bedtime; business friends shake hands when they see each other; relatives exchange

108. See *supra* note 70 and accompanying text.

109. MODEL PENAL CODE § 213.1, *Comment* (ALI 1985) (emphasis added).

hugs at holiday time. The parties involved in such conduct assume it will continue. It would be cumbersome and ludicrous to reestablish consent to such physical contact on each occasion. If there has been consent in the past, and no present words or actions indicate a change in attitude, it is reasonable to presume that consent continues. I believe the same should be true in sexual relationships.¹¹⁰

Ingram, therefore, advocates that the law harbor a “rebuttable presumption” of consent to whatever prior sexual intimacies the parties had previously engaged in.¹¹¹ Although this “rebuttable presumption” may be overcome without dissolution of the marriage,¹¹² it continues to assume that consent may be ongoing, extending through time unless there are changed circumstances.

Second, marital exemptions for mentally incapacitated rape and unconscious rape in twenty states derive from a belief that nonforcible spousal sexual offenses are not harmful enough for the justice system to criminalize because of ongoing consent. Some scholars have argued that the previously discussed presumption of ongoing consent should extend to circumstances in which a woman cannot consent to sexual acts because she is incapacitated or unconscious. For example, the Commentary to the marital immunity provision in the Model Penal Code explains:

At a minimum . . . husbands must be exempt from those categories of liability based not on force or coercion but on a presumed

110. John Dwight Ingram, *Date Rape: It's Time for "No" to Really Mean "No,"* 21 AM. J. CRIM. L. 3, 26 (1993). Ingram argued that the solution to increasing convictions of nonviolent nonconsensual sexual intercourse with a voluntary social companion was to label it “sexual assault” instead of “rape.” *Id.* at 26. “Studies show that when such sexual conduct is labeled ‘sexual assault’ or some similar term, usually punishable less severely than rape, there is a much greater likelihood of conviction, especially in a jury trial.” *Id.* (footnotes omitted). In turn, Ingram speculated that an increase in convictions for nonstranger assaults might encourage victims to report their attacks, and ultimately result in less frequent assaults. *Id.* Ingram even found merit to a proposal that a woman, after being sexually assaulted, should pursue an indecent exposure charge instead of a rape count. *Id.* at 27. Doing so, he argued, would eliminate many problems that women face when accusing someone of rape. “Among the advantages of this approach are: (1) police do not have any respect for men who expose themselves to women, and will not show any boys-will-be-boys deference for the accused; (2) the police will not treat the victim as a whore; (3) the woman will not be embarrassed and mistrusted by police, prosecutors, friends, and relatives; (4) the assaulter will be humiliated and treated as a “weirdo” by his friends and relatives and (hopefully) his fellow inmates; and (5) it is very unlikely that a consent defense will succeed.” *Id.* Ingram recognized that the penalty for an indecent exposure conviction would be less than for a rape charge, but he insisted that it will “arguably” lead to “increased prosecution and conviction of sexual assaulters, which may help in eventually reducing the number of sexual assaults.” *Id.*

111. *Id.* at 30.

112. *Id.* at 31 (“even when a presumption can be said to exist, sexual partners should require very little to rebut or negate it”).

incapacity of the woman to consent. For example, a man who has intercourse with his unconscious wife should scarcely be condemned to felony liability on the ground that the woman in such circumstances is incapable of consenting to sex with her own husband, at least unless there are aggravating circumstances. The same holds true for intercourse with a wife who for some reason other than unconsciousness is not aware that a sexual act is committed upon her.¹¹³

Michael Hilf argues that this kind of marital immunity is justified by the lesser expectation of personal autonomy that women have when they enter marriage:

While an act of non-consensual intercourse is an interference with personal autonomy, a married person's general expectation of autonomy is less than a single person's. . . . It is obvious that some personal autonomy is sacrificed when one enters into a marital relation in order to allow for some degree of marital autonomy. A married person has, to some extent, a lesser expectation of personal autonomy; therefore, the affront to one's autonomy is less in the case of spousal rape than in the case of ordinary rape. . . . While a married person's interest in bodily integrity is not inconsiderable, a balance must be struck between the individual's interest in private autonomy and the public policy favoring spousal immunity.¹¹⁴

Hilf suggests the circumstances in which "the public policy favoring spousal immunity" outweighed the wife's "interest in private autonomy."¹¹⁵ He asks, "Do we quite seriously want to subject to criminal liability a husband who begins to engage in sexual contact with his sleeping or intoxicated wife? To ask the question is to answer it."¹¹⁶

In an influential article in the *Columbia Law Review*, Donald Dripps crystallizes a theory about sexual intercourse under these circumstances with his notion of "implied authorization" for sex.¹¹⁷

113. MODEL PENAL CODE § 213.1, *Comment* (ALI 1985).

114. Michael Gary Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31, 41 (1980).

115. *Id.*

116. *Id.* at 43.

117. Dripps, *supra* note 5, at 1800. Dripps uses the term "sexual expropriation" to describe nonconsensual, nonviolent sex. He claims that expropriation should be criminal, but to a lesser degree than forced sex involving violence. *Id.* at 1799–1800. Dripps also argued that legislatures should replace rape statutes with graded statutory offenses based on the amount of force used, punishing acts of violence more harshly than "nonviolent pressures." *Id.* at 1800. Dripps argued, "[p]hysical violence in general does far more harm to the victim's welfare than an unwanted sex act." *Id.* He continued, "[p]eople generally . . . would rather be subjected to unwanted sex than be shot, slashed or beaten with a tire iron." Panel Discussion: Donald Dripps, Linda Fairstein, Robin West, Panelists, *Men, Women and Rape*, 63 FORDHAM. L. REV. 125, 141 (1994) (hereinafter *Panel Discussion*). In comparing a serial stranger rape, where violence was threatened during the crime, to a college acquaintance rape, Dripps believed that although the acquaintance rape victim suffered, she suffered less than the victim of the stranger rape.

He poses a hypothetical set of facts: A married couple returns home from a party very drunk. After his wife passes out “unconscious on the bed,” the man “engages in coitus with her.”¹¹⁸ Dripps argues that, although the wife never consented to the sexual act, he enjoyed “implied authorization” to penetrate her without her consent.¹¹⁹ According to Dripps, the man’s “implied authorization” to have sex derives from the fact that the woman has, “while sober and over a long course of dealing, approved of a complex relationship in which sex plays a prominent role.”¹²⁰ Dripps’s argument for “implied authorization” for unconscious, nonconsensual sexual relations is one modern manifestation of the ongoing consent ideology.

Third, the wholesale downgrading of spousal offenses, the application of lesser penalties to these offenses, and the refusal to prosecute them without a prompt complaint in seven states suggest that some scholars and legislators believe that spousal sexual offenses in general are not important enough or harmful enough for the justice system to criminalize. Many people believe that there is no harm in sexual intercourse without consent when a man has been previously intimate with a woman. Media images tend to depict wife rape as a “petty conflict” or “trivial event” stirred by an excess of male sexual passion and resulting in little authentic suffering for women.¹²¹ Consequently, people tend to believe that wife rape is a less

Id. Robin West responded that Dripps trivializes the effects of unwanted sex on a victim: “From the victim’s perspective, unwanted sexual penetration involves unwanted force, and unwanted force is violent. . . . Dripps omits this central feature of the experience.” Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993). For his part, Dripps referred to West’s argument as an “insistence on equating ardor with violence,” one that gives “an inadequate account of the evil of sexual assault.” Donald A. Dripps, *More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 COLUM. L. REV. 1460, 1461 (1993).

118. Dripps, *supra* note 5, at 1801.

119. *Id.*

120. *Id.*

121. FINKELHOR & YLLO, *supra* note 14, at 14–15. See also HELEN BENEDICT, *VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES* 25–87 (1992) (discussing one of first marital rape trials in country, Rideout trial). In covering a trial involving accusations of rape by Greta Rideout against her husband, John, reporters gave significant attention to the defense attorney’s allegations and arguments. *Id.* at 57 (noting “the slant against Greta in the printed stories . . . was so unmistakable”). The reporters were caught up in the sensationalism and national intrigue surrounding the trial. *Id.* at 52. The interest was generated merely by the fact that a wife accused her husband of rape, and had little to do with the suffering and trauma that results from marital rape. *Id.* When the couple reconciled after John’s acquittal for rape, Greta was portrayed as a wife “crying rape for revenge and attention,” and was no longer seen “as a victim.” *Id.* at 69. Media coverage failed to acknowledge that “rape by an intimate is often more traumatic for the victim than by a stranger.” *Id.* at 71. Rather than recognizing Greta as a battered wife who was financially dependent on her husband, the media trivialized her allegations of rape as “incited by feminists” in order to “cry rape for revenge.” *Id.* at 60.

traumatizing experience to victims than is stranger rape.¹²² For example, in a 1981 statement in front of the Senate Judiciary Committee, Alabama Senator Jeremiah Denton evaluated “whether the anguish caused by intercourse forced by a husband is equivalent to that inflicted by intercourse forced by someone else” and concluded that the “character of the voluntary association of a husband and wife . . . could be thought to mitigate the nature of the harm resulting from the unwanted intercourse.”¹²³ Hilf likewise argues, “the harm caused by spousal rape would seem to be less severe than the harm caused by non-spousal rape.”¹²⁴

In short, each of the modern justifications for the current marital immunities have at their core the belief that marriage extends to men some kind of ongoing consent for sexual acts. The notion that there should be a “rebuttable presumption” of consent to sexual acts, the notion of “implied authorization” to mentally incapacitated and unconscious sexual acts, and the notion that there is less harm from spousal sexual assault because of the “character of the voluntary association of a husband and wife,” each derive from Hale’s ongoing consent ideology.¹²⁵

II. Formal Neutrality on Marital Status in Sexual Offenses

The doctrine of ongoing consent underlying both the past and current marital immunities in sexual offense statutes contradicts circumstances in the real world at an intolerable cost to married women. As a result, states must abolish their current marital immunities to achieve formal neutrality on the marital status of the parties, affording no status preference to men who sexually abuse their wives. Upon examination, each of the intertwined modern justifications for continued marital immunities in sexual offense statutes is ultimately unpersuasive. I will address each in turn.

122. COLLEEN A. WARD, *ATTITUDES TOWARD RAPE: FEMINIST & SOCIAL PSYCHOLOGICAL PERSPECTIVES* 74 (1995).

123. FINKELHOR & YLLO, *supra* note 14, at 137. In 1985, Lord Justice Mill in England concurred: “The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be. . . . [I]n some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship.” *R. v. Cox*, 7 Crim. App. R. (S.) 422 (6 Dec. 1985). See also Comment, *Rape and Battery*, *supra* note 3, at 723–24 (“In the ordinary marriage relationship the classical form of forcible rape is not probable. Presumably the parties have at times been very intimate, and the possibilities of serious social, physical, or mental harm from a familiar, if unwanted, conjugal embrace are rather small.”).

124. Hilf, *supra* note 114, at 41.

125. See FINKELHOR & YLLO, *supra* note 14, at 137; Dripps, *supra* note 5, at 1801; Ingram, *supra* note 110, at 30–31.

First, a number of scholars have argued that a woman who has previously consented to sexual intercourse with a man should be presumed to have given her ongoing consent to future sexual acts. Because marriage implies a wife's "generalized consent," as the Model Penal Code terms it, there is a requirement of separation or divorce before certain spousal sexual offenses will be considered criminal in twelve states. Without separation or divorce, there is consent that prevents those sexual acts from being criminal.

In the real world, however, many women who experience rape in marriage are battered and remain with their abusers for complicated reasons other than "generalized consent" to sexual relations in the future.¹²⁶ Battered women are especially vulnerable to wife rape.¹²⁷ Studies indicate that between one-third and one-half of battered women have been raped one or more times by their batterers.¹²⁸ A woman who is raped by her husband may stay with him because she has nowhere to go,¹²⁹ she may want to provide stability for her young children,¹³⁰ or she may feel love for her husband, despite his sexual

126. LENORE WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* 42-45 (1989).

127. FINKELHOR & YLLO, *supra* note 14, at 22 ("Battered women are at especially high risk of sexual assault. Studies of battered women regularly show that anywhere from a third to a half of them are victims of marital sexual assault."). See also Raquel Kennedy Bergen, *Marital Rape, Violence Against Women Online Resources* (1999), at <http://www.vaw.umn.edu/finaldocuments/Vawnet/mrape.htm> [hereinafter Bergen, *Marital Rape*]. Surprisingly, then, there is no section on marital rape in casebook of over 1000 pages. CLAIRE DALTON & ELIZABETH SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001).

128. Bergen, *Marital Rape, supra* note 127. RUSSELL, *supra* note 6, at 96 ("21 percent of the 644 women who had ever married reported being subjected to physical violence by a husband at some time in their lives. This figure may be lower than the true incidence of violence in marriage for a number of reasons. First, it was left to respondents to define what they thought constituted physical violence. They were simply asked the question: *Was your husband (or ex-husband) ever physically violent with you?* If they said no, there was no further probing.") (emphasis added).

In one study, 40% of the 1,200 battered women in Denver shelters had been subjected to at least one sexual assault by a boyfriend or husband; one-third of those women had been sexually assaulted at least once a month. RUSSELL, *supra* note 6, at xxi, xxviii. That said, some women have been raped in marriage but not battered. FINKELHOR & YLLO, *supra* note 14, at 45 (40% of marital rape victims were not routinely beaten by their husbands and "these women had not been subjected to the frequent and frightening outbursts that the victims of battering had"); Bergen, *Marital Rape, supra* note 127 ("Four percent of women in [Russell's] sample who had ever been married had been raped by their partners but not battered. In what Finkelhor and Yllo (1985) have called 'force-only rape,' husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. Forty percent of Finkelhor and Yllo's sample of women were victims of 'force-only rape.'").

129. RUSSELL, *supra* note 6, at 222.

130. *Id.* at 220.

abuse.¹³¹ Many victims of wife rape are financially unable to leave.¹³² A number of victims are told by family, friends, religious leaders, or health professionals that they should stay.¹³³ Many rapists tell their wives that they will murder them if they leave.¹³⁴ In fact, sexual abuse as well as other physical abuse frequently increases when women do declare their intention to leave or actually leave their spouses.¹³⁵

131. Patricia Mahoney et al., *Violence Against Women by Intimate Relationship Partners*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 147 (Claire M. Renzetti et al. eds., 2001) (“In particular, a woman’s opportunities to leave an abusive relationship can be affected in a variety of ways by sharing her life with her perpetrator. For example, the perpetrator may control all aspects of family finances; this can keep a woman from having enough financial resources to leave, but it may also serve to keep her ignorant of the skills she would need to support herself on her own.”).

132. See RUSSELL, *supra* note 6, at 220 (“For 90 percent of the women who stayed, their husbands provided the money they lived on at the time of the survey, as compared with 24 percent of the wives who were no longer married to the men who raped them.”); see also *id.* (“Most significant of all is that all nineteen of the wives (100 percent) who were the sole providers of the household income at the time of the first wife rape were no longer married to the men who raped them. This is powerful evidence that economic resources play a key role in why raped wives stay.”)

133. *State v. Morrison*, 426 A.2d 47 (N.J. 1981) (counselors at mental health institution told wife rape victim that they could do nothing for her and that she should go home with rapist). See also FINKELHOR & YLLO, *supra* note 14, at 27 (“One night he knocked her out completely with a punch in the mouth. Another time he threw a knife at her. That same evening, in front of his parents, he threw her to the ground and kicked her in the head. He burned her with a cigarette. He locked her in their shed for an evening. His mother warned her to leave: ‘He’s gonna kill you.’ Then, when she did so, the mother begged her to go back to him, because he was so distraught she thought he would commit suicide.”). See also *id.* at 32 (obviously violently raped woman asked her doctor what was wrong with her husband and he responded, “The only thing wrong with him is that he is a sex maniac. He needs to have his sexual satisfaction”); *id.* at 127 (marital rape victim “stayed with her husband for years on the advice of her fundamentalist pastor”).

Women also experience doctors who treat the effects of obvious sexual violence but do nothing to help. See FINKELHOR & YLLO, *supra* note 14, at 32 (“He would put his whole hand inside her vagina and try to pull [the vagina] inside out. Once when he did this he began to hurt her so badly that she kicked him away with her feet. As he pulled away, his fist ripped her vagina, and she started to bleed ‘like somebody had turned the water on.’ Four blood transfusions later, she recovered, but the doctor told her she had been very, very lucky. Unfortunately, the doctor neither asked about the cause of the injury nor reported it to the police.”).

134. See, e.g., *Jones v. State*, 74 S.W.3d 663, 667 (Ark. 2002) (victim testified that Jones told her “that if I wanted out of the marriage by divorce I wouldn’t get it because the only way to get out of our marriage was like our wedding vows is through death and I would have to die.”); *Hernandez v. State*, 804 S.W.2d 168, 168 (Tex. Crim. App. 1991) (victim did not file for divorce because Hernandez “threatened to kill her”); *State v. Morrison*, 426 A.2d 47 (N.J. 1981) (estranged husband taped photo of gravesite to victim’s door, indicating that their marriage would only end in death).

135. FINKELHOR & YLLO, *supra* note 14, at 25 (“A wife’s leaving or threatening to leave her marriage frequently provokes a marital rape. Irene Frieze, in fact, found that among the group of battered women she studied, leaving or threatening to leave was the factor that was most often associated with a sexual assault. In our study, over two-thirds

Many, perhaps most, women who are raped by their spouses do not leave the relationship after the first instance of rape.¹³⁶ In a 1998 Pennsylvania case, for example, the victim testified that her husband, Richter, had on a previous occasion raped her and then penetrated her with a brush dipped in plumber's glue.¹³⁷ After being taken to the hospital and treated for serious internal injuries, she reported the rape to authorities.¹³⁸ Richter pled guilty to aggravated assault and was sentenced to probation and a stay-away order. Nevertheless, six weeks later, Richter moved in with his wife again.¹³⁹ After some time, they divorced. Three years after the first rape, Richter went to his ex-wife's house, beat her in the face, broke her tooth, and then forced sex on her.¹⁴⁰ She was again hospitalized from his attack. A few years later, Richter again raped her. The first time Richter sexually assaulted his wife was no less a rape simply because the parties were still married. One cannot assume that Richter's wife gave "generalized consent" to sex with him based on their marriage.

Like Richter's wife, battered wives who are raped are at the greatest risk of sustaining serious injury from their husbands.¹⁴¹

of the women in our sample were raped in the waning days of a relationship, either after previous separations or when they were making plans to get out."). *See also* BERGEN, WIFE RAPE, *supra* note 23, at 21 ("[W]omen are particularly at risk of being raped when they are separated or divorced, because despite the dissolution of the marital bond, this sense of entitlement and the belief that their (ex) wives are their property live on.").

In one case, for example, Blevins violated a protective order and broke into his family home, armed with a pistol, woke his wife, and told her he wanted to have sex with her. She resisted. *Blevins v. State*, 18 S.W.3d 266, 267 (Tex. Crim. App. 2000). He then held her at gunpoint, threatened to kill her, gagged her, forcibly injected her with a syringe of methamphetamine, and then had sex with her. *Id.* at 267-68.

136. BERGEN, WIFE RAPE, *supra* note 34, at 25-26 ("The vast majority of women in this sample did not leave the relationship after the first incident but instead tried to manage the violence. After the first incident, all of the women reported feeling a similar sense of shock that the assault was happening to them and a general feeling of disbelief that someone they loved was responsible for their pain."). For example, in a 1994 Virginia case, a wife testified that her husband (who was a police officer and a tenth degree black belt in karate) had subjected her to eight to twelve instances of sexual violence over the course of their marriage. *Morse v. Commonwealth*, 440 S.E.2d 145 (Va. Ct. App. 1994).

137. *Pennsylvania v. Richter*, 711 A.2d 464, 466 (Pa. 1998).

138. *Richter*, 711 A.2d at 466.

139. *Id.*

140. *Id.*

141. "[V]ictims of wife rape are at greater risk of being murdered by their husbands, or of murdering them, than battered women who are not also sexually violated." RUSSELL, *supra* note 6, at xxviii. "[B]attered women who were raped by their male partners were significantly more likely to have been beaten during pregnancy than those who had not been raped." *Id.* at xxix. *See, e.g., State v. Randle*, 647 N.W.2d 324 (Wis. Ct. App. 2002) (Randle kidnapped his estranged wife, grabbed her when she attempted to escape, put her in a headlock, punched her several times in the head, choked her, and then forced sex on her). *See also Temple v. State*, 517 S.E.2d 850 (Ga. Ct. App. 1999) (Temple kicked down his estranged wife's door, choked her, slapped her, beat her with gun, held gun to her head

Having been raped is associated with “significantly more serious physical violence in terms of the severity and frequency of the aggression as well as the severity of the resulting injuries.”¹⁴² Without separation or divorce, battered wives who are raped are harmed physically as well as psychologically by sexual assaults. For these reasons, there should be no requirement of separation or divorce before a sexual offense in marriage is legally cognizable.

Second, a number of scholars have argued that the “generalized consent” that marriage grants a husband should extend to circumstances in which the wife is mentally incapacitated or unconscious and cannot consent. The related notion is that incapacitated or unconscious rape by a spouse is not harmful enough for the justice system to recognize. In a number of states, men even enjoy immunity when they themselves drug their wives, rendering them unable to consent.¹⁴³

and threatened to kill her, sexually assaulted her with gun, and beat her until she lost consciousness).

142. RUSSELL, *supra* note 6, at xxviii. “They found that battered women who were also raped had significantly lower self-esteem than women who had only been battered. Campbell also reports that women in her study who were raped and battered by their male partners had significantly lower self-esteem than those who had not been raped, ‘even if it happened only once or early in the relationship.’” *Id.* See also Lisa A. Goodman et al., *Violence Against Women: Physical and Mental Health Effects*, in APP. & PREVENTIVE PSYCH. 79, 84 (1993) (“[B]attered women who are raped by their partners are likely to experience more severe nonsexual attacks than other battered women.”). It is also associated with increased anxiety and paranoid ideation as well as damaged body image and numerous physical ailments for the victim. RUSSELL, *supra* note 6, at xxix.

143. CONN. GEN. STAT. § 53a-65 (5) (West 2002) (definition of mentally incapacitated is when “person is rendered temporarily incapable of appraising or controlling such person’s conduct owing to the influence of a drug or intoxicating substance *administered . . . without such person’s consent*”) (emphasis added); HAW. REV. STAT. § 707-700 (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (mentally incapacitated defined as person who is “rendered temporarily incapable of appraising or controlling the person’s conduct owing to the influence of a substance *administered to the person without the person’s consent*”) (emphasis added); MD. CRIM. LAW § 3-301 (West 2002) (mentally incapacitated defined as “an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual *without the individual’s consent . . . is rendered substantially incapable of appraising the nature of the individual’s conduct*”) (emphasis added); MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his or her spouse being under age 16, mentally incapable or mentally incapacitated); § 750.520a (definition of mentally incapacitated is when “person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance *administered to that person without his or her consent*”) (emphasis added); MINN. STAT. ANN. § 609-341 (West 2002), *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (mentally incapacitated defined as “person under the influence of alcohol, a narcotic, anesthetic, or any other substance, *administered to that person without the person’s agreement*”) (emphasis added); MISS. CODE ANN. § 97-3-97 (2002) (mentally

As a preliminary matter, it is important to note that drugging a wife to have sex with her is not an uncommon weapon in a batterer's arsenal.¹⁴⁴ In one case, for example, a man laced his wife's food with half a bottle of anti-depressants, rendering her unconscious.¹⁴⁵ While she was unconscious, he orally and digitally penetrated her as he videotaped the episode.¹⁴⁶ The use of drugs is analogous to the use of physical force to render a woman incapacitated. Some men beat or

incapacitated defined as "one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting due to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent"); OHIO REV. CODE ANN. § 2907.02(a) (West 2002) amended by 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (rape includes when "for the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception"); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) ("Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator" where the victim is "incapable through mental illness or any other unsoundness of mind; where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit; or where the victim is at the time unconscious of the nature of the act."); R.I. GEN. LAWS 1956 § 11-37-1 (1953-2001) (mentally incapacitated defined as a "person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent") (emphasis added); S.C. CODE ANN. § 16-3-652 (Law. Co-op. 2002) (criminal sexual conduct in first degree includes when "the actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering . . . a controlled substance"); TENN. CODE ANN. § 39-13-501 (West 2002) (mentally incapacitated defined as "person [who is] rendered temporarily incapable of appraising or controlling the person's conduct due to the influence of a narcotic, anesthetic or other substance administered to that person without the person's consent") (emphasis added).

Louisiana's rape statute does not include marital immunity "when the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim." However, there is marital immunity when someone other than the offender administers the substance. La. R.S. 14:43 (A)(1)-(2).

143. S.C. CODE ANN. 1976 § 16-3-652 (Law. Co-op. 2002) (sexual conduct in first degree includes when actor causes victim to become physically helpless, defined as unconscious, asleep or "for any other reason physically unable to communicate unwillingness to an act").

144. Bergen, *Marital Rape*, *supra* note 127. See also The Wife Rape Information Page, at <http://www.wellesley.edu/WCW/mrape.html> (last visited June 7, 2003) (discussing how sex may be accomplished without woman's consent if she is under influence of alcohol or drugs, is unconscious or asleep, or permanently or temporarily disabled).

145. See *Trigg v. State*, 759 So. 2d 448 (Miss. Ct. App. 2000) (defendant engaged in sexual acts with unconscious wife after drugging her).

146. See *id.* at 450.

choke their wives to render them unconscious before raping them.¹⁴⁷ As one victim in a study on wife rape described:

[My husband] would try to choke me, and then I would pass out. Then he would rape me. He would put me to sleep and then rape me. Sometimes when we were out somewhere, and he didn't like something I did, he would say, "You wanna go to sleep?" and laugh like it was real funny. It was like a punishment.¹⁴⁸

Although most states would recognize the choking here as force that makes the sexual offense rape, too many states would not recognize drugging a wife for the identical purpose as force that makes the sexual offense rape.

Distinct from the issue of deliberate drugging on the part of the husband, in twenty states men enjoy immunity when they simply take advantage of their wives' mental incapacity or unconsciousness to have sex with them without their consent.¹⁴⁹ Some scholars roundly dismiss the potential harm of this kind of invasion. Dripps argues that it should not be criminal for a man to penetrate his wife when she is passed out.¹⁵⁰ The problems with this position are both principled and practical.

As a matter of principle, the argument in favor of the marital exemption for mental incapacitation or unconscious rape ignores or greatly undervalues a married woman's sexual autonomy—her freedom to decide whether and when to engage in intercourse.¹⁵¹ A woman has the right to reserve her body for her own ends and not to be used as an object for someone else's ends.¹⁵² Affording married

147. See *State v. Beliveau*, No. 01AP-211, 2001 WL 1286495, at *1 (Ohio Ct. App. 2001) (defendant threw his girlfriend down and raped her while she was unconscious). Although this case involved a man and his girlfriend, the factual situation is relevant to demonstrate how a person can rape their partner, whether married or not, after knocking them unconscious. Beyond intimate relationships, there are many cases where acquaintances have taken advantage of women and girls who have passed out or become semi-conscious due to intoxication or drugs. See, e.g., *State v. Farnum*, 554 N.W.2d 716, 718 (Iowa Ct. App. 1996) (victim awoke from an unconscious state to find defendant had already penetrated her vagina).

148. BERGEN, WIFE RAPE, *supra* note 23, at 19. See also Charlotte Watts & Cathy Zimmerman, *Violence Against Women: Global Scope and Magnitude*, 359 LANCET 1232 (2002) (surveying women around globe for instances of intimate partner violence). The authors noted that research carried out in Zimbabwe showed that 26% of married women had been subjected to forced sex by their partners, and that of those women, 12% reported being forced while they were asleep. See *id.*

149. See *supra* note 71 and accompanying text.

150. See *supra* note 5 and accompanying text.

151. For a general discussion of sexual autonomy in other rape contexts, see STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW at ix-x (1998).

152. Although a woman passed out cold is not dead, she is, perhaps, as close as one could get. Laws that allow men to penetrate women who are unconscious treat women's bodies as lifeless receptacles.

women this right is crucial to their dignity and equality under the law. It is this right that rape laws should be designed to protect.¹⁵³

Hilf argues, however, "A married person has, to some extent, a lesser expectation of personal autonomy; therefore, the affront to one's autonomy is less in the case if spousal rape than in the case of ordinary rape."¹⁵⁴ While married individuals may have lesser expectations of certain kinds of autonomy, it does not follow that in the sexual realm, a woman's autonomy must bow to the demands of her husband's interest in obtaining sex. A man's desire for an orgasm simply does not outweigh his wife's interest in avoiding the invasion of unwanted intercourse. A married woman's expectation of sexual autonomy should be no less than a single person's.

As a practical matter, the argument that incapacitated and unconscious rape are not harmful reveals ignorance about the perils of sexual penetration for a woman. A man who penetrates a woman when she is unconscious denies her the power to negotiate the use of contraceptives and other protection to prevent pregnancy and disease. In the 1921 Alabama case, for example, when the wife withdrew from sexual relations in order to stop having children, her husband proceeded to force her to have sex against her will.¹⁵⁵ If she had been drugged and he had taken advantage of her unconscious state and made her pregnant as a result, the primary injury she sought to avoid—unwanted pregnancy—would have been the same. Unwanted pregnancy and disease are serious injuries for both unmarried and married women.

Even if the man does not make his unconscious wife pregnant against her will or give her a sexually transmitted disease, he has profoundly degraded her bodily integrity. Women's dry orifices are not permeable. To penetrate them takes force that may bruise, tear, and otherwise damage tissue.¹⁵⁶ Physical and psychological pain will likely greet the woman when she regains consciousness. These injuries and this suffering matter. Sexual injury and suffering are what rape laws should be designed to prevent. Because incapacitated and unconscious rape denies sexual autonomy and causes harm, the

153. See SCHULHOFER, *supra* note 151, at 99–113.

154. See Hilf, *supra* note 114, at 41.

155. Anonymous, 89 So. 462 (Ala. 1921).

156. Despite this potential, most victims do not have this kind of corroborating physical evidence of rape. The vast majority of rape victims suffer little or no physical injury in addition to the rape itself. Susan B. Sorenson & Judith M. Siegel, *Gender, Ethnicity, and Sexual Assault: Findings from a Los Angeles Study*, 48 J. SOC. ISSUES 93, 97 (1992). About 10% of rape victims suffer extrinsic physical injury. *Id.* Only 5% suffer serious, extrinsic injury. See LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 12 (1997).

twenty states that currently provide immunity for it should abolish that immunity.

Third, a number of scholars have argued that spousal sexual offenses in general are not harmful enough for the justice system to criminalize. It is this argument that underlies the general downgrading of spousal sexual offenses, subjecting them to lesser penalties and requiring prompt complaints in seven states. Interestingly, it is the ongoing consent in marriage that supposedly makes spousal sexual assaults less harmful. As previously mentioned, Senator Denton argued that the “character of the voluntary association of a husband and wife . . . could be thought to mitigate the nature of the harm resulting from the unwanted intercourse.”¹⁵⁷ The implicit position is that stranger sexual offenses are injurious to victims, but, because of ongoing consent, spousal sexual offenses are not.

The research, however, indicates that wife rape is as harmful to victims as stranger rape. Marital sexual attacks are more likely than stranger sexual attacks to end in completed rapes rather than attempted rapes.¹⁵⁸ Wife rape victims are more likely than victims of acquaintances or strangers to be raped orally and anally.¹⁵⁹ Contrary

157. FINKELHOR & YLLO, *supra* note 14, at 137. In 1985, Lord Justice Mill in England concurred: “The rape of a former wife or mistress may have exceptional features which make it a less serious offence than otherwise it would be. . . . [I]n some instances the violation of the person and defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a long-standing sexual relationship.” *R. v. Cox*, 7 Crim. App. 422 (1985) (concurrency). See also Comment, *Rape and Battery*, *supra* note 3, at 724 (“In the ordinary marriage relationship the classical form of forcible rape is not probable. Presumably the parties have at times been very intimate, and the possibilities of serious social, physical or mental harm from a familiar, if unwanted, conjugal embrace are rather small.”).

158. RUSSELL, *supra* note 6, at 64 (“It is evident that the more intimate the relationship, the more likely the attempts at rape will succeed; thus the number of attempted rapes for husbands, lovers, and boyfriends are all very low in comparison to the number of attempted rapes by non-intimates.”).

159. See Bergen, *Marital Rape*, *supra* note 127. In one study of marital rape victims that did not specifically ask about these experiences, one-third of the raped wives mentioned having been subjected to forced anal intercourse and a fifth of them mentioned forced oral sex. FINKELHOR & YLLO, *supra* note 14, at 30 (“Nearly a quarter said they had been subjected to sex in the presence of others—usually their children. These incidents are not disagreements over sexual positions; they are sexual humiliations inflicted on women.”). In a study of wife rape victims, “40% of the women reported at least one incident of anal rape, and 33% had been forced to perform oral sex on their partners.” BERGEN, *WIFE RAPE*, *supra* note 23, at 19. Both oral and anal rape can have serious psychological consequences; moreover, anal rape results in serious physical damage to the victim and oral rape can threaten to choke and kill her. See, e.g., FINKELHOR & YLLO, *supra* note 14, at 35 (“Clare said that for weeks afterward she had to defecate standing up, and that the

to popular opinion, wife rapes tend to be more violent than stranger rapes.¹⁶⁰ Men have raped their wives with wooden batons, fists, dogs, and loaded firearms.¹⁶¹ The physical consequences of wife rape can, therefore, be painful and dangerous:

The physical effects of marital rape may include injuries to the vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. [Researchers] report that one half of the marital rape survivors in their sample were kicked, hit or burned during sex. Specific gynecological consequences of marital rape include vaginal stretching, miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases, including HIV.¹⁶²

Despite the serious physical consequences of wife rape, the psychological consequences are usually more devastating.¹⁶³ Short-

injury took five years to heal fully. Another woman said that repeated anal rapes left her rectum torn and bleeding.”).

160. Patricia Rozee, *Stranger Rape*, in *THE PSYCHOLOGY OF SEXUAL VICTIMIZATION: A HANDBOOK* 97 (Michele Antoinette Paludi ed., 1999). For a discussion of the kinds of force used in marital rape, see RUSSELL, *supra* note 6, at 112.

161. See, e.g., Shunn v. State, 742 P.2d 775, 776 (Wyo. 1987) (defendant battered and raped his wife with a wooden baton); Temple v. State, 517 S.E.2d 850, 851 (Ga. Ct. App. 1999) (Temple kicked down estranged wife's door, choked her, slapped her, beat her with gun, held gun to her head, threatened to kill her, sexually assaulted her with gun, and beat her until she lost consciousness); People v. M.D., 595 N.E.2d 702, 705 (Ill. App. Ct. 1992) (defendant raped victim with his fist repeatedly, ripping her vagina and causing internal damage, after which victim suffered from long-term urinary incontinence); State v. Dominy, 6 S.W.3d 472, 474 (Tenn. 1999) (Dominy repeatedly raped wife with dog). For other victim's stories see, e.g., BERGEN, *WIFE RAPE*, *supra* note 23, at 16 (“I was cooking, and he came out and started to hassle me, and I burned the eggs and then he started beating me because I had burned them. So he beat me up for a half hour, I guess, and then he said, ‘OK, bitch, get back upstairs,’ and I knew he wanted sex just by the way he said it. I said, ‘I can’t do that now because I’m really upset and I can’t make love to someone who beat me up’ . . . and he said ‘now,’ and he turned off the stove and ripped off my pajamas and started punching me . . . and I got into the corner and was all curled up and he picked me up and threw me on the bed and did his thing. It was disgusting, and afterward I got up and threw up.”); *id.* at 17 (“Sometimes we would go to bed, and he would push my legs aside and force sex on me. Or he would grab my head and force me [to give him oral sex]. . . . Other times he would beat the crap out of me in bed or hold a gun to my head to force me.”).

162. Bergen, *Marital Rape*, *supra* note 127. See also BERGEN, *WIFE RAPE*, *supra* note 23, at 59.

163. FINKELHOR & YLLO, *supra* note 15, at 126 (“The destruction of the ability to trust was the most common long-term effect of rape in marriage that our interviewees mentioned. Marital rape constituted for them not only a sexual assault, but a violation of trust and intimacy. The shock experienced by a woman who was sexually brutalized by the man she had loved and trusted above all others did not wane quickly. More than a third of our interviewees felt that their ability to trust and develop intimate relationships

term psychological effects of wife rape may include “anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress disorder.”¹⁶⁴ Long-term psychological effects may include “disordered eating, sleep problems, depression, problems establishing trusting relationships, and increased negative feelings about themselves” as well as “flash-backs, sexual dysfunction, and emotional pain for years after the violence.”¹⁶⁵ In one study of raped wives, “[m]ore than half of the women mentioned considering or attempting suicide at some point.”¹⁶⁶

One reason that wife rapes are so traumatic is that victims are less likely to tell family members, rape crisis counselors, or police officers about their experiences, and they are less likely to receive support when they do.¹⁶⁷ In her groundbreaking study on wife rape, Diana Russell concluded:

with men had been impaired, the impairment ranging from wanting to withdraw from contact with men altogether to feeling great caution in relations with men; from an underlying disdain to an outright hatred.”). See also Mark A. Whatley, *For Better or Worse: The Case of Marital Rape*, 8 VIOLENCE AND VICTIMS 29, 33 (1993) (“Women who are victims of marital rape have a hard time trusting men; an increased phobia of intimacy and sex, and a lasting fear of being sexually assaulted again.”).

164. Bergen, *Marital Rape*, *supra* note 127. In Diana Russell’s ground breaking study of marital rape, 56% of the victims she studied were “extremely upset” by having been raped, 21% were “very upset” and 18% were somewhat upset. RUSSELL, *supra* note 6, at 191.

165. Bergen, *Marital Rape*, *supra* note 127. See also FINKELHOR & YLLO, *supra* note 14, at 126 (“In addition to the immediate trauma of marital rape, the victims we talked to reported serious long-term effects. Some were still experiencing them five or ten years after they had divorced their husbands. They talked about an inability to trust. They talked about lingering fear and emotional pain. They talked about terrifying flashbacks and nightmares. They talked about apprehensions about men and sexual dysfunctions—problems that kept them from having a social life, or that interfered with subsequent marriages.”); BERGEN, WIFE RAPE, *supra* note 23, at 60 (“Like other survivors of sexual assault, many of the women in this sample commonly experienced flashbacks and ongoing nightmares about their assaults.”). See also Lee Bidwell & Priscilla White, *The Family Context of Rape*, 1 J. FAM. VIOLENCE 277, 283 (1986) (“The depersonalization and devaluation that accompany the act of rape must be especially devastating [sic] when the rapist is your husband.”).

Again, contrary to popular opinion, wife rape victims may experience more anger and depression than do stranger rape victims. Bergen, *Marital Rape*, *supra* note 127. But see Rozee, *supra* note 160, at 107 (“Some studies have found that stranger rape seems to be related to greater depression and fear (Ellis, Atkeson, & Calhoun, 1981), while others have found no difference in mental health outcomes among date, stranger, and marital rape survivors (Resick, 1993).”).

166. BERGEN, WIFE RAPE, *supra* note 23, at 59. See also Whatley, *supra* note 163, at 33 (“[V]ictims of marital rape turn to drugs and alcohol, [and] attempt suicide.”)

167. Bergen, *Marital Rape*, *supra* note 127. Stranger rape survivors are more likely than acquaintance rape survivors to reach out for social support and are more likely to report the attack to authorities. Rozee, *supra* note 160, at 97.

[W]ife rape can be as terrifying and life threatening to the victim as stranger rape. In addition, it often evokes a powerful sense of betrayal, deep disillusionment, and total isolation. Women often receive very poor treatment by friends, relatives, and professional services when they are raped by strangers. This isolation can be even more extreme for victims of wife rape. And just as they are more likely to be blamed, they are more likely to blame themselves.¹⁶⁸

In addition to feeling betrayed, isolated, and blamed, victims of wife rape are also more likely than victims of stranger rape to endure multiple offenses from their attackers and to suffer from persistent terror.¹⁶⁹ In their follow-up study on marital rape, David Finkelhor and Kersti Yllo reported that fifty percent of the women in their

168. RUSSELL, *supra* note 6, at 198; Charlene Muehlenhard & Barry Highby, *Coercive Sex*, in *SEXUALITY IN AMERICA: UNDERSTANDING OUR SEXUAL VALUES AND BEHAVIOR* 172, 178 (Robert Francoeur et al. eds., 1998) (hereinafter *SEXUALITY IN AMERICA*) (“Victims of acquaintance rape are as likely as victims of stranger rape to experience depression, anxiety, problems with relationships, problems with sex, and thoughts of suicide. Women who are raped by acquaintances they had trusted may doubt their ability to evaluate the character of others and may be reluctant to trust others. Women raped by acquaintances are less likely than women raped by strangers to be believed and supported by others.”).

169. Bergen, *Marital Rape*, *supra* note 127 (“Marital rape may be even more traumatic than rape by a stranger because a wife lives with her assailant and she may live in constant terror of another assault whether she is awake or asleep.”). *See also id.* (“Women who are raped by their husbands are likely to be raped many times—often 20 times or more before they are able to end the violence.”); FINKELHOR & YLLO, *supra* note 14, at 23 (“For most marital-rape victims, rape is a chronic and constant threat, not an isolated problem. The battered women, of course, were the most vulnerable of all to such repeated sexual abuse. Twice as many battered women suffered from chronic rapes (twenty times or more) as the other raped women.”); Muehlenhard & Highby, *supra* note 168, at 179 (“Whereas stranger rape is typically a one-time occurrence, the rape of wives and other partners is likely to occur repeatedly and may last for years. The more frequently women are raped by their husbands or partners, the more likely they are to suffer from grave long-term consequences.”); Mahoney et al., *supra* note 131, at 147 (“When a woman lives with her perpetrator, one of the ways her situation is different from the woman attacked by a stranger is that she has no safe haven, no place where she can feel safe and secure from another attack. Even women who do not live with their intimate partners may not feel, as dates and ex-partners often know how best to break into a woman’s home; they know which doors and windows have no locks and when a woman may be most vulnerable.”); Kersti Yllo, *Wife Rape: A Social Problem for the 21st Century*, 5 *VIOL. AG. WOMEN* 1059, 1060 (1999) (“When you are raped by a stranger, you live with a frightening memory, but when you are raped by your husband, you live with your rapist.”).

For a victim’s perspective, see BERGEN, *WIFE RAPE*, *supra* note 23, at 43 (“It was very clear to me. He raped me. He ripped off my pajamas, he beat me up. I mean, some scumbag down the street would do that to me. So to me it wasn’t any different because I was married to him, it was rape—real clear what it was. It emotionally hurt worse [than stranger rape]. I mean you can compartmentalize it as stranger rape—you were at the wrong place at the wrong time. You can manage to get over it differently. But here you’re at home with your husband, and you don’t expect that. I was under constant terror [from then on] even if he didn’t do it.”).

study had been sexually assaulted twenty times or more.¹⁷⁰ The negative physical and mental consequences of such repeated sexual attacks include chronic injury and trauma.¹⁷¹ Given the serious physical and psychological harm of wife rape, the seven states that currently maintain such unfair requirements should not downgrade it, subject it to lesser penalties, or refuse to prosecute it without a prompt complaint.

At a bare minimum, twenty-six states must abolish the remaining marital immunity for sexual offenses. They need to treat marital and non-marital sexual assault the same and repeal the laws that require separation or divorce, extra force, or prompt complaint, as well as the provisions that downgrade spousal sexual offenses or exempt incapacitated or unconscious rape from legal condemnation.

Formal neutrality as to the marital status of the parties in sexual offense statutes is, at this point, long overdue. Although legal scholars have not until now specifically analyzed and challenged the provisions that remain in statutes today, some have argued generally for the deletion of marital exemptions¹⁷² or for new provisions that authorize the prosecution of wife rape.¹⁷³ By eliminating the provisions that evince bias against married women and favoritism toward sexually abusive men, these proposals would achieve formal

170. FINKELHOR & YLLO, *supra* note 14, at 23. They continued, “And for the majority of the women we talked to, rape was a repeated occurrence. For some, assaults were so common they could not remember how often.” *Id.* See also BERGEN, WIFE RAPE, *supra* note 23, at 19 (reporting that “most women (55%) were raped frequently—more than 20 times during the course of their relationships”).

171. Mahoney et al., *supra* note 131, at 146. She continued, “Intimate violence victims experience this multiple victimization by the same perpetrator over time, and the perpetrator is likely to employ a variety of types of violence. For example, the person who threatens a woman with a knife is the same person who has beaten her in the past. Each violent episode builds on past violent episodes and threats.” *Id.*

172. See, e.g., Bearrows, *supra* note 3, at 222–26 (proposing a rape statute that would be silent on relationship between perpetrator and victim and would grade offenses based on amount of violence used); Dripps, *supra* note 5, at 1800 (proposing that legislatures replace marital and other rape statutes with graded offenses based on the amount of force used); Sitton, *supra* note 3, at 264 (“[C]omplete abolition of all laws distinguishing among rape and sexual assault victims based on their relationship to their assailant is required in order for women to achieve equal protection under the law.”).

173. See, e.g., Eskow, *supra* note 3, at 705 (rape statute should first “set[] forth a definition of rape that neither affirmatively includes nor excludes spouses as potential victims, while the second paragraph [would] clarif[y] that marriage is no defense to rape.”). Although I prefer non-gender neutral terms because rape within marriage is overwhelmingly a crime that men commit on women, I use the term spouse because the statutes are gender neutral. See RUSSELL, *supra* note 6, at 9 (“The term ‘wife rape’ is preferred over ‘marital rape’ or ‘spousal rape’ because it is not gender neutral. The term ‘spousal rape’ in particular seems to convey the notion that rape is something that wives do to husbands, if not as readily as husbands do it to wives, at least sufficiently often that a gender neutral term should be used.”).

neutrality on the question of the marital status of the parties in sexual offense statutes.

III. Development of the Law on Sexual Offenses by Intimates

As much as formal neutrality on marital status in sexual offense statutes is needed, it is not enough. Even the complete abolition of marital immunity in some jurisdictions has done little for raped wives who face police, prosecutors, judges, and juries who infer that, absent extraordinary violence, the wives' prior consent to sexual intercourse implied ongoing consent to the alleged rape.¹⁷⁴ It has also done nothing for those women raped by former lovers, boyfriends, and cohabitants who face the same legal actors who make the same improper inference of ongoing consent. The ongoing consent ideology, applicable to all forms of intimate rape, is perhaps the most difficult and enduring problem produced by the marital rape exemption.

When analyzing marital rape, few legal scholars have linked marital rape to rape by other intimates.¹⁷⁵ By focusing on the formal contours of marital immunity in forcible rape statutes, most legal

174. Following the battle against marital immunity for forcible rape, reformers have shown little political will to tackle marital immunities for other sexual offenses. RUSSELL, *supra* note 6, at xxi. After the marital exemption for rape was defeated, the battle wound down, observed Martin Schwartz in 1989. *Id.* "There is only one problem," he continued, "[n]othing has changed" because reformers "have not created the political climate to allow the police to arrest and the prosecutors to prosecute." *Id.* See also *id.* at xx ("Only three cases of wife rape were reported in Colorado one year after rape in marriage had been criminalized. Byrne no doubt knew that most wives are reluctant to report because of the humiliating aspects of the trial and the lack of public sympathy for their plight."). See also Bergen, *Marital Rape*, *supra* note 127 ("There is a large body of research that addresses the inadequate response of the police to the problem of wife abuse. . . . [I]nterviews with marital rape survivors reveal that when police officers learn that the assailant is the woman's husband, they may fail to respond to a call from a victim of marital rape, refuse to allow a woman to file a complaint, and/or refuse to accompany her to the hospital to collect medical evidence.").

175. Robin West stands as one exception. West, *supra* note 3, at 78. In the concluding paragraph of her influential article on the constitutionality of the marital rape exemption, she stated:

[T]he foundational and permanent recognition of women's rights to be free from forced marital sex . . . may be a prerequisite to further progress on a range of related issues regarding women's physical and sexual security. Date rape and acquaintance rape, for example, unlike marital rape, clearly are criminal, but they may be insulated from legal prosecution and public condemnation in many states at least in part because of their shadow resemblance to marital rape.

Id. West saw the formal abolition of the marital rape exemption as a possible *precondition* to ameliorating the legal system's harsh treatment of date rape victims. *Id.* To treat marital rape and date rape as two separate battles, however, may have undermined the fight against both.

scholars failed to notice the larger problem of the ongoing consent ideology that the marital rape exemption originally caused.

Unlike legal scholars, social scientists when analyzing marital rape have often included all intimates in their analysis, regardless of the legal status those intimates share.¹⁷⁶ As Raquel Kennedy Bergen explained in her 1996 book, *Wife Rape*, “I do this to acknowledge that one need not be legally married to suffer the trauma and consequences of being raped by one’s intimate partner.”¹⁷⁷ The harm marital rape causes is not unique to the marital relationship. It arises when intimates cohabit or date, regardless of the legal status they share.¹⁷⁸ There are many important similarities between rape by intimates and marital rape. In her book *Rape in Marriage*, Diana Russell detailed those similarities in this way:

First, in both situations there is frequently a lack of recognition by both parties that forced intercourse, or intercourse because of threat of force or inability to consent, is rape. Second, the rape often occurs more than once; frequently it occurs many times. Third, the woman is often unwilling to employ all her resources, particularly her capacity to be violent, when trying to fend off the rapist. Fourth, there is often more of a sense of disillusionment and betrayal as a consequence of rape by intimates than when a woman is raped by an acquaintance or stranger. Fifth, the police and public at large are often even more skeptical, unsympathetic, and unhelpful than in cases of rape by non-intimates. Sixth, as with a husband, the woman often has a hard time getting rid of an unwanted male lover when she wants to. The male lover frequently seems to feel his masculine role threatened if it is not he who decides on any major changes in the relationship, particularly the ending of the sexual side of it. Even when the relationship is over, she may have a hard time getting rid of an ex-lover or ex-husband. And seventh, the perception of the woman as an unequal partner with unequal rights, indeed, as the property of the man, is also evident in both types of relationships.¹⁷⁹

176. BERGEN, *WIFE RAPE*, *supra* note 23, at 8. See also Mahoney et al., *supra* note 131, at 143–44 (“Because we are focusing on intimate violence against women, the perpetrators of this type of violence can include current and former husbands, current and former boyfriends, and current and former girlfriends (i.e., lesbian relationship partners). It includes people who are dating while living apart as well as those who are cohabiting or married; people who share children, as well as those who do not; young people dating for the first time and older people who are divorced.”).

177. BERGEN, *WIFE RAPE*, *supra* note 23, at 8. See also *id.* (Furthermore. . . ‘a marriage license probably does not change the dynamics of sexual abuse within an ongoing intimate relationship, except to make it legal in some states.’ Thus, my sample includes legally married women, those who have cohabited with their partners for more than a year, and those in partnerships who share a child.).

178. For example, one study found that cohabitating intimates had twice the level of violence of non-cohabiting intimates. Mahoney et al., *supra* note 131, at 161.

179. RUSSELL, *supra* note 6, at 269.

Russell concluded, “another thing that many lover relationships have in common with marriage is that once a woman has voluntarily consented to intercourse, many men believe she has given up her right to refuse them on future occasions.”¹⁸⁰ On many levels, then, rape by non-spouse intimates is the functional equivalent of spousal rape.

The question remains whether intimate rape is the legal equivalent of marital rape and how the ongoing consent ideology manifests itself as a result. Revisiting the legal history of the marital rape exemption sheds light on this question.

The next section details that history and argues that the driving force behind the marital rape exemption has been not marital status but intimate sexual relations. Notably, as society began to decriminalize sexual relations outside of marriage, the sexual offense immunities provided by statute began to include cohabitants and voluntary social companions. Additionally, rape shield laws routinely admitted evidence of the prior sexual history between the defendant and the complainant. These legal changes are two modern manifestations of the traditional ongoing consent ideology.

A. History of the Marital Rape Exemption Revisited

After noting that sexual intercourse between husband and wife is always *lawful*, Rollin Perkins pointed out in his treatise that “all other sexual intercourse is *unlawful*.”¹⁸¹ Perkins’s second point is crucial. Under English common law when Hale formulated the marital rape exemption, marriage was the only context in which people were legally allowed to be sexually active. For most of the history of English common law, legitimate sexual activity was confined to marriage.¹⁸² Extra-marital sexual acts—whether consensual or nonconsensual—were proscribed by laws on adultery and fornication.¹⁸³ It is important to incorporate the criminalization of these other sexual acts into the analysis. As Anne Coughlin recently argued, “we cannot understand rape law unless we study the doctrine, not in isolation, but in conjunction with the fornication and adultery prohibitions with which it formerly resided and, perhaps, continues to reside.”¹⁸⁴ Coughlin warned:

180. *Id.* at 261.

181. *Id.*

182. See generally HALE, *supra* note 1, at 629 (discussing rationale for marital rape exemption).

183. Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998).

184. See *id.* Coughlin continued, “By unearthing our ancestors’ belief that *all* nonmarital intercourse should be criminalized, we may begin to understand, even as we reject, the inclination of courts to approach rape complaints with deep suspicion.” *Id.* at 8.

If our critique [of modern rape jurisprudence] is inattentive to the sexual proscriptions with which rape formerly coexisted, we may fail to articulate the precise forms that sexism previously assumed and thus be unable to respond directly to the illiberal and/or anti-feminist ways of thinking about sexuality presumably still indulged by those opposed to rape reform.¹⁸⁵

Attention to the proscriptions on fornication and adultery with which rape law formerly coexisted clarifies the precise ways that the ongoing consent ideology continues today.

When viewing the marital rape exemption in light of the broader proscription against fornication and adultery, the doctrine's shape shifts. In a jurisdiction in which all non-marital sexual activity was illegal, the rape immunity prohibited women from bringing charges against the only men with whom they *could have been* legally sexually active.¹⁸⁶ The rape immunity, therefore, was not centrally about the formal status of marriage between husband and wife per se (except to the extent that marriage conferred legal authority for sexual activity). It was fundamentally about the sexual activity between the parties itself.

The most famous justification for the marital rape exemption—Hale's ongoing consent theory—lends support to this view. As earlier noted, Hale declared, “[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.”¹⁸⁷ Hale's analysis reveals the centrality of sexual relations to the immunity. When Hale said, “the wife hath given herself up *in this kind* unto her husband,” he was referring to giving “her body to her husband,” as he stated two sentences later.¹⁸⁸ Hale believed that marriage afforded men contractual consent to sexual activity with their wives over time.¹⁸⁹ Once she “gave her body to her husband,” a wife necessarily also gave him ongoing consent to sexual intercourse in the future.¹⁹⁰

Coupled with proscriptions against fornication and adultery, the marital rape exemption dictated which men could be charged with rape.¹⁹¹ Men who *had not* previously gained legal sexual access to women (through marriage, which was the only legal form of sexual access at the time) could be charged with raping them. Men who *had* previously gained legal sexual access to women, by contrast, could not

185. *Id.* at 10.

186. PERKINS, *supra* note 18, at 115.

187. HALE, *supra* note 1, at 629.

188. *Id.* at 628.

189. FINKELHOR & YLLO, *supra* note 14, at 163–64.

190. *Id.*

191. PERKINS, *supra* note 18, at 115.

be charged with raping them. The law, therefore, protected men from being charged with sexually assaulting the only women with whom they *could be* legally sexually active.¹⁹² The marital rape immunity was a polite trope for the notion that women could not bring sexual offense charges against men with whom they were (legally) sexually active. Therefore, when the marital rape exemption developed, there were no legal intimate relationships besides those in marriage. Marital sexual relations comprised the whole category of legal intimate relations.

The English common law's prohibition on fornication and adultery shaped the developing legal systems in the colonies of the New World. Non-marital sexual intercourse was one of the first offenses proscribed by lawmakers in this country.¹⁹³ In their definitive history of sexuality in America, John D'Emilio and Estelle Freedman found that colonial statutes outlawed both fornication and adultery, "prescribing corporeal or capital punishment, fines, and, in some cases, banishment for sexual transgressors."¹⁹⁴ In fact, fornication was the most common legal charge against women in New England.¹⁹⁵ D'Emilio and Freedman described its punishment:

Fornication carried heavy penalties, including fines, whipping, or both. In Maryland, where laws were less likely to be enforced, unmarried couples who had sex could receive up to twenty lashes and be fined as much as five hundred pounds of tobacco. In Plymouth Colony, civil penalties for fornication included a ten-pound fine—reduced only to fifty shillings for a betrothed couples—several lashes on the back, or both. Throughout New England, a fine of nine lashes awaited both parents of a child born too soon after marriage.¹⁹⁶

192. See *supra* note 185 and accompanying text.

193. Coughlin, *supra* note 182, at 26.

194. JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* xvii, 18 (2d ed. 1988). See also David Weis, *Basic Sexological Premises*, in *SEXUALITY IN AMERICA*, *supra* note 168 at 11; Merril D. Smith, *Regulating Sex and Sexuality in Colonial New England*, in *SEX AND SEXUALITY IN EARLY AMERICA* 87 (Merril D. Smith ed., 1998) ("Just as sexual activity prior to marriage threatened the stability of colonial New England society, so did the absence of marital sexual activity."). Puritans viewed marriage as a spiritual union. Sex was expected and was a duty to be fulfilled. Weis, *supra*, at 11.

195. Else L. Hambleton, *The Regulation of Sex in Seventeenth-Century Massachusetts*, in *SEX AND SEXUALITY IN EARLY AMERICA*, *supra* note 194, at 89, 97. "Although adultery, fornication, and bastardy involved couples, women in both northern and southern colonies were more likely than men to be prosecuted and convicted for these sexual offenses." D'EMILIO & FREEDMAN, *supra* note 293, at 28. Pregnancy was the reason for this disparity. *Id.*

196. D'EMILIO & FREEDMAN, *supra* note 193, at 22. See also Hambleton, *supra* note 194, at 89 ("Women who bore illegitimate children, their sexual partners, and couples whose first child arrived within eight months of marriage were prosecuted for fornication in the Quarterly Courts of the Massachusetts Bay Colony.").

For adultery, most colonial laws authorized the death penalty.¹⁹⁷ However, in practice, “New England courts usually imposed fines of ten to twenty pounds, along with public whipping, and the wearing of the letters *AD* on a garment or burned onto the forehead.”¹⁹⁸ In colonial America, these sexual regulations reflected “a consensus about the primacy of familial reproductive sexuality” in society; those who violated this consensus “could expect severe, often public, punishment and the pressure to repent.”¹⁹⁹

The criminalization of fornication and adultery remained in effect in this country until well into the twentieth century, although societal conceptions of sexuality and the family evolved.²⁰⁰ By the nineteenth century, “the sexualization of love” replaced the primacy of the familial reproductive sexuality.²⁰¹ Marriage came to be known less as an institutional arrangement with reciprocal duties and more as a personal relationship between spouses based on love.²⁰² By the twentieth century, the dominant view became that sexuality was a peak experience of marriage, which “served to legitimate the erotic aspects of sexuality itself.”²⁰³ As this view came to the fore, it was only a matter of time before people began to question why sexuality should be confined to marital relations.²⁰⁴

Early twentieth-century American society began to embrace the idea that sex was a significant and legitimate experience, independent

197. D’EMILIO & FREEDMAN, *supra* note 193, at 28.

198. *Id.*

199. *Id.*

200. In the eighteenth century, although fornication and adultery remained illegal, southern colonies did not prosecute white men who raped female servants and slaves. Merrill D. Smith, *Race, Sex, and Social Control in the Chesapeake and Caribbean in the Eighteenth Century*, in *SEX AND SEXUALITY IN EARLY AMERICA*, *supra* note 194, at 133. See also D’EMILIO & FREEDMAN, *supra* note 193, at 101 (“By legal definition, a slave could not be raped, since she was the property of her master”). White owners operated under the assumption that the women they enslaved were “sexually available to them.” See *id.* at 86–87. This hypocrisy and cruelty did not undermine the general proscription on fornication and adultery within white society. The sexual availability of enslaved women supported white supremacy. See *id.* at 87. White society did not condemn these sexual relations. See *id.* at 95–96 (referencing belief of societal supporters that ability of white men to engage in extramarital sexual relations with women they enslaved “provided a safety valve that protected the virtue of white women”). “Greater regulation of women’s sexuality was matched by greater sexual privilege for white men. Slavery provided abundant opportunity for white men to exercise sexual license.” *Id.* White women faced punishment for engaging in extramarital sexual relations including “personal disgrace, violent physical punishment by her husband, divorce, and the loss of her children.” *Id.* at 95.

201. Weis, *supra* note 193, at 14.

202. *Id.* When love failed, divorce became an alternative, but divorce was only available for cause, such as adultery, desertion, and cruelty. Hasday, *supra* note 3, at 1465.

203. Weis, *supra* note 193, at 14.

204. *Id.* at 14–15.

of its relationship to marriage.²⁰⁵ As time passed, sexual expression outside of marriage began occurring more frequently and with more tacit social support.²⁰⁶ American society began to embrace “sexual liberalism—an overlapping set of beliefs that detached sexual activity from the instrumental goal of procreation.”²⁰⁷ Although the amount of acceptable sexual expression fluctuated during the Depression and World War II, by the mid-1960s, sexual liberalism was rooted firmly in United States society.²⁰⁸

As a result of this sexual revolution, extra-marital sex was no longer generally criminalized, and marriage was no longer the only place that people could engage in legal sexual acts.²⁰⁹ Legitimate sexual activity began to occur in many different relationships.²¹⁰ Although fornication and adultery statutes continued to be invoked in civil suits, direct enforcement of fornication and adultery laws by states faded.²¹¹

In the past, women were either unmarried or married and assumed to be sexually inactive or active, respectively.²¹² By the late twentieth-century, marriage no longer represented a meaningful distinction between those women who had sex and those who did not. As legitimate sexual activity moved outside the marital relationship, the ongoing consent ideology founded on the marital rape exemption moved outside the marital relationship as well.

Two major changes in rape law occurred as a result of these transformed attitudes toward non-marital sex. First, marital immunities in some states began to include sexual offenses against cohabitants and voluntary social companions. Second, states passed rape shield laws that admitted evidence of the sexual history of the defendant and the complainant, regardless of the legal status they shared.

205. *Id.* at 16. Examples of such trends are the rising percentage of premarital sexual experiences among young people, the “expansion of marital sexuality, including increases in frequency, satisfaction, and variation in behavior,” and greater equality between genders. *Id.* at 17.

206. *See, e.g.*, D’EMILIO & FREEDMAN, *supra* note 193, at 241.

207. *Id.*

208. *Id.* at 240–41.

209. Anderson, *supra* note 23, at 1746.

210. *Id.*

211. Coughlin, *supra* note 182, at 23–26. As of 1998, seventeen states and the District of Columbia continued to outlaw fornication and 24 states and the District of Columbia continued to outlaw adultery. *Id.* at 21–22.

212. *See supra* notes 181–22 and accompanying text.

B. Cohabitants and Voluntary Social Companions

As a result of the societal transformation that legitimized sex outside of marriage, a number of states adjusted the focus of their marital exemptions from formal marital status to the substantive matter of sexual relations. In 1962, the Model Penal Code, for example, supplemented its comprehensive marital rape immunity with a provision that included cohabitants. It said: “Whenever in this article 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.”²¹³ This provision thereby expanded the common law marital rape immunity to unmarried individuals who were living together.²¹⁴

Some states went further than cohabitation in their sexual offense codes to create provisions applying to “voluntary social companions.” The Model Penal Code itself downgraded first-degree rape to second-degree if the victim was “a voluntary social companion of the actor upon the occasion of the crime” who had “previously permitted him sexual liberties.”²¹⁵ Delaware, Hawaii, Maine, North Dakota, and West Virginia enacted similar statutes that gave partial immunity to men who sexually assaulted women who had previously permitted them sexual contact.²¹⁶ If a man had previous consensual sex with a woman, he could not be convicted of raping her.²¹⁷ For example, from 1986 to 1998, Delaware’s criminal code on first-degree rape provided:

A person is guilty of unlawful sexual intercourse in the first degree when the person intentionally engages in sexual intercourse . . . without the victim’s consent and the defendant was not the victim’s voluntary social companion on the occasion of the crime and had not permitted the defendant sexual intercourse within the previous 12 months.²¹⁸

213. MODEL PENAL CODE § 213.6(2) (2001).

214. *Id.*

215. MODEL PENAL CODE § 213.1(1)(d) (2001).

216. FINKELHOR & YLLO, *supra* note 14, at 149.

217. *Id.*

218. DEL. CODE ANN. tit. 11, § 775 (1986), was stricken in its entirety on June 11, 1998 and replaced with § 773, first-degree rape. Today, the statute is formally neutral. *See* DEL. CODE ANN. tit. 11, § 763 (1975–2001) (silent on sexual harassment, unclassified misdemeanor); § 767 (silent on unlawful sexual contact in third degree, Class A misdemeanor); § 768 (silent on unlawful sexual contact in second degree, Class G felony); § 769 (silent on unlawful sexual contact in first degree; Class F felony); § 770 (silent on rape in fourth degree; Class C felony); § 771 (silent on rape in third degree, Class B felony); § 772 (silent on rape in second degree, Class B felony); § 773 (silent on rape in first degree, Class A felony); § 776 (silent on sexual extortion, Class E felony).

If a victim had “permitted the defendant sexual intercourse within the previous 12 months,” regardless of the marital status of the parties, the defendant could not be convicted of first-degree rape.²¹⁹

In their study, Finkelhor and Yllo analyzed the effect of adding voluntary social companion provisions to sexual offense statutes:

These voluntary-social-companion laws may work to vitiate the effect of abolishing the marital exemption. For example, when Delaware eliminated the spousal exemption as it applied to first- and second-degree rape, it also enacted a law to prohibit the prosecution of voluntary social companions for the crime of first-degree rape. If “voluntary social companions” are interpreted to include husbands and cohabiting boyfriends, the marital-rape exemption may still be in effect for that first-degree charge.²²⁰

As they went on to explain, “the extension of the exemption to voluntary social companions appears to imply that by merely allowing sexual intimacy once, a woman grants a form of permanent consent.”²²¹ Finkelhor and Yllo thereby explained how Hale’s ongoing consent theory behind the marital rape exemption evolved into an inference of ongoing consent based solely on the existence of a prior intimate relationship, without marriage.

Connecticut, Hawaii, and Minnesota currently extend their spousal immunities to cohabiting partners.²²² In Connecticut, for example, cohabitation is a complete defense to sexual assault when the victim is mentally incapacitated or physically helpless and to sexual assault involving sexual contact without consent.²²³ The relevant provision states, “it shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of

219. *Id.*

220. FINKELHOR & YLLO, *supra* note 14, at 149.

221. *Id.* at 150.

222. CONN. GEN. STAT. ANN. § 53a-67 (West 2002); HAW. REV. STAT. § 707-700 (2001); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West).

223. CONN. GEN. STAT. ANN. § 53a-73a (West 2002) (“A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age, or (B) mentally defective or mentally incapacitated to the extent that he is unable to consent to such sexual contact, or (C) physically helpless . . . ; or (2) Such person subjects another person to sexual contact without such other person’s consent”). Section 53a-65 (Sexual contact is defined as “contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person”); CONN. GEN. STAT. ANN. § 53a-67 (West 2002). The Commission Comment from 1971 states, “Parties not legally married to each other but living together as man and wife are treated the same as married persons. The rationale is that the same elements of privacy, consent, and intimacy of relationship are likely to be present here as in the marriage situation. This is in accord with the position taken by the Model Penal Code. . . . It is meant to convey a continuing status of cohabitation as man and wife.”

cohabitation, regardless of the legal status of their relationship.”²²⁴ Hawaii’s statute indicates that “married” includes “a male and female living together as husband and wife regardless of their legal status.”²²⁵ Hawaii’s commentary to this provision explains that the “definition of *married* was amended to recognize the prevalence of many male and female couples living together although not legally married.”²²⁶ Under a section entitled “voluntary relationships,” Minnesota’s code clarifies that its marital immunity applies “if the actor and complainant were adults cohabitating in an ongoing voluntary sexual relationship at the time of the alleged offense.”²²⁷

Notably, modern scholars who argue for the marital rape exemption treat rape by non-spouse intimates as the equivalent of spousal rape. In defending the modern marital immunities in sexual offenses, they rarely stop at marital status. The Commentary to the Model Penal Code’s comprehensive marital rape exemption, for example, applies it to all those intimates in “equivalent” relationships:

marriage *or an equivalent relationship*, while not amounting to a legal waiver of the woman’s right to say “no,” does imply a kind of generalized consent that distinguishes some versions of the crime of rape from parallel behavior by a husband. The relationship itself creates a presumption of consent, valid until revoked.²²⁸

Likewise, Ingram offers an expansive range of relationships to which his “rebuttable presumption” of consent should apply.²²⁹ He argues, “[t]he same presumptions [of consent] should also arguably be recognized with unmarried cohabitants, and probably with regular, frequent social companions, regardless of their level of sexual activity.”²³⁰

Dripps agrees with this view. After claiming that sex with an unconscious wife is legitimated by the man’s “implied authorization” to proceed without consent, Dripps clarifies that the couple’s marriage itself is not essential.²³¹ He points out, such “implied authorization” would exist for those engaged in an ongoing cohabiting or dating relationship as well—indeed, whenever “a long-standing sexual relationship connects the defendant with the

224. CONN. GEN. STAT. ANN. § 53a-67 (West 2002).

225. HAW. REV. STAT. § 707-700 (2001).

226. 14 HAW. REV. STAT. § § 37-38, commentary on chapters 701–853 (1993) at 169.

227. MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West).

228. MODEL PENAL CODE § 213.1, cmt. (1985) (emphasis added).

229. Ingram, *supra* note 110, at 30.

230. *Id.* at 31. Even with such a presumption of consent, however, “very little” was necessary to “rebut or negate it.” *Id.* “Any words or action suggesting lack of consent should prompt the other person to inquire and be sure that sexual activity is wanted by both.” *Id.*

231. *See* Dripps, *supra* note 5, at 1801.

victim.”²³² The modern scholars who support marital immunity therefore seek to include prior intimate relationships within their reach under the theory that “a long-standing sexual relationship” implies ongoing consent to future sexual acts.²³³

C. Evidence of the Sexual History between the Defendant and the Complainant

The extension of marital immunity to cohabitants and voluntary social companions in some states was not the only manifestation of the broad reach of the ongoing consent ideology. Another manifestation came from an unlikely source: another area of feminist reform in rape laws. In the late 1970s and 1980s, legislatures passed rape shield laws.²³⁴ These laws were part of a feminist effort to ensure that the rape defendant, not the rape victim, was on trial.²³⁵ Rape shield laws were designed to protect rape victims from embarrassing questions about their private sexual lives when they testified.²³⁶ In general, they forbade the admission of evidence of a complainant’s prior sexual history at a rape trial.²³⁷ Forty-eight states and the District of Columbia passed some form of rape shield law.²³⁸ These laws, by statute or by judicial decree, contained one nearly universal exception: prior sexual behavior between the complainant and the defendant himself would be admitted.²³⁹ By this exception, the law declared that evidence of the prior sexual behavior between a rape defendant and a complainant was relevant and admissible when he claimed the defense of consent.²⁴⁰

Given the widely varied forms of rape shield laws across the country, this uniform exception was striking. It communicated a shared assumption about sexual relations: once a woman “hath given her body” to a man, she was assumed to continue to consent to sexual intercourse.²⁴¹ Coupled with the traditional norm of ongoing consent derived from the marital rape exemption, this universal exception

232. *Id.*

233. *Id.*

234. *Id.* at 3 (“In the late 1970s, in response to such calls, feminists around the country began to mount legal and political efforts to remove the marital-rape exemption from the law books. Bills to criminalize rape in marriage were introduced in many state legislatures and after intensive lobbying efforts, they were successful in California, Connecticut, New Jersey, Pennsylvania, as well as other states.”). Anderson, *supra* note 23, at 1732–37.

235. Anderson, *supra* note 23, at 1737–36.

236. *Id.* In that Article, I critiqued the use of privacy as a basis for rape shield laws. See *Id.* at 1747–46.

237. *Id.* at 1705–07.

238. *Id.* at 1733.

239. *Id.* at 1771–75.

240. *Id.* at 1775.

241. HALE, *supra* note 1, at 629.

facilitated the improper modern inference of consent based solely on the existence of an intimate relationship.

In states that have abolished the marital rape exemption, a man who rapes a woman with whom he has been previously intimate does not enjoy formal immunity from prosecution. However, he does have the benefit of presenting evidence of their sexual history to prove his defense of consent.²⁴² This benefit is great indeed. It often deters women who are raped by prior intimates from reporting that they have been raped to the police.²⁴³ When these women do report a rape, it often discourages police from founding the complaints and taking their reports seriously.²⁴⁴ Police frequently have been unresponsive or hostile to women who report having been raped by their intimate partners.²⁴⁵ Some women have had to lie to police to

242. Anderson, *supra* note 23, at 1771–84.

243. See, e.g., JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 96 (1993). The authors note that somewhere between 10 and 14% of wives are raped by their husbands, and the rape of a spouse can be among the most brutal of rapes. Despite its prevalence, however, victims of spousal rape often remain silent. See Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 936 (2001).

244. See, e.g., Charles R. Jeffords, *Prosecutorial Discretion in Cases of Marital Rape*, 9 VICTIMOLOGY 415 (1984). In a mail survey of 113 prosecutors in the 11 states in which no legal distinction existed between marital and non-marital rapes, responses to hypothetical rape cases containing corroborative evidence indicated that prosecutors were significantly less likely to believe that maximum charges would be filed in marital rape cases, particularly where no serious injury occurred. Many prosecutors choose not to prosecute these cases even if the victim was willing. It was noted that the prosecutor must convince the jury that the perpetrator deserves to be convicted. See also Kersti Yllo & David Finkelhor, *Marital Rape*, in *RAPE AND SEXUAL ASSAULT: A RESEARCH HANDBOOK* 156 (Ann Wolbert Burgess ed., 1985). “The criminal justice system in the United States has reinforced the fact that the marriage license is essentially a raping license. Laws make prosecution of marital rape impossible and reinforce the assumption that marriage implies unquestionable consent by wives to all sexual advances by husbands.” *Id.*

245. BERGEN, *WIFE RAPE*, *supra* note 23, at 55 (“Most commonly, women felt that the police were unresponsive to them because the abusers were their husbands. Erica ‘couldn’t believe it. They [the police] were no help at all because we were married.’ Pam told me, ‘I called the cops one day, and they came and said, ‘You gotta go’ and made me leave. And I said, ‘I called you, and you’re taking his side.’ They were his friends, and they didn’t care that he beat me up. It was my fault.”). See also *id.* at 56 (“The police wouldn’t come out, and when they did, they didn’t even take the knife [that her husband had used to assault her], and they didn’t want me to press charges. I wanted to have a rape kit done and asked for a woman, and they said there was no woman. There was no one to speak to me.”); *id.* (“Wanda met with a similar response: ‘The police wouldn’t let me do a rape kit, and they said we don’t know about that law [against wife rape].’ Because of the police reaction, Wanda did not pursue filing charges. In fact only eight women in my study saw their husbands charged with rape in the criminal justice system.”); *id.* (“Of those women who did file reports with the police, only two found police officers supportive. Most had experiences similar to Sally’s: ‘I had to go to the state police, and then I had to go through three detectives and explain everything and be totally embarrassed, and I had to talk about penises and how he ejaculated and how he did

get them to respond to rapes by intimates.²⁴⁶ Some police have encouraged raped women to remain with their husbands.²⁴⁷ Police behavior has put some women at greater risk for serious injury from their abusers.²⁴⁸ When police do take reports of marital rape seriously, the potential admission of evidence of the sexual history between the defendant and the complainant often dissuades prosecutors from pursuing the charges.²⁴⁹ When prosecutors do pursue charges, evidence of the sexual history between the defendant and the complainant can dissuade a panel of appellate judges from upholding an intimate rape conviction on appeal.²⁵⁰ The fact that newly enacted rape shield laws admitted the prior sexual history of the defendant and the complainant, regardless of their marital status, was consistent with the concurrent expansion of the marital immunity's rationale of ongoing consent to non-marital intimate relationships.

The transformation of doctrinal rape law from one that focused on marital status to one that included non-marital intimate relationships confirms that the sexual relationship, rather than marriage per se, was at the heart of the marital rape exemption. The fact that rape shield laws make no distinction between spouses and non-spouses in terms of the blanket exceptions they provide for the admission of sexual history between the defendant and the

certain things. I had to do it with the [tape] recorder on, and they kept saying, 'Could you say that again miss, speak up, miss, and call it this and that, miss.' And 'what kind of underwear were you wearing, miss? Were you wearing fancy negligees?' They were like his [her husband's] buddies, and they were busting my balls. They should have been more qualified to handle this case, and they should have a woman in that situation.").

246. *Id.* at 57 ("In one case, Karen was finally able to successfully obtain the help of the police when she cleverly disguised the nature of the problem. Karen had called the police on numerous occasions and said it normally took them 45 minutes to respond to her calls. With her past experiences in mind, on the day she left her abuser, Karen 'called the cops and said some guy was beating up some lady in front of the house with a gun. They first asked me if the guy was married to the woman—like that makes a big difference. I said no and they showed up in 15 minutes.").

247. *Id.* at 55 ("When Donna called the police for assistance, they encouraged her to 'work it out and get marital counseling.' Donna never called the police again.").

248. *Id.* at 57 ("I saw the cops walking up the walkway, but they never came in. I know today that I should have sued the police department, because I could have been lying there almost near death, and I saw two officers walk up and then turn around and leave and then I was like, I knew I was dead. He [her husband] was going to kill me for calling the police, and he was very violent all that day, and I stayed in the bedroom all day petrified.' Natalie also called the police repeatedly but eventually stopped because the police routinely 'did nothing' and her partner would beat her unmercifully to punish her for her 'betrayal.'").

249. *See, e.g.,* Jeffords, *supra* note 243, at 415 (noting that prosecutors often take on only those cases that are very violent, and many choose not to prosecute even if the victim is willing).

250. *See infra* cases discussed at notes 260–87 and accompanying text.

complainant means that the ongoing consent ideology has affected a new area of the law.

As a result, it is not enough to have formal neutrality in sexual offenses statutes that simply allow for the prosecution of spouses for sexual assault. States need to reject the ongoing consent ideology that now affects both marital and other intimate rape.

IV. Formal Neutrality on Marital Status in Sexual Offenses Revisited

Two main proposals for reform of the marital rape exemption have emerged over the past thirty years: the argument that states should simply abolish the marital immunities in their sexual offense statutes and the argument that states should add an explicit provision on marital status in their sexual offense statutes declaring that men may be prosecuted for raping their wives. Twenty-four states and the District of Columbia have no immunities for sexual crimes based on the formal relationship of the parties.²⁵¹ The statutes in these states are either silent as to marital rape, or they contain an explicit provision clarifying that marriage is no defense to sexual assault.²⁵² An examination of how these state statutes work in practice reveals their inadequacies in terms of eliminating the ongoing consent ideology that affects marital and other intimate rape.

A. Silence on Marital Status in Sexual Offenses

A number of scholars have called for states to delete all provisions in rape laws that refer to the marital status of the parties.²⁵³ These scholars argue that silence on the issue of marital status in a rape statute would allow a state to criminalize marital and non-marital sexual assault in equal ways.²⁵⁴ These rape statutes would

251. See *supra* note 8 for a complete list of state statutes.

252. See *infra* notes 252–97 and accompanying text.

253. See, e.g., Dripps, *supra* note 5, at 1800 (proposing that legislatures replace rape statutes with graded statutory offenses based on the amount of force used); Sitton, *supra* note 3, at 264 (“[C]omplete abolition of all laws distinguishing among rape and sexual assault victims based on their relationship to their assailant is required in order for women to achieve equal protection under the law.”).

254. Bearrows, *supra* note 3, at 222–26 (proposing silent rape statute on relationship between perpetrator and victim and proposing grading offenses based on amount of violence used). He proposed that statutes remain silent on the issue of the relationship between the defendant and the complainant and grade sexual offenses based on the amount of violence the defendant employed. For example, Sexual Battery in the First Degree was when the actor caused another person serious injury or displayed a deadly weapon in a threatening manner. Bearrows, *supra* note 3, at 224. Second degree involved the use of or a threat to use force which did not create a substantial risk of death or serious

allow “a married woman to withdraw her consent to sexual relations when she so desired.”²⁵⁵ Depending on the type of force used, a husband could be found guilty of first or second-degree sexual assault.²⁵⁶ This proposal seems appealing because it removes from statutes the specific provisions that prevented prosecutors from charging men for sexual offenses against their wives.

Seventeen states currently have sexual offense laws that are silent on the question of the marital status between the parties.²⁵⁷

injury, third degree required the use of or threat to use force, and fourth degree was sexual contact perpetrated without the victim’s consent. *Id.*

255. *Id.* at 222. Because his statute was silent as to relationship status, Bearrows intended for the statute to cover stranger rapes and spousal rapes, as well as nonconsensual sodomy. *Id.* at 226. “The model statute prohibits several different types of sexual invasions which a husband could commit upon his wife.” *Id.*

256. In a footnote, however, he admitted that the reality of such violence was doubtful: “It seems extremely unlikely that husbands will commit rape using deadly weapons or causing serious injury to their wives. Instead a husband may indulge in nonconsensual sexual contact, constituting sexual battery in the third or fourth degree.” *Id.* at 226, n.167.

257. ARK. CODE ANN. § 5-14-103 (Michie 1987–2001) (silent on rape, Class Y felony); § 5-14-124 (silent on sexual assault in first degree, Class A felony); § 5-14-125 (silent on sexual assault in second degree, Class B felony); § 5-14-126 (silent on sexual assault in third degree, Class C felony); § 5-14-127 (silent on sexual assault in fourth degree, Class A misdemeanor); DEL. CODE ANN. tit. 11, § 763 (1975–2001) (silent on sexual harassment, unclassified misdemeanor); § 767 (silent on unlawful sexual contact in third degree, Class A misdemeanor); § 768 (silent on unlawful sexual contact in second degree, Class G felony); § 769 (silent on unlawful sexual contact in first degree; Class F felony); § 770 (silent on rape in fourth degree; Class C felony); § 771 (silent on rape in third degree, Class B felony); § 772 (silent on rape in second degree, Class B felony); § 773 (silent on rape in first degree, Class A felony); § 776 (silent on sexual extortion, Class E felony); FLA. STAT. ANN. § 794.011 (West 2002) *amended by* 2002 Fla. Sess. Law Serv. Ch. 2002-211 (H.B. 1399) (West) (silent on sexual battery); IND. CODE ANN. § 35-42-4-1 (West 2002) (silent on rape, Class A or B felony); § 35-42-4-2 (silent on criminal deviate conduct, Class A or B felony); § 35-42-4-8 (silent on sexual battery, Class C or D felony); KY. REV. STAT. ANN. § 510.040 (Michie 2002) *updated* 2002 Kentucky Acts Ch. 259 (S.B. 25) (silent on rape in first degree); § 510.040 (silent on rape in second degree); § 510.060 (silent on rape in third degree); § 510.070 (silent on sodomy in first degree); § 510.080 (silent on sodomy in second degree); § 510.090 (silent on sodomy in third degree); § 510.100 (silent on sodomy in fourth degree); § 510.110 (silent on sexual abuse in first degree); § 510.120 (silent on sexual abuse in second degree); § 510.130 (silent on sexual abuse in third degree); § 510.140 (silent on sexual misconduct); ME. REV. STAT. ANN. 17-A § 253 (West 2002) (silent on gross sexual assault, Class A, B or C crime); § 255 (silent on unlawful sexual contact, Class C, D, or E crime); MASS. GEN. LAWS ANN. ch. 265 § 22 (West 2002) (silent on rape); § 34 (silent on crime against nature); § 35 (silent on unnatural and lascivious acts); § 3 (silent on drugging persons for sexual intercourse); MO. REV. STAT. § 566.030 (2002) (silent on rape); § 566.040 (silent on sexual assault); § 566.060 (silent on forcible sodomy); § 566.070 (silent on deviate sexual assault); § 566.090 (silent on sexual misconduct in first degree); § 566.100 (silent on sexual abuse); MONT. CODE ANN. § 45-5-502 (2001) (silent on sexual assault); § 45-5-503 (silent on sexual intercourse without consent); § 45-5-505 (silent on deviate sexual conduct); NEB. REV. STAT. § 28-319 (2001) (silent on sexual assault in first degree, Class II felony); § 28-320 (silent on sexual assault in second or third degree, Class III felony and Class I misdemeanor); N.M. STAT. ANN.

They delineate various sexual offenses in their statutes but do not mention whether a spouse may or may not be prosecuted for these crimes. These states reveal how silence in sexual offense statutes tends to work in practice. An examination of the cases in these states discloses that silence in sexual offense statutes as to the marital status of the parties is an inadequate solution to the ongoing consent ideology derived in the marital rape exemption.²⁵⁸

Despite the ability to bring suits against spouses for various sexual offenses in these seventeen states, there is a paucity of written appellate dispositions involving spousal rape or spousal sexual abuse.²⁵⁹ The lack of criminal appeals suggests that the belief in ongoing consent in marital relationships may continue to discourage prosecutors from pursuing these cases and being able to obtain convictions.²⁶⁰

§ 30-9-11 (Michie 1978–2001) (silent on criminal sexual penetration); § 30-9-12 (silent on criminal sexual contact); § 30-9-14.3 (silent on aggravated indecent exposure); N.D. CENT. CODE § 12.1-20-03 (1999–2001) (silent on gross sexual imposition, Class A or B felony); § 12.1-20-04 (silent on sexual imposition, Class B felony); § 12.1-20-07 (silent on sexual assault, Class C felony or Class A misdemeanor); § 12.1-20-12 (silent on deviate sexual act, Class A misdemeanor); OR. REV. STAT. § 163.355 (2001) (silent on rape in the third degree, Class C felony); § 163.365 (2001) (silent on rape in second degree, Class B felony); § 163.375 (silent on rape in first degree, Class A felony); § 163.385 (silent on sodomy in third degree, Class C felony); § 163.395 (silent on sodomy in second degree, Class B felony); § 163.405 (silent on sodomy in first degree, Class A felony); § 163.408 (silent on unlawful sexual penetration in second degree, Class B felony); § 163.411 (silent on unlawful sexual penetration in first degree, Class A felony); § 163.415 (silent on sexual abuse in third degree, Class A misdemeanor); § 163.425 (silent on sexual abuse in second degree, Class C felony); § 163.427 (silent on sexual abuse in first degree, Class B felony); 18 PA. CONS. STAT. ANN. § 3121 (West 2002) (silent on rape); § 3123 (silent on involuntary deviate sexual intercourse); § 3124.1 (silent on sexual assault); TEX. PENAL CODE ANN. § 22.011, § 22.021 (Vernon 2002) (silent on sexual assault or aggravated sexual assault); VT. STAT. ANN. tit. 13, § 3252 (2001) (silent on sexual assault), § 3253 (silent on aggravated sexual assault); W. VA. CODE § 61-8B-3 (1966–2002) (silent on sexual assault in first degree, felony); § 61-8B-4 (silent on sexual assault in second degree, felony); § 61-8B-5 (silent on sexual assault in third degree, felony); § 61-8B-7 (silent on sexual abuse in first degree, felony); § 61-8B-8 (silent on sexual abuse in second degree, misdemeanor); § 61-8B-9 (silent on sexual abuse in third degree, misdemeanor).

258. See *infra* notes 258-87 and accompanying text.

259. Westlaw research has revealed a scarcity of appellate level cases involving convictions for marital rape or sexual abuse committed by a spouse in the seventeen states that have statutes silent as to the marital status of the parties. The following is a list of the number of appellate cases that were located in each of these seventeen states that involved convictions for rape or sexual abuse by a spouse or estranged spouse under the statutes silent as to marital status: Arkansas (2), Delaware (1), Florida (6), Indiana (2), Kentucky (1), Maine (3), Massachusetts (1), Pennsylvania (3), Missouri (2), Montana (1), Nebraska (2), New Mexico (1), North Dakota (0), Oregon (2), Texas (8), Vermont (2), and West Virginia (4).

260. It may, of course, also, deter wives from reporting sexual abuse by their spouses and dissuade juries from convicting.

There is also very little applicable case law involving rape by intimates who are not legally married but simply cohabit. Where it appears, one can detect the improper inference of ongoing consent based on intimate relationships. In *Vermont v. Gonyaw*,²⁶¹ for example, the complainant and Gonyaw had a relationship that began six years before an alleged sexual assault. Although not married, they cohabitated for the first three years of that relationship.²⁶² At trial, Gonyaw wanted to testify in front of the jury as to the sexual relationship they had prior to the alleged sexual assault.²⁶³ At a hearing in front of the judge on the matter, the complainant testified that they had not engaged in consensual sexual intercourse for more than a year before the assault.²⁶⁴ Gonyaw, by contrast, testified that they had consensual sex four days prior to the alleged assault.²⁶⁵ The trial court decided to prohibit Gonyaw's testimony and the jury convicted.²⁶⁶

The Vermont Supreme Court reversed. It stated, "[a] jury hearing evidence, even though contradicted, of consensual sexual acts after their separation, one which allegedly occurred four days before the act complained of, might well have" acquitted Gonyaw.²⁶⁷ It held, "[c]onsensual sexual activity over a period of years, coupled with a claimed consensual act reasonably contemporaneous with the act complained of, is clearly material on the issue of consent."²⁶⁸ The court limited its holding to circumstances in which the prior sexual activity was "reasonably contemporaneous, and the relationship between the parties must support a reasonable belief that there was consent to renewed sexual activity."²⁶⁹ The court thus concluded that the complainant's "consent to renewed sexual activity" with Gonyaw could reasonably be inferred if she had engaged in a sexual act with him four days prior to the alleged assault.²⁷⁰

Vermont's criminal code does not have a marital rape exemption and is silent as to its abolition.²⁷¹ Although prosecutors can bring charges against Gonyaw for sexually assaulting the complainant, Vermont's silent statute does not otherwise help to curb the improper

261. 507 A.2d 944, 946 (Vt. 1985).

262. *Gonyaw*, 507 A.2d at 945.

263. *Id.* at 946.

264. *Id.*

265. He also testified that the complainant would often "initially refuse to participate in sexual intercourse but would then consent." *Id.*

266. *Id.*

267. *Id.* at 947.

268. *Id.*

269. *Id.*

270. *Id.*

271. VT. STAT. ANN. tit. 13, § 3252 (2001) (silent as to marital exemption on sexual assault), § 3253 (silent as to marital exemption on aggravated sexual assault).

inference jurors and judges will likely make based on the intimate relationship of the parties. The complainant is subjected to the inference that sex four days prior to the alleged assault can support a reasonable belief in renewed, ongoing consent to sexual activity with the defendant.

Improper inferences of ongoing consent based on intimate relationships also emerge in cases involving intimates who are not legally married and have never cohabitated. Take, for example, the recent Nebraska case of *State v. Sanchez-Lahora*.²⁷² At trial, the complainant testified that Sanchez-Lahora asked her to sell drugs for him, and when she agreed, he insisted on sex.²⁷³ After she declined, he went to the kitchen, retrieved a gun, and asked her if she wanted to die.²⁷⁴ Each time she refused his advances, Sanchez-Lahora asked if she wanted to die.²⁷⁵ He then pressed the gun to her forehead and stated, “[o]ne bullet for you,” and had oral, vaginal, and anal sex with her.²⁷⁶

After the complainant left, she went to a neighbor’s house.²⁷⁷ The neighbor testified that she arrived at his house pale, shaking, crying, and breathing as if she might hyperventilate.²⁷⁸ She told him what had happened and cried throughout her visit.²⁷⁹

Sanchez-Lahora himself took the stand and testified that he and the complainant had a secret relationship and had previously met five or six times at a club.²⁸⁰ He admitted that on the night in question he had sex with her, but claimed that the sex was consensual.²⁸¹ He also sought to introduce testimony that he and the complainant “had been engaging in a sexual relationship for several months prior to that date,” estimating that they had had sexual intercourse 11 to 14 times.²⁸² The trial court denied Sanchez-Lahora’s motion to present this evidence under Nebraska’s rape shield law, which required the defendant to “(1) show a relation between the past conduct and the conduct involved in the case and (2) establish a pattern of conduct of behavior by the victim which is relevant to the issue of consent.”²⁸³

272. 616 N.W.2d 810 (Neb. Ct. App. 2000).

273. *Sanchez-Lahora*, 616 N.W.2d at 816.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 814.

283. *Id.* at 818.

The Nebraska appellate court reversed. It cited approvingly an evidentiary syllogism it found implicit within Nebraska's rape shield law:

Major [premise]: The victim's past sexual behavior with the defendant was consensual behavior. Minor [premise]: The victim's behavior in the present prosecution is the type of activity in which the victim participated with the defendant in the past. Conclusion: Therefore, the victim's behavior in the present prosecution was consensual.²⁸⁴

As to the disputed evidence, then, the appellate court concluded, "[w]e believe the evidence of the alleged prior sexual conduct between the defendant and the victim does tend to establish a pattern of conduct relevant to the issue of consent," and, thus, the jury should have heard it.²⁸⁵

In abolishing its marital rape exemption, the state of Nebraska decided to remain silent in its rape statute on the marital status of the parties.²⁸⁶ Nebraska's silent statute does not help the woman who complained of Sanchez-Lahora's behavior. She is subjected to the assumption that her prior consent to sex with Sanchez-Lahora implied ongoing consent to sex with him. The court's syllogistic reasoning is clear: prior consent to similar sexual acts means consent to the sexual acts in question.²⁸⁷ Again, the prior intimate relationship itself creates an improper inference of ongoing consent.²⁸⁸

284. *Id.*

285. *Id.* at 820.

286. NEB. REV. STAT. § 28-319 (2001) (silent on sexual assault in first degree, Class II felony); § 28-320 (silent on sexual assault in second or third degree, Class III felony and Class I misdemeanor).

287. *Lahora*, 616 N.W.2d at 818.

288. The ongoing consent ideology can even appear in cases in which the alleged prior sexual intercourse occurred not 11 to 14 times, but one time. In *Bixler v. Kentucky*, 712 S.W.2d 366, 367 (Ky. Ct. App. 1986), for example, Bixler and Bean were tried for having raped a female acquaintance. Bixler sought to testify that he had engaged in consensual sexual intercourse with the complainant once some 18 months earlier. *Id.* at 368. The trial judge excluded that evidence, stating, "I can't see how sexual intercourse 18 months before the incident can be contemporaneous with or under [the rape shield] statute be appropriate for evidence of this action." *Id.* The Court of Appeals of Kentucky reversed. It held, "Evidence of such prior sexual habits or conduct between the victim and Bixler was crucial" because Bixler's defense was consent and because "Bean's defense hinged in part on the fact that he knew the victim had a prior sexual relationship with Bixler and, therefore, he expected to have a similar relationship with her." *Id.*

In abolishing its marital rape immunity, the state of Kentucky decided to remain silent in its rape statute on the marital status of the parties. KY. REV. STAT. ANN. § 510.040 (West 2002) *updated* 2002 Kentucky Acts Ch. 259 (S.B. 25) (silent on rape in first degree); § 510.040 (silent on rape in second degree); § 510.060 (silent on rape in third degree); § 510.070 (silent on sodomy in first degree); § 510.080 (silent on sodomy in second degree); § 510.090 (silent on sodomy in third degree); § 510.100 (silent on sodomy in fourth degree); § 510.110 (silent on sexual abuse in first degree); § 510.120 (silent on

Statutory silence on marital status and intimate relationships between the parties is inadequate. Silence does nothing for those women, married or not, who have had sexual relationships with defendants when the defendants claim that such sexual relationships entitle them to assume consent to the sexual acts alleged to have been rapes. The next section turns to explicit provisions in sexual offense statutes authorizing the prosecution of spouses for marital rape to see if they provide a better solution to the improper inference of ongoing consent based on intimate relationships.

B. Explicit Provisions in Sexual Offenses Authorizing Prosecution of Spouses

A number of scholars have argued that states should do more than remain silent; they should insert new provisions into their sexual offense statutes that explicitly authorize the prosecution of spouses.²⁸⁹ A statutory framework might criminalize marital rape by defining rape as “an act of sexual intercourse accomplished with a person including the spouse of a perpetrator.”²⁹⁰ This provision seems to do more than the mere silence on the marital status of the parties. It would remove the marital exemptions in sexual offense laws by clarifying that marriage itself is not an impediment to prosecution. Jurisdictions have enacted two kinds of analogous statutes: prosecutorial “allowance” codes and “no defense” codes.

The “allowance” codes explicitly authorize the prosecution of men who rape their wives. The codes of the District of Columbia, Michigan, New Hampshire, New Jersey, North Carolina, and Wisconsin contain such specific provisions.²⁹¹ North Carolina’s code,

sexual abuse in second degree); § 510.130 (silent on sexual abuse in third degree); § 510.140 (silent on sexual misconduct). Kentucky’s silent statute does not help the woman who reported having been raped by Bixler and Bean. She is subjected to an assumption that her prior consent to sex on one occasion with Bixler may imply subsequent consent to sex with him (and even consent to sex with Bean).

289. *See, e.g.*, Eskow, *supra* note 3, at 704–05 (ideal rape statute would first “set[] forth a definition of rape that neither affirmatively include nor exclude spouses as potential victims, while the second paragraph [would] clarif[y] that marriage is no defense to rape.”).

290. *Id.* Eskow believed Utah’s rape statute to be the best example of her strategy. Utah’s rape statute reads:

- (1) A person commits rape when the actor has sexual intercourse with another person without the victim’s consent.
- (2) This section applies whether or not the actor is married to the victim.
- (3) Rape is a felony of the first degree.

Utah Code Ann. § 76-5-402 (1994). *See also* Eskow, *supra* note 3, at 705.

291. D.C. CODE ANN. § 22-419 (2002) (“No actor is immune from prosecution under any section of this subchapter because of marriage or cohabitation with the victim; provided, however, that marriage of the parties may be asserted as an affirmative defense in a prosecution under this subchapter where it is expressly so provided.”); MICH. COMP.

for example, states that prosecution for sexual crimes is not dependent upon the relationship between the offender and the victim: "A person may be prosecuted under this Article whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense."²⁹² Codes in New Jersey, Wisconsin, and the District of Columbia state that a husband "shall not be presumed to be incapable of violating" a sexual offense provision.²⁹³

The "no defense" codes are slightly different. The codes of Alaska, Colorado, and Georgia not only *allow* prosecutors to charge men with sexual offenses against their wives, but they also clarify that the marital status of the parties "*shall not be a defense*" to a charge of rape.²⁹⁴ Of the two types, the "no defense" provisions goes further than the "allowance" provisions. Not only may a husband be prosecuted for violating the rape statute, but he also may not use the marriage itself as a defense at trial.²⁹⁵

Hybrid states also exist; these states' provisions do not fall neatly into the "allowance" or "no defense" categories because they also include silent provisions.²⁹⁶ Idaho and Utah, for example, state that

LAWS ANN. § 750.5201 (West 2002) ("A person may be charged and convicted . . . even though the victim is his or her legal spouse."); N.H. REV. STAT. ANN. § 632-A:5 (2002) ("An actor commits a crime under this chapter [sexual offenses] even though the victim is the actor's legal spouse."); N.J. STAT. ANN. § 2C:14-5(b) (West 2002) ("No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim."); N.C. GEN. STAT. § 14-27.8 (2002) ("A person may be prosecuted under this Article whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense."); WIS. STAT. ANN. § 940.225(6) (West 2002) ("A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.").

292. N.C. GEN. STAT. § 14-27.8 (2002).

293. D.C. CODE ANN. § 22-3019; N.J. STAT. ANN. § 2C:14-5(b) (West 2002); WIS. STAT. ANN. § 940.225(6) (West 2002).

294. ALASKA STAT. § 11.41.432 (Michie 2001) ("Except as provided in (a) of this section [when victim is mentally incapable or incapacitated] it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant."); COLO. REV. STAT. ANN. § 18-3-409 (West 2002) ("Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense under this part 4 unless such defense is specifically set forth in the applicable statutory section by having the elements of the offense specifically exclude a spouse;" spouses exempt only from statutory rape); GA. CODE ANN. § 16-6-1(2) (Harrison 1982-2001) ("The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape"); § 16-6-2 ("The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy").

295. *See infra* note 304 and accompanying text.

296. *Compare* CAL. PENAL CODE § 262 (West 2002) ("Rape of a spouse") *with* § 243.4 (silent on sexual battery), § 266c (silent on unlawful sexual intercourse), § 286 (silent on sodomy), § 288 (silent on lewd or lascivious acts), *and* § 289 (silent on forcible acts of sexual penetration); *compare* GA. CODE ANN. § 16-6-1(2) (Harrison 1982-2001) ("The

fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.”) *and* § 16-6-2 (“The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy”) *with* § 16-6-22.1 (silent on sexual battery) *and* § 16-6-22.2 (silent on aggravated sexual battery); *compare* HAW. REV. STAT. § 707-732 (2001) *note in* 2002 Haw. Sess. Laws 36 (H.B. 2560) (West 2002) (partial marital immunity for sexual assault in third degree) *and* § 707-733 (marital immunity for sexual assault in the fourth degree) *with* § 707-730 (silent on sexual assault in first degree) *and* § 707-731 (silent on sexual assault in second degree); *compare* IDAHO CODE § 18-6107 (Michie 1948–2002) (“No person shall be convicted of rape for any act or acts with that person’s spouse, except under the circumstances cited in paragraphs 3 [force] and 4 [threats of harm or use of intoxicating substance] of section 18-6101”) *with* § 18-6608 (silent on forcible sexual penetration by use of foreign object); *compare* KAN. STAT. ANN. § 21-3508 (2001) (marriage is defense to lewd and lascivious behavior, a Class B nonperson misdemeanor or Level 9 person felony) *and* § 21-3517 (2001) (marriage is defense to sexual battery, Class A person misdemeanor) *with* § 21-3505 (silent on criminal sodomy), § 21-3506 (silent on aggravated criminal sodomy), *and* § 21-3508 (silent on rape); *compare* LA. REV. STAT. ANN. § 14:43 (West 2002) (marital immunity for simple rape) *and* § 43.1 (marital immunity for sexual battery) *with* § 14:41 (silent on rape), § 14:42 (silent on aggravated rape), § 14:42.1 (silent on forcible rape), *and* § 14:43.2 (silent on aggravated sexual battery); *compare* N.Y. PENAL LAW § 130.20 (McKinney 2002) (spouses are partially immune from sexual misconduct, Class A misdemeanor), § 130.40 (marital immunity for sodomy in third degree, Class E felony), § 130.45 (marital immunity for sodomy in second degree, Class D felony), § 130.50 (marital immunity for sodomy in first degree, Class B felony), § 130.55 (marital immunity for sexual abuse in third degree, Class B misdemeanor), § 130.60 (marital immunity for sexual abuse in second degree), *and* § 130.65 (marital immunity for sexual abuse in first degree, Class D felony) *with* § 130.25 (silent on rape in third degree), § 130.30 (silent on rape in second degree), § 130.35 (silent on rape in first degree), § 130.65-a (silent on aggravated sexual abuse in the fourth degree), § 130.66 (silent on aggravated sexual abuse in third degree), § 130.67 (silent on aggravated sexual abuse in second degree), *and* § 130.70 (silent on aggravated sexual abuse in first degree); *compare* R.I. GEN. LAWS 1956 § 11-37-2 (1953–2001) (marital immunity for first degree sexual assault when victim is mentally incapacitated, mentally disabled, or physically helpless; silent on other provisions) *with* § 11-37-4 (silent on second degree sexual assault); *compare* S.D. CODIFIED LAWS § 22-22-7.4 (Michie 1968–2002) (spouses exempt from sexual contact without consent with person who is capable of consenting, Class 1 misdemeanor) *with* § 22-22-1 (silent on rape); *compare* UTAH CODE ANN. § 76-5-402(2) (1953–2001) (“This section [rape] applies whether or not the actor is married to the victim”) *and* § 76-5-405 (aggravated sexual assault; includes definition of rape in statute which applies “whether or not the actor is married to the victim.”) *with* § 76-5-402.2 (silent on object rape), § 76-5-403 (silent on forcible sodomy), *and* § 76-5-404 (silent on forcible sexual abuse); *compare* VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), *and* § 18.2-67.2(B) (Michie 2002) (no person shall be found guilty of rape, forcible sodomy, or object sexual penetration unless, at time of alleged offense, spouses were living separate and apart) *with* § 18.2-67.3 (silent on aggravated sexual battery) *and* § 18.2-67.4 (silent on sexual battery); *compare* WASH. REV. CODE ANN. § 9A.44.060 (West 2002) (marital immunity for rape in third degree, Class C felony) *and* § 9A.44.100 (marital immunity for indecent liberties, Class A or B felony) *with* § 9A.44.040 (silent on rape in first degree) *and* § 9A.44.050 (silent on rape in second degree).

marriage is not a defense to first-degree rape, but they remain silent on other sexual assault provisions such as sexual battery.²⁹⁷ A number of other states specifically delineate certain crimes for which marriage is a defense and certain crimes for which marriage is not a defense.²⁹⁸

States with explicit provisions in sexual offense statutes authorizing the prosecution of men for raping of their wives reveal how these provisions tend to work in practice. An examination of the cases in these states discloses that even these explicit provisions are an inadequate solution to the ongoing consent ideology embedded within the traditional marital rape immunity.

The assumption that marriage provides men with their wives' ongoing consent to sexual relations may continue to exist in states

297. IDAHO CODE § 18-6107; § 18-6608 (Michie 1948–2002); UTAH CODE ANN. § 76-5-402(2), § 76-5-405, § 76-5-402.2, § 76-5-403, § 76-5-404 (1953–2001); *see also* GA. CODE ANN. § 16-6-1(2), § 16-6-2, § 16-6-22.1, § 16-6-22.2 (Harrison 1982–2001).

298. ALASKA STAT. §§ 11.41.432(b) (Michie 2002) (“Except as provided in (a) of this section, in a prosecution under AS 11.41.410 or 11.41.420, it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant.”); CONN. GEN. STAT. ANN. § 53a-67 (West 2002) (“In any prosecution for an offense under this part, except an offense under section 53a-70 [sexual assault in first degree], 53a-70a [aggravated sexual assault in first degree], 53a-70b [sexual assault in spousal or cohabiting relationship], 53a-71 [sexual assault in second degree], 53a-72a [sexual assault in third degree] or 53a-72b [sexual assault in third degree with firearm], it shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship”); IDAHO CODE § 18-6107 (Michie 1948–2002) (“No person shall be convicted of rape for any act or acts with that person’s spouse, except under the circumstances cited in paragraphs 3 [force] and 4 [threats of harm or intoxicating substance] of section 18-6101”); MD. CODE ANN. CRIM. § 3-318 (West 2002) (spouses can only be prosecuted for rape in first degree, rape in second degree, or sexual offense in third degree if force is used or couple is living separately); MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his or her spouse being under age 16, mentally incapable or mentally incapacitated); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 Minn. Sess. Law. Serv. Ch. 381 (S.B. 2433) (West) (spouse does not commit criminal sexual conduct in third or fourth degree if actor knows or has reason to know that complainant is mentally impaired, mentally incapacitated, or physically helpless); OHIO REV. CODE ANN. § 2907.02(G) (West 2002) *amended by* 2002 Ohio Sess. Law. Serv. File 156 (H.B. 485) (West) (marriage or cohabitation is no defense to rape if offender uses force or threat of force); S.C. CODE ANN. 1976 § 16-3-658 (Law. Co-op. 2002) (“A person cannot be guilty of criminal sexual conduct under Sections 16-3-651 through 16-3-659.1 if the victim is the legal spouse unless the couple is living apart and the offending spouse’s conduct constitutes criminal sexual conduct in the first degree or second degree as defined by Sections 16-3-652 and 16-3-533”); TENN. CODE ANN. § 39-13-507(d) (2002) (A person does not commit an offense under sexual offenses if the victim is the legal spouse of the perpetrator unless defendant is armed with weapon, inflicts serious bodily injury, or parties are living separately and have filed for divorce); WYO. STAT. ANN. § 6-2-307 (Michie 1977–2001) (“The fact that the actor and the victim are married to each other is not by itself a defense to a violation of W.S. 6-2-302(a)(i), (ii) or (iii) or 6-5-303(a)(i), (ii), (iii) or (vi)”).

with explicit statutes.²⁹⁹ One case indicates that states may lack a coherent theory about what the evidence of sexual relations grants defendants in terms of consent in marital rape cases. Adair was charged with two counts of sexually assaulting his wife a few days after serving her with divorce papers.³⁰⁰ At a hearing in front of the judge on the admissibility of evidence of the prior sexual history between the parties, the wife admitted that, during a brief reconciliation, she had engaged in consensual sexual relations with Adair a few times after that alleged sexual assault.³⁰¹ The trial court decided to admit evidence of those subsequent sexual acts.³⁰² An interlocutory appeal on the matter went to the Michigan Supreme Court, which remanded the issue and directed the trial court to reweigh the evidence's probative value to determine its admissibility:

On a common-sense level, a trial court could find that the closer in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant, the stronger the argument would be that if indeed she had been sexually assaulted, she would not have consented to sexual relations with him in the immediate aftermath of sexual assault. Accordingly, the evidence may be probative. Conversely, the greater the time interval, the less probative force the evidence may have, depending on circumstances.³⁰³

The court offered factors that would make the subsequent sexual acts more or less probative of the wife's consent on the instance in question.³⁰⁴ However, the court did not articulate a theory about what prior or subsequent consensual sexual acts standing alone reveal in terms of consent on the instance in question.

Michigan's rape statute explicitly provides that husbands "may be charged and convicted" of criminal sexual conduct "even though the victim is his or her legal spouse."³⁰⁵ Although the provision allows

299. There are apparently very few marital rape cases in these jurisdictions as well. Westlaw research has revealed few appeals for criminal convictions of rape or sexual assault of a spouse in each of the "allowance" and "no defense" states. The number of appeals found in each of the states are as follows: Alaska (3), Colorado (2), District of Columbia (0), Georgia (7), Michigan (5), New Hampshire (3), New Jersey (2), North Carolina (0), and Wisconsin (6).

300. *Michigan v. Adair*, 550 N.W.2d 505 (Mich. 1996).

301. *Adair*, 550 N.W.2d at 508.

302. *Id.*

303. *Id.* at 512. The court also directed the trial court to weigh the nature of the relationship. *Id.*

304. *Id.*

305. MICH. COMP. LAWS ANN. § 750.5201 (West 2002) ("person may be charged and convicted [for first through fourth degree criminal sexual conduct] even though the victim is his or her legal spouse;" however, spouse cannot be prosecuted for criminal sexual

Adair to be prosecuted, it does not prevent Adair's wife from being subjected to an improper inference that her subsequent consent to sex with Adair itself implied consent to sexual intercourse with him on the instance in question.

Ongoing sexual consent analysis emerges in cases involving intimates who are not legally married. In the recent Alaska case of *Napoka v. State*, the complainant, fourteen-year-old N.A., made a report to a state trooper after he gave a presentation at her school about sexual abuse.³⁰⁶ She stated that Napoka had raped her nine or ten times over the past few years.³⁰⁷ Upon investigation, Napoka admitted to the trooper that he had engaged in non-consensual sex with N.A. on three previous occasions, so he was indicted for those three instances.³⁰⁸ At trial, the state moved to exclude evidence of the other sexual acts between Napoka and N.A.³⁰⁹ The trial court granted the motion, but on appeal, this decision was reversed.³¹⁰ The court of appeals stated:

N.A.'s prior sexual conduct with Napoka was clearly relevant to the two issues confronting the jury: (1) whether, as a factual matter, N.A. consented to have sex with Napoka on the three occasions identified in the indictment, and (2) whether, even if N.A. did not consent, Napoka nevertheless reasonably believed that she did consent. . . . The disputed evidence was relevant, not because it showed that N.A. had engaged in sexual activity before, but rather because it showed that N.A. had engaged in sex *with Napoka* before. If, as the defense claimed in its offer of proof, Napoka and N.A. had a long history of consensual sex, this fact would obviously be important to the jury's proper decision of these two things.³¹¹

conduct in first through fourth degrees based solely on spouse being under age 16, mentally incapable, or mentally incapacitated).

306. 996 P.2d 106, 107 (Alaska Ct. App. 2000).

307. *Id.* at 107.

308. *Id.*

309. *Id.*

310. *Id.* at 108.

311. *Id.* at 110 (emphasis in original). The court continued:

The evidence is important, not because of what it reveals about N.A.'s willingness to engage in sexual activity in general, but because of what it reveals about N.A.'s relationship with Napoka—specifically her willingness to engage in sexual activity with Napoka—and how this might have influenced Napoka's perception of whether N.A. consented to the sexual activity during the three incidents charged in the indictment. *Id.* Similarly, in the recent case of *Nickoli v. State*, Nos. A-7129, 4285, 2000 Alaska App. LEXIS 1471558 (Oct. 4, 2000), the appellate court issued a memorandum disposition, indicating that the outcome of the case was controlled by the precedent of *Napoka* and its holding broke no new legal ground. Nevertheless, the court's analysis in *Nickoli* is instructive. Nickoli was charged with first-degree sexual assault; his defense was consent. A.S. testified that he had taken her to a remote spot along the Yukon River and raped her. At trial, she offered that she had previously engaged in consensual sexual

According to this court, then, the prior sex was crucial to the jury's consideration of N.A.'s consent on the instance in question and, even if she did not consent, Napoka's *reasonable belief* that N.A. consented on the instance in question.³¹²

Alaska's marital statute includes an explicit provision regarding forcible and nonconsensual marital rape such as the kind that N.A. allegedly suffered.³¹³ The court in *Napoka*, however, declared that the evidence of prior sexual activity between Napoka and N.A. revealed her "willingness to engage in sexual activity with Napoka" on the instance in question.³¹⁴ Alaska's explicit "no defense" provision does nothing for N.A.; the court still found that her prior relationship with Napoka implied ongoing consent.

Explicit provisions regarding marital status do not attack Hale's understanding of sexual relations: that a woman who "hath given her body" to a man continues to consent to sexual intercourse with him through time.³¹⁵ To reach the heart of this improper inference, society needs a new law on sexual offenses by intimates.

intercourse with Nickoli one month before the sexual assault. The trial judge restricted Nickoli's ability to question A.S. about a prior sexual relationship that spanned several years. Nickoli appealed the judge's decision on this matter and the court of appeals reversed. It analyzed the disputed evidence this way:

Nickoli's prior sexual relationship with A.S. was critical to his defense. The fact that A.S. had engaged in a single act of sexual intercourse approximately one month before the alleged rape was certainly substantial evidence which supported Nickoli's defense. But the fact that A.S. and Nickoli engaged in sexual intercourse over a long period of time on several occasions, both before and after A.S. was married, significantly strengthens Nickoli's claim. The fact that A.S. had been involved in a long-term relationship with Nickoli supports the inference that she might have been willing to engage in consensual intercourse with Nickoli, or that Nickoli might have reasonably concluded that she was willing at the time of the alleged rape. A jury might find these inferences stronger with evidence of a long-term relationship than with evidence that Nickoli had engaged in a single recent act of consensual sex with A.S. Nickoli was entitled to present this evidence to the jury.

Id. at *7-8. A "long-term relationship" implied ongoing consent.

312. *Id.*

313. ALASKA STAT. § 11.41.432 (Michie 2001) ("Except as provided in (1) of this section [when victim is mentally incapable or incapacitated] it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant"). Alaska's marital rape immunity extends to sexual offenses in which the victim is mentally incapable or incapacitated—circumstances that would include Dripps' hypothetical unconscious wife. ALASKA STAT. § 11.41.432 (Michie 2001) (it is defense to sexual assault when victim is incapable of consenting that offender is married to person and neither party has filed with the court for separation).

314. *Napoka*, 996 P.2d at 110.

315. HALE, *supra* note 1, at 629.

V. New Law on Sexual Offenses by Intimates

As a preliminary matter, this Part begins by analyzing two possible responses to the ongoing consent ideology that continues to dominate rape cases involving intimates: (1) reforming rape shield laws and (2) admitting expert testimony on intimate rape. After exploring the limitations of these two responses, Section A sets out a proposal for a new law on sexual offenses by intimates, and argues that its manifold advantages outweigh its potential disadvantages. Section B applies the new law on sexual offenses by intimates to the cases discussed in Part IV. It concludes that such a law would mitigate the harm of the ongoing consent ideology and improve the law in useful and equitable ways.

One obvious place to begin reforming the law regarding sexual offenses by intimates is with rape shield laws, which admit evidence of the sexual history between the defendant and the complainant. In an earlier Article, I argued that routinely admitting this evidence befuddles the jury's ability to discern truth from a set of facts.³¹⁶ It prejudices the truth-seeking process primarily by reinforcing the antiquated notion that, once a woman consents to sexual intercourse with a man, he is entitled to assume that she consents to future sexual acts.³¹⁷ To limit the admission of evidence of the sexual history between the complainant and the defendant, I proposed the following rape shield statute:

Evidence of the complainant's sexual conduct and sexual communication with the defendant on the instance in question is admissible. Direct or opinion evidence of the complainant's sexual conduct and sexual communication prior or subsequent to the instance in question is inadmissible, subject to the following three exceptions:

- (1) Evidence of an alternate source for the semen, pregnancy, disease, or injury that the complainant suffered.
- (2) Evidence of negotiations between the complainant and the defendant to convey consent in a specific way or to engage in a specific sexual act at issue.
- (3) Evidence of the complainant's bias or motive to fabricate the charge of rape.³¹⁸

This statute would prohibit the admission of much of the specific evidence of prior sexual history between the defendant and the complainant. In brief, the only routinely admissible evidence of the sexual history between the complainant and the defendant would be "[e]vidence of negotiations between the complainant and the

316. Anderson, *supra* note 23, at 1771-84.

317. *Id.*

318. *Id.* at 1802.

defendant to convey consent in a specific way or to engage in a specific sexual act at issue.” Negotiations “to convey consent in a specific way” might entail, for example, a discussion that a person likes to have sex while saying “no” but wants her partner to stop if she says “red.” Negotiations “to engage in a specific sexual act” might entail, for example, a discussion about the sexual acts that the parties planned to do to each other on their next date, provided that those acts were at issue. Most other evidence of specific sexual acts between the parties would be inadmissible.

Although I do not expect to convince the reader of the merits of the statute here (for a full discussion of it, please refer to my earlier Article), what I do hope to do is to show that even a restrictive rape shield statute such as the one I previously proposed would not dismantle the ongoing consent ideology that tends to affect intimate rape cases.³¹⁹ Despite its restrictions on admissible evidence, the statute would still admit evidence of the fact that the parties had been previously intimate. As I argued:

Although prior sexual history between the complainant and the defendant should not be a categorical exception to rape shield laws, complaints of rape should not want for meaningful context. A complainant who has been intimate with the defendant cannot pretend to be a stranger to him when she lodges a complaint that he raped her. For the sake of background and perspective, it is appropriate to allow the defendant to discuss general information about the nature of the parties’ relationship, such as the fact that the parties were married or lived together, or dated previously. This general information is not covered by rape shield laws and is not the sort of evidence that would be excluded by them. Descriptions of the level of sexual intimacy previously attained or of specific prior sexual acts, however, befuddle the truth-seeking process, so they should ordinarily be inadmissible.³²⁰

In a footnote, I explored briefly the potential bias that might flow from the admission of even general information about the nature of the parties’ relationship:

Admittedly, even general statements about the prior intimate relationship between the complainant and the defendant may also befuddle the truth-seeking process. However, defendants have the right to provide some context for the instance in question, and the state should not be allowed to leave the misimpression with the jury that the complainant and the defendant were strangers.³²¹

Given that general information about the nature of the parties’ relationship would be admitted after the passage of such a law, there remains the very real problem that jurors and judges will invest this

319. For a fuller discussion of the merits of the statute, see *id.* at 1802–08.

320. *Id.* at 1784.

321. *Id.* at 1784, note 490.

general evidence with probative value that it simply does not contain. Therefore, some other reform measure is needed to blunt potential bias against women who are sexually assaulted by their intimates.

One might propose that experts on intimate rape be allowed to testify in intimate rape cases. Experts could testify, for example, that a complainant's prior consent to sexual intercourse does not imply later consent to sexual intercourse.³²² Experts could testify that women are harmed by intimate rape and that they do not intend to give ongoing consent to sexual activities to men once they have had sex with them. I support the proposal for expert testimony in these cases; however, it would require, of course, prosecutors to obtain experts. Often, local prosecutors do not have the resources or the desire to do so. There is no reason to leave a much-needed legal change to the constraints imposed by local prosecutors' possibly limited resources or imaginations. Changes should be made at a statewide level in a way that imposes no new burdens on prosecutorial budgets.

Additionally, expert testimony can be disputed. A defense attorney could present its own expert to testify that a woman's past consent does imply consent to future sexual acts. The question at issue, however, is not actually one of expert opinion. The question is whether *the law* will allow defendants and jurors to infer that past consent to sexual acts itself means consent to future sexual acts. Either defendants and jurors may infer a complainant's consent to sexual intercourse on the instance in question based solely on her prior consent or they may not. If the law does not allow such an improper inference to be made, a new provision should be adopted that simply states that such an inference is incorrect as a matter of law.

322. Another way to eliminate juror bias in date rape trials proposed by Steve Friedland was to screen jurors "more carefully during voir dire to allow the attorney to exclude those jurors who are indelibly tainted by the culture of acceptance." See Friedland, *supra* note 16, at 520. Once the jury selection process was completed, the selected jurors would be educated about the dangers of the culture of acceptance. *Id.* Friedland views this as a two-pronged prevention and educational attack on the culture of acceptance. *Id.* at 523. Because determining which jurors would be more influenced by the culture of acceptance would be difficult, Friedland sees this educational process to be an intricate element to his proposal.

A number of district attorneys have acknowledged the need to educate jurors through experts about domestic violence and marital rape in order to "contextualize rape in marriage and debunk myths about implied consent." See Eskow, *supra* note 3, at 699-702. One prosecutor believed that the key to removing this stigma was through domestic violence classes in high schools and colleges, which would educate potential jurors earlier. *Id.* at 701-02.

A. Analysis of the New Law on Sexual Offenses by Intimates

States must directly address the question of what impact a prior sexual relationship between the defendant and the complainant has on a claim of consent. I propose that states abolish provisions in their sexual offense codes that deal exclusively with the marital status of the defendant and the complainant. I propose, instead, that each state's sexual offense statute include the following provision:

A prior or subsequent sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense and shall not affect the grading of a sexual offense. The sole fact that the complainant consented to the same or different acts with the defendant on other occasions shall not be a sufficient basis for inferring consent on the instance in question. The mere existence of such a sexual relationship shall not be a sufficient basis for the defendant to claim a mistake of fact as to consent defense.

These three sentences would significantly change the way that the legal system weighs evidence of a sexual relationship between the complainant and the defendant. I will analyze each sentence in turn.

“A prior or subsequent sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense and shall not affect the grading of a sexual offense.”

This first sentence would address rape by intimates as a whole and not single out marital rape victims for special treatment. Collective treatment of rape by intimates is appropriate because victims who have been previously intimate with their assailants suffer similar harm to marital rape victims.³²³ As we have seen, “one need not be legally married to suffer the trauma and consequences of being raped by one's intimate partner.”³²⁴ More importantly, from a fairness standpoint, victims who have been previously intimate with their assailants are often subject to the improper inference of ongoing consent regardless of the formal legal status the parties share. As a result, the sexual relationship between the parties itself is the centerpiece of the proposed provision; whether that relationship occurred “in marriage, cohabitation, dating, or other circumstances” is immaterial because the provision covers each circumstance.

The first sentence also clarifies that such a prior sexual relationship “shall not be a defense to a sexual offense.” In that

323. See *supra* notes 129–35 and accompanying text.

324. BERGEN, WIFE RAPE, *supra* note 23, at 8 (“Furthermore . . . a marriage license probably does not change the dynamics of sexual abuse within an ongoing intimate relationship, except to make it legal in some states.” Thus, my sample includes legally married women, those who have cohabited with their partners for more than a year, and those in partnerships who share a child.”).

sense, it is similar to the “no defense” provisions of Alaska, Colorado, and Georgia, which state that the marital status of the parties “shall not be a defense” to a charged sexual offense.³²⁵ The new law on rape by intimates is different, however, because it focuses on what drives the traditional marital rape exemption: the prior sexual relationship between the parties itself. For that reason, the new law says that the prior sexual relationship itself (rather than technical marital status) “shall not be a defense.”

In addition to addressing a prior sexual relationship between the parties, the first sentence addresses a *subsequent* sexual relationship between the parties. Many battered women stay with their abusers even after they have been assaulted repeatedly. The fact that they stayed after the abuse does not mean that they consented to being battered or that the battering was not a crime. Likewise, many raped women continue to have relationships with their abusers, relationships that may include subsequent sexual relations.³²⁶ As we have seen, the fact that they stayed after the rapes does not mean that they consented to being raped or that the rapes were not crimes.

Finally, the first sentence clarifies that a sexual relationship between the parties “shall not affect the grading of a sexual offense.” At least four states allow the mere fact that the parties were married or cohabitating to affect the grading of the offense and, as a consequence, how seriously the police, prosecutors, courts, and juries take these offenses. In basic fairness to women, this explicit statement that a previous sexual relationship shall not affect the grading of the offense should be included in the statute as a matter of legislative intent.

“The sole fact that the complainant consented to the same or different acts with the defendant on other occasions shall not be a sufficient basis for inferring consent on the instance in question.”

325. ALASKA STAT. § 11.41.432 (Michie 2001) (“Except as provided in (a) of this section [when victim is mentally incapable or incapacitated] it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant”); COLO. REV. STAT. ANN. § 18-3-409 (West 2002) (“Any marital relationship shall not be defense unless such defense is specifically set forth in statute;” spouses exempt only from statutory rape); GA. CODE ANN. § 16-6-1(2) (Harrison 1982–2001) (“The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape”); § 16-6-2 (“The fact that the person allegedly sodomized is the spouse of a defendant shall not be a defense to a charge of aggravated sodomy”).

326. See, e.g., *United States v. Parker*, 54 M.J. 700, 705 (A. Ct. Crim. App. 2001) (victim testified to having sexual relations with defendant after two alleged rapes of victim by defendant); *State v. Alston*, 312 S.E.2d 470, 473 (N.C. 1984) (discussing defendant and complainant’s sexual relations after complaint made to police about alleged rape); *Commonwealth v. Richter*, 711 A.2d 464, 466 (Pa. 1998) (victim allowed defendant to move back in with her after alleged rape).

This second sentence of the new law on sexual offenses by intimates means that that one cannot conclude that the complainant consented on the instance in question simply by virtue of her consent to the same act with the defendant on a different occasion. Simply because a woman previously agreed to have oral sex with a man before does not mean that she consented to oral sex with him on the instance in question. The prior act, alone, provides no basis for making that inference. Combined with other evidence, such as how the complainant acted on the instance in question in light of her prior behavior in the relationship, the prior act may be a *factor* upon which one might infer consent, but as a lone bit of evidence, it is not sufficient for one to infer consent. The provision therefore states that the complainant's consent on the instance in question may not be inferred solely based on her consent to the same act with the defendant on other occasions.

The second sentence also addresses prior consent to sexual acts that are *different* than the one charged. It likewise clarifies that one cannot infer consent simply by virtue of the complainant's consent to a different act with the defendant on a different occasion. Simply because a woman had consensual vaginal sex with a man previously does not mean that she consented to oral sex with him on the instance in question. The provision therefore states that the complainant's consent on the instance in question may not be inferred solely based on her consent to a different act with the defendant on other occasions.

Finally, the second sentence of the new law on sexual offenses by intimates abolishes the defendant's ability to claim that he enjoyed "implied authorization" to proceed with sex with the complainant without her consent whenever "a long-standing sexual relationship connects the defendant with the victim."³²⁷ Such "implied authorization," Dripps argues, derives from the fact that the woman had, "while sober and over a long course of dealing, approved of a complex relationship in which sex plays a prominent role."³²⁸ The new law on sexual offenses by intimates nips this analysis in the bud: The complainant's consent on the instance in question may not be inferred solely from her consent to the same or different acts with the defendant on other occasions. No "implied authorization" for future sex follows "a complex relationship in which sex plays a prominent role."³²⁹

327. Dripps, *supra* note 5, at 1801.

328. *Id.*

329. *Id.*

“The mere existence of such a sexual relationship shall not be a sufficient basis for the defendant to claim a mistake of fact as to consent defense.”

The third sentence of the new law addresses the specific defense of mistake of fact as to consent that a prior sexual relationship between the parties helps provide defendants. It clarifies that a defendant may not assume he has consent solely by virtue of the fact that he has been sexually active with a woman before. There may be any number of reasons a man harbors a legitimate mistake of fact as to a woman's consent, but the mere fact that he has been sexually active with her before should not provide him with the opportunity to make such a claim. This provision prevents the defendant from relying on a particularly unreasonable mistaken belief: that once a woman consents to sex with him, she has given him ongoing consent to future sexual acts. The new law declares that, because it is unreasonable to make an assumption of consent based solely on the fact that one has been sexually active with someone before, it is legally untenable. Combined with other evidence of what occurred on the instance in question in light of past practices between the parties, the fact that a man has been sexually active with a woman before may be a *factor* upon which he may conclude, reasonably but mistakenly, that she consented on the instance in question. But the mere existence of a relationship itself cannot provide him with a reasonable mistake. Prior consent alone provides the defendant with no reasonable basis upon which to assume consent on the instance in question.

In proposing this new law on sexual offenses by intimates, I am advancing a particular normative vision of consent to sexual intercourse.³³⁰ I believe that consent to sexual intercourse is temporally constrained permission that is specific as to act and non-transferable to others.³³¹ Examples illustrate each of these principles. Consent is temporally constrained: A woman may choose to end a passionate affair in order to become a celibate Buddhist nun. Just because she consented to sex with her lover in the past does not mean she consents in the future. Consent is specific as to act: A wife may choose to have vaginal intercourse with her husband, but refuse his requests for anal sex. Just because she consented to vaginal intercourse does not mean she consents to anal sex. Consent is non-transferable to other people: A woman may exchange oral sex for money with seven men in one night to pay her rent, but refuse the eighth. Just because she consented to sex with seven men, does not

330. I advanced the same normative vision of consent in an earlier article on rape shield laws. See Anderson, *supra* note 23, at 1796–1802.

331. *Id.* at 1707–08.

mean she consents to sex with the eighth. Sexual consent is permission that must be negotiated each time.

Rape law has not evinced this normative vision of consent.³³² Historically, rape law portrayed consent to sexual intercourse as temporally unconstrained permission that could be imprecise as to act and even indiscriminate as to person.³³³ Marital immunity for sexual offenses enshrined two of these objectionable aspects of this distorted normative vision into rape law.

First, it established sexual consent as temporally unconstrained permission. As Vivian Berger noted in her influential *Columbia Law Review* article on the marital rape exemption, marital immunity derived from the “fictional notion that marriage implies continuing consent to sexual relations.”³³⁴ As we have seen, ongoing sexual consent to her husband was imagined to be a “term” of the marriage “contract,” something that continued for the duration of the marriage.³³⁵

Second, marital immunity established sexual consent as permission that was imprecise as to sexual act. Once a woman professed a nuptial “I do,” she could not assert a conjugal “I don’t do that.”³³⁶ Her husband could force her to engage in any sexual act that pleased him, and the law provided her no refuge.³³⁷

The new law on sexual offenses by intimates abandons this retrograde normative vision of consent in favor of a more egalitarian view. This new law would help to temporally constrain sexual

332. *Id.* at 1703–04.

333. *Id.*

334. Vivian Berger, *Man’s Trial, Women’s Tribulation: Rape Cases in the Courtroom*, 77 *COLUM. L. REV.* 1, 9 (1977).

335. *State v. Smith*, 426 A.2d 38, 44 (N.J. 1981) (noting most prevalent justification for marital exemption is “that upon entering the marriage contract a wife consents to sexual intercourse with her husband”). “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?” *Id.* See also *Weishaupt v. Commonwealth*, 315 S.E.2d 847, 854 (Va. 1984) (“[I]f a woman can unilaterally secure a divorce, thereby revoking the marriage contract in its entirety, then it is illogical to conclude that she cannot, by her own act, revoke a term of that contract.”); *Kizer v. Commonwealth*, 321 S.E.2d 291, 293 (Va. 1984) (“[T]he prosecution . . . must prove beyond a reasonable doubt that the wife unilaterally had revoked her implied consent to marital intercourse.”).

336. See *HALE*, *supra* note 1, at 629 (stating women give matrimonial consent which may not be withdrawn). Hale provided justification for the marital rape exemption by saying, “the 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.*” See *id.* (emphasis added). See also Hasday, *supra* note 3, at 1399 (emphasizing how Hale had formulated a “legal rule conclusively inferring consent from her initial agreement to marry”).

337. See Hasday, *supra* note 3, at 1400. Marriage provided a man “a right of sexual access to his wife.” *Id.* Likewise, it “bestowed an obligation on the wife to submit.” *Id.*

consent and make it precise as to act. Consent would be temporally constrained because a prior or subsequent sexual relationship would not itself be a defense to a rape charge. The mere existence of consensual sex on another occasion would not be sufficient to infer consent on the instance in question. Consent would also be specific as to act because neither the defendant nor the jury would be permitted to infer that the complainant consented to the sexual act in question simply by virtue of the complainant's prior consent to the same or a different sexual act.

Defendants charged with sexual offenses in jurisdictions in which this new law on sexual offenses by intimates has been adopted could still claim consent as a defense, of course.³³⁸ These defendants would not, however, be able to argue that, simply by having had sex with the complainant before, they could assume consent to the sexual acts in question. Under the new law on sexual offenses by intimates, a defendant's prior sexual relationship with a complainant would not be a defense, nor would it provide a defendant with an inference of ongoing consent.

The new law on sexual offenses by intimates I propose may break new ground in rape law, but it travels a well-worn path.³³⁹ As we have seen, three states have enacted "no defense" provisions in their rape codes that clarify that marital status is no defense to a charged sexual offense.³⁴⁰ The new law on sexual offenses by intimates is not a great leap from those provisions; it simply re-

338. A defendant could advance a defense of consent primarily by producing evidence of the complainant's words or actions on the instance in question. If a complainant and a defendant previously negotiated a unique method of communicating consent to sex, evidence of that negotiation would certainly be admissible to reveal what the defendant reasonably believed about the complainant's consent to sexual intercourse on the instance in question. If a complainant and a defendant previously negotiated future consent to specific acts, again, evidence of that negotiation would be admissible to reveal what the defendant reasonably believed about the complainant's consent to sexual intercourse on the instance in question. Notice, however, that in both circumstances, the mere existence of a previous sexual relationship would not be a defense to a charge of rape, nor would it provide the defendant with an automatic presumption of consent to future sexual relations. Anderson, *supra* note 23, at 1804-07.

339. Steven Friedland argued for specialized jury instructions that would warn jurors against assuming a woman's consent to sexual acts simply because they disapprove of her nonverbal actions before those acts. See Friedland, *supra* note 16, at 524. Friedland argued, "[t]he instructions could inform juries explicitly that nonverbal cues such as dress and body language do not impliedly support a finding of consent unless there is a reasonable, unbiased ground for that inference." *Id.* at 525. One district attorney in northern California surveyed for a student note in the *Stanford Law Review* argued for creating specialized jury instructions that read, "[a]ll spouses have the right to control their bodies. Spousal status [is] no defense to rape." This provision would be similar to the new law on sexual offenses by intimates that I propose herein. Eskow, *supra* note 3, at 702.

340. For a further discussion of statutes providing that marital status is "no defense" to rape, see *supra* note 293-294 and accompanying text.

focuses the law on the impact of the prior sexual relationship rather than the technical marital status. In addition, the states of California and Colorado have interesting, analogous provisions regarding the substantive issue of consent in their sexual offense codes. Both the California and Colorado codes on consent state, “[a] current or previous dating relationship shall not be sufficient to constitute consent” for a sexual offense.³⁴¹ California courts have interpreted this provision to mean, “consent, to be a defense, must be *current*; the fact that a victim has previously engaged in sexual activities with the attacker does not constitute consent *in perpetuo*.”³⁴² In other words, consent to prior sexual acts does not extend in perpetuity to other sexual acts: consent is not ongoing. This analysis is a central rationale behind the new law on sexual offenses by intimates.

This new law on sexual offenses by intimates would authorize prosecutors to obtain jury instructions that would limit the jury’s ability to infer consent from a prior sexual relationship between the parties. Three states with arguably the best statutes on marital immunity each have statutes that provide that marriage is not a defense to a charge of rape.³⁴³ However, these three states lack patterned jury instructions to take advantage of the statutes.³⁴⁴ The progressive language in these laws, declaring that marriage is not a defense to rape, is ineffectual without an accompanying jury instruction cautioning the jury not to make an improper inference of consent based solely on the marital relationship.

Appropriate jury instructions based on the new law on sexual offenses by intimates would depend on whether, in the applicable jurisdiction, nonconsent is a material element of the crime of rape and so must be proven by the state beyond a reasonable doubt, or consent

341. *People v. Gonzalez*, 39 Cal. Rptr. 2d 778 (C.A. 2d Dist. 1995). It goes on to say, “[n]othing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.” *Id.* at 780. See also CAL. PENAL CODE § 261.6 (West 2002); COLO. REV. STAT. ANN. § 18-3-401 (West 2002).

342. *In re Keith S.*, No. E027838, 2002 WL 220630 (Cal. App. 4 Dist.) (unpublished disposition).

343. ALASKA STAT. § 11.41.432 (Mitchie 2001) (“[I]t is not a defense that the victim [of sexual assault in the first or second degree] was, at the time of the alleged offense, the legal spouse of the defendant.”); COLO. REV. STAT. ANN. § 18-3-409 (West 2002) (“Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense under this part); GA. CODE ANN. § 16-6-1(a)(2) (Harrison 1982–2001) (“The fact that the person allegedly raped is the wife of the defendant shall not be a defense to the charge of rape.”).

344. See generally ALASKA SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS, ALASKA PATTERN JURY INSTRUCTIONS (CRIMINAL) (1980) (amended 1988); COLO. SUPREME COURT COMM. ON CRIMINAL JURY INSTRUCTIONS, COLO. CRIMINAL JURY INSTRUCTIONS (1993); COUNCIL OF SUPERIOR COURT JUDGES OF GA., SUGGESTED PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, vol. II (1991) (amended 2002).

is an affirmative defense for which the defendant has the burden of persuasion. In most jurisdictions, nonconsent is a material element of the crime of rape. One potential jury instruction based on the new law on sexual offenses by intimates in these jurisdictions would, therefore, be:

In this case, the defendant claims that the complainant consented to the conduct alleged to have been rape. You have heard evidence that the parties _____ [were involved in a prior sexual relationship] or [were involved in a subsequent sexual relationship] or [engaged in the same sexual act on another occasion] or [engaged in a different sexual act on another occasion]. This fact, in and of itself, is not sufficient to raise a reasonable doubt as to consent. This fact, weighed with other evidence, may raise a reasonable doubt as to consent.

If the defendant offers other evidence of consent besides the prior sexual relationship itself, the risk remains that jurors will invest the relationship with probative value that it does not warrant. Therefore, even if the defendant offers other evidence of consent, the prosecution should be entitled to obtain this instruction when a defendant in an intimate sexual offense case claims the defense of consent.

On the question of mistake of fact as to consent, a jury instruction might read:

In this case, the defendant claims that he had a reasonable but mistaken belief that the complainant consented to the conduct alleged to have been rape. You have heard evidence that the parties _____ [were involved in a prior sexual relationship] or [engaged in the same sexual act on another occasion] or [engaged in a different sexual act on another occasion]. This fact, alone, is not a reasonable basis upon which the defendant can make a mistake as to the complainant's consent. If you find that this fact is the sole basis upon which the defendant believed that the complainant consented, you must find that his belief was unreasonable. If, however, you find that the defendant relied on other evidence as well, you may weigh this fact with that other evidence when evaluating whether his mistake was reasonable.

By these instructions, juries would be cautioned that a sexual relationship between the parties is not itself a defense and that the defendant may not assume ongoing consent or "implied authorization" to sexual intercourse simply by virtue of a prior or subsequent sexual relationship. Such instructions would help to curtail juror bias against victims who have had prior sexual relationships with their assailants. These instructions would also undermine the legal legacy of the marital rape exemption: the substantive notion of ongoing consent based solely on an intimate relationship, regardless of the marital status of that relationship.

B. Application of the New Law on Sexual Offenses by Intimates

If the victims in *Gonyaw*, *Sanchez-Lahora*, *Adair*, and *Napoka* had lived in jurisdictions in which the new law on sexual offenses by intimates had been in effect, the appellate courts evaluating those cases would have had to acknowledge that a prior sexual relationship between the defendant and the complainant did not itself afford the defendant an inference of consent. Moreover, on retrial, the juries in those cases would be properly cautioned about how to weigh that evidence and their ability to make an improper inference of ongoing consent would be appropriately constrained.

In *Gonyaw*, the complainant and the defendant had cohabitated for three years.³⁴⁵ The Vermont Supreme Court stated that consensual sex between them four days prior to the alleged sexual assault could “support a reasonable belief that there was consent to renewed sexual activity.”³⁴⁶ Under the new law on sexual offense by intimates, the defendant could not reasonably believe in consent to “renewed sexual activity” based solely on a recent consensual act of sex.³⁴⁷ Consent to “renewed sexual activity” as a concept would be improper because prior sexual acts, in and of themselves, do not imply consent to subsequent sexual acts, even if those prior acts were “reasonably contemporaneous” with the instance in question.³⁴⁸ At retrial, after hearing evidence of their three-year cohabitation and a disputed act of sex four days earlier, the jury would be properly instructed that the existence of such a sexual relationship “alone, is not a reasonable basis upon which the defendant can make a mistake as to the complainant’s consent.”

If the new law on sexual offenses by intimates were in effect in Nebraska at the time, the appellate court in *Sanchez-Lahora* could not have endorsed the faulty syllogism it believed it found in the state’s rape shield law. In that case, *Sanchez-Lahora* wanted to testify that he had had sex with the complainant 11–14 times before.³⁴⁹ When analyzing this potential evidence the appellate court said:

Major [premise]: The victim’s past sexual behavior with the defendant was consensual behavior. Minor [premise]: The victim’s behavior in the present prosecution is the type of activity in which

345. *Vermont v. Gonyaw*, 507 A.2d 944, 947 (Vt. 1985).

346. *Id.*

347. *Id.* Under the rape shield law I proposed in an earlier Article, evidence of sex four days prior to the alleged assault would likely be excluded, but evidence of the fact that the parties had previously cohabitated would not be excluded. See *supra* notes 316–20 and accompanying text. For this reason, the new law on sexual offenses by intimates and the jury instruction it allows would be appropriate even if Vermont had passed my rape shield law.

348. *Gonyaw*, 507 A.2d at 947.

349. *State v. Sanchez-Lahora*, 616 N.W.2d 810, 814 (Neb. Ct. App. 2000).

the victim participated with the defendant in the past. Conclusion: Therefore, the victim's behavior in the present prosecution was consensual.³⁵⁰

The new law on sexual offenses by intimates rejects the notion that consent to sex on the instance in question ineluctably follows from consent to similar acts before. On the contrary, it clarifies that, as a logical matter, one may not infer consent on the instance in question based on the mere fact that the complainant's past sexual behavior with the defendant was similar and consensual.³⁵¹ At retrial, the jury would be properly instructed that the sole fact that the complainant consented to the same act with the defendant before "is not sufficient to raise a reasonable doubt as to consent."

In *Adair*, the Michigan Supreme Court would not have had to struggle for a way to interpret the sexual acts that occurred *after* the alleged sexual assault during a brief reconciliation between the Adair and his wife.³⁵² The new law on sexual offenses by intimates would instruct the jury plainly that a "subsequent sexual relationship" between the defendant and the complainant, in and of itself, "is not sufficient to raise a reasonable doubt as to consent."

Likewise, in *Napoka*, the "long history of consensual sex" alleged by Napoka with the minor would not imply authorization for sex with her on the three instances in question.³⁵³ In *Napoka*, the Alaska appellate court said that the sexual history of sex between a complainant and a defendant was important to two material issues: (1) the actual consent of the minor to the sex alleged to have been rape and (2), if there was no actual consent, the defendant's reasonable belief that she consented.³⁵⁴ The new law on sexual offenses by intimates addresses both material issues.³⁵⁵ Actual

350. *Id.* at 818.

351. Under the rape shield law I proposed in an earlier Article, evidence of sex 11–14 times prior to the alleged assault would likely be excluded, but evidence of Sanchez-Lahora's allegation that the parties had previously been involved in some kind of romantic relationship would not be excluded. *See supra* notes 316–20 and accompanying text. For this reason, the new law on sexual offenses by intimates and the jury instruction it allows would be appropriate even if Nebraska had passed my rape shield law.

352. *Michigan v. Adair*, 550 N.W.2d 505, 512 (Mich. 1996). Under the rape shield law I proposed in an earlier Article, evidence of sex after the alleged assault would likely be excluded, but evidence of the fact that the parties were married would not be excluded. *See supra* notes 316–20 and accompanying text. For this reason, the new law on sexual offenses by intimates and the jury instruction it allows would be appropriate even if Michigan had passed my rape shield law.

353. *Napoka v. Alaska*, 996 P.2d 106, 110 (Alaska Ct. App. 2000).

354. *Id.* at 110.

355. Under the rape shield law I proposed in an earlier Article, evidence of allegedly consensual sex between Napoka and the minor prior to the alleged assault would likely be excluded, but evidence of the fact that Napoka claimed some romantic relationship would not be excluded. *See supra* notes 316–20 and accompanying text. For this reason, the new

consent to sexual intercourse may not be inferred solely based on a history of consensual sex. Because, legally, jurors and defendants may not infer consent on the instance in question based solely on prior consensual sexual behavior, the defendant himself may not construct a defense of reasonable belief in consent based on that evidence alone. Prior consent in and of itself provides the defendant with no reasonable basis to assume consent on the instance in question. At retrial, the jury would be properly instructed that the mere existence of such a sexual relationship “is not sufficient to raise a reasonable doubt as to consent” and “is not a reasonable basis upon which the defendant can make a mistake as to the complainant’s consent.” Having such an instruction is superior to the status quo because it allows the jury to make conclusions based on the evidence surrounding the disputed sexual act itself rather than on a biased inference of ongoing consent based solely on prior acts.

Critics might worry that the new law on sexual offenses by intimates would engender unfair results in cases in which the issue of consent is a particularly close one. They need not fret. Assume, for example, a situation in which a woman voices no affirmative consent to sexual intercourse, nor does she verbally or physically object to it. What happens when her husband penetrates her but she remains passive and silent? As a practical matter, of course, no prosecutor would bring such a weak case to the jury. Even if the parties were not married, this case could not result in a conviction under current law in the vast majority of jurisdictions.³⁵⁶ The new law on sexual offenses would not change that fact.

Moreover, as a theoretical matter, the application of the new law on sexual offenses in a hypothetical prosecution based on these facts would not make the case more troubling. Should the husband be able to argue that his wife consented on the instance in question based solely on the existence of his prior relationship with her? No. His defense of consent should be based on evidence surrounding the disputed sexual act itself: that his wife was passive and silent on the instance in question. Coupled with this evidence, he would also be able to point to past sexual practices between them to argue consent. Whether he would prevail would depend on the substantive definition

law on sexual offenses by intimates and the jury instruction it allows would be appropriate even if Alaska had passed my rape shield law.

356. Most jurisdictions do not criminalize this behavior. Only in jurisdictions such as New Jersey, in which consent requires affirmative, freely given permission, would this situation be potentially criminal. *State of New Jersey in the interest of M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (consent defined as “affirmative and freely-given permission of the victim to the specific act of penetration”).

of consent in the jurisdiction, rather than on the new law on sexual offenses by intimates that I have proposed.³⁵⁷

Conclusion

Legally declaring that “a prior sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense” will not end the occurrence of sexual offenses by intimates, of course.³⁵⁸ It will, however, end the marriage between an intimate relationship and the improper inference of ongoing consent to sexual intercourse. Because the ideology of ongoing consent has bullied the legal interpretation of intimate relationships in rape cases for generations, such a divorce is long overdue.

357. *See, e.g., id.*

358. As Diana Russell has pointed out: “Clearly, though legal reform is a crucial step in dealing with wife rape, it is not enough. Our survey data have shown that many women who are economically dependent on their husbands do not feel able to leave the husbands who rape them. Hence, the struggle against wife rape and other wife abuse is connected with the struggle for women to obtain greater economic independence, in their marriages and outside of them. Ultimately it is not possible to eradicate wife rape as long as women are subordinate to men in the family and in society. Hence, the struggle for equal power, which means more for women and less for men, is part of the struggle against wife rape.” RUSSELL, *supra* note 6, at 360.

Introduction to the Appendix of State Sexual Offense Statutes with Marital Immunity

The following appendix details only those twenty-six states that contain some form of marital immunity in their sexual offense statutes. It does not include states that have abolished marital immunity.

State statutes regarding sexual offenses vary widely. Many states criminalize sexual transgressions in unique ways. Even as I have tried to be comprehensive in this compilation of states' sexual offense statutes with marital immunity, I have cut certain provisions to focus on the most pertinent aspects of the doctrine for forcible and nonconsensual sexual offenses. For this reason, I have omitted provisions that criminalize sexual intercourse based on age of the victim, commonly called statutory rape laws. These almost universally provide for marital immunity.³⁵⁹ I have also omitted provisions that criminalize sexual intercourse based on the developmental disability or other cognitive limitation of the victim; statutes often refer to these victims as "mentally defective."³⁶⁰ These

359. Statutes that exempt spouses from crimes classified as statutory rape are beyond the scope of this paper and will not be discussed. Additionally, nearly every state has a provision providing immunity for spousal statutory rape. *See, e.g.*, VT. STAT. ANN. tit. 13, § 3252 (2001) (sexual assault: "The other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual"); W.VA. CODE § 61-8B-3 (1966-2002) (sexual assault in first degree: "The person, being fourteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is eleven years old or less and is not married to that person"). Marital immunity for statutory rape will not be discussed in this paper. I have also omitted provisions regarding incest because they do not involve spouses.

360. Several states provide marital immunity for sexual offenses if one spouse suffers from mental retardation or a mental defect that renders her incapable of providing consent. ALA. CODE 1975 § 13A-6-62(a)(2) (2002) (marital immunity for rape in second degree when he or she engages in sexual intercourse with a victim who is incapable of consent by reason of being mentally defective); § 13A-6-64 (marital immunity for sodomy in the second degree when person engages in deviate sexual intercourse with a person who is incapable of consent by reason of being mentally defective); ALASKA STAT. § 11.41.410 (Michie 2001) (marital immunity for sexual assault in the first degree when the offender "engages in sexual penetration with another person who the offender knows is mentally incapable"); § 11.41.420 (marriage is defense to second degree sexual assault if the victim is mentally incapable); § 11.41.420 (marriage is a defense to third degree sexual assault if the victim is mentally incapable); CONN. GEN. STAT. ANN. § 53a-67 (West 2002) (spouses or cohabitants are exempt from sexual assault in fourth degree, which occurs when person intentionally subjects another to sexual contact who is mentally defective, mentally incapacitated or physically helpless); § 53a-71 (spouses and cohabitants are immune from sexual assault in second degree when the victim is mentally defective); HAW. REV. STAT. § 707-732(d) (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (spouses and cohabitants are exempt from sexual assault in third degree, Class C felony, if victim is mentally defective, mentally incapacitated, or physically helpless); IDAHO CODE § 18-6101

provisions, too, routinely provide for marital immunity. I have omitted the rare provisions regarding rapes that involve an abuse of authority (which frequently provide for marital immunity), such as those in which the victim is a prisoner in a correctional facility in which the offender is a guard. I have also omitted those very rare provisions regarding rapes that involve an abuse of trust (which are silent as to marital immunity), such as those that involve perpetrators who are members of the clergy or attending psychotherapists. Occasionally, a state explicitly criminalizes attempted sexual offenses; I have omitted those provisions. I have also omitted indecent exposure statutes (which routinely provide for marital immunity).³⁶¹

(Michie 1948–2002) (marital immunity where the victim is incapable, through any unsoundness of mind, whether temporary or permanent, of giving legal consent); IOWA CODE ANN. § 709.4(A)(2)(a) (West 2002) (marriage is defense to sexual abuse in third degree if victim is suffering from mental defect or incapacity which precludes giving consent; Class C felony); KY. REV. STAT. ANN. § 510.035 (West 2002) *updated* 2002 Kentucky Laws Ch. 259 (S.B. 25) (marriage is a defense to sexual intercourse, deviate sexual intercourse, or sexual contact if the spouse is mentally retarded); MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his or her spouse being under age 16, mentally incapable or mentally incapacitated); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 MINN. SESS. LAW. SERV. CH. 381 (S.B. 2433) (West) (spouse does not commit criminal sexual conduct in third or fourth degree if actor knows or has reason to know that complainant is mentally impaired, mentally incapacitated, or physically helpless); N.H. REV. STAT. ANN. § 632-A:2(I)(h) (2002) (spouses are exempt from prosecution under aggravated felonious sexual assault if victim is “mentally defective and the actor knows or has reason to know that the victim is mentally defective”); R.I. GEN. LAWS 1956 § 11-37-2 (1953–2001) (spouses exempt from first degree sexual assault if victim is mentally incapacitated, mentally disabled, or physically helpless); S.D. CODIFIED LAWS § 22-22-7.2 (Michie 1968–2002) (spouses exempt from sexual contact when person is incapable of consenting, Class 4 felony); WASH. REV. CODE ANN. § 9A.44.050(c) (West 2002) (marital immunity for rape in the second degree “when the victim is developmentally disabled and the perpetrator is a person who is not married to the victim and who has supervisory authority over the victim”); WYO. STAT. ANN. § 6-2-302(iv) (Michie 1977–2001) (marital immunity from sexual assault in the first degree when the actor “knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim’s conduct”).

Surprisingly, the Rhode Island statute for first degree sexual assault provides a partial marital rape immunity if the victim is mentally incapable or physically helpless, and therefore unable to give consent, yet the statutes for second and third degree sexual assault provide no such immunity. R.I. GEN. LAWS 1956 § 11-37-2, § 11-37-4, § 11-37-6 (1953–2001).

361. Some states criminalize indecent exposure as a sexual offense. I have excluded references to indecent exposure statutes in the appendix, however, because that issue is beyond the scope of this article. *See* HAW. REV. STAT. § 707-734 (2001) *note in* 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002) (“A person commits the offense of indecent exposure if, the person intentionally exposes the person’s genitals to a person to whom the person is not married under circumstances in which the actor’s conduct is likely to cause affront.”); MONT. CODE ANN. § 45-5-504 (2001) (“A person commits the offense of

Appendix of State Sexual Offense Statutes with Marital Immunity

Statute	Relevant Statutory Provisions	Interpretation
ALABAMA		
13A-6-60: Definitions	Deviate sexual intercourse is defined as "any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another." Sexual contact is defined as "any touching of the sexual or other intimate parts of a person not married to the actor."	
13A-6-63: Sodomy in 1st degree	Engaging "in deviate sexual intercourse with another person by forcible compulsion; . . . [OR] . . . with a person who is incapable of consent by reason of being physically helpless or mentally incapacitated."	Marital immunity from sodomy in 1st degree and Sexual misconduct when engaging in deviate sexual intercourse because deviate sexual intercourse is defined as only between "persons not married to each other." See 13A-6-60.
13A-6-65: Sexual misconduct	Being a male and engaging "in sexual intercourse with a female without her consent, under circumstances other than those covered [by 1st degree rape]; or with her consent where consent was obtained by the use of any fraud or artifice; or being a female [and engaging] in sexual intercourse with a male without his consent; [OR being male or female and] engag[ing] in deviate sexual intercourse with another person under circumstances other than [1st degree sodomy]."	
13A-6-66: Sexual abuse in 1st degree	Subjecting "another person to sexual contact by forcible compulsion; [OR] . . . who is incapable of consent by reason of being physically helpless or mentally incapacitated."	Marital immunity from sexual abuse in 1st and 2nd degree because sexual contact can only occur by the touching of "intimate parts of a person not married to the actor."
13A-6-67: Sexual abuse in 2nd degree	Subjecting "another person to sexual contact who is incapable of consent by reason of some factor other than being less than 16 years old."	
	Rape in 1st degree is silent as to marital immunity.	

indecent exposure if the person knowingly or purposely exposes the person's genitals under circumstances in which the person knows the conduct is likely to cause affront or alarm in order to (a) abuse, humiliate, harass, or degrade another; or (b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person."); WASH. REV. CODE ANN. § 9A.44.100 (West 2002) (spouses exempt from indecent liberties, Class A or B felony).

ALASKA		
11.41.432(a): Defenses	“It is a defense to [2nd degree sexual assault when the offender knows that the victim is incapacitated; or unaware that a sexual act is being committed and 3rd degree sexual assault] that the offender is . . . married to the person and neither party has filed with the court for a separation, divorce or dissolution of the marriage.	Marital immunity from 3rd degree sexual assault (sexual contact) and 2nd degree sexual assault (sexual penetration) when the offender knows that the victim is “ . . . incapacitated; or unaware that a sexual act is being committed.”
11.41.432(b): Defenses	“Except as provided in (a) of this section, in a prosecution [of 1st or 2nd degree sexual assault], it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant.”	No marital immunity from 1st or 2nd degree sexual assault.
ARIZONA		
13-1401: Definitions	Spouse is defined as “a person who is legally married and cohabiting.”	
13-1404: Sexual abuse	“Intentionally or knowingly engaging in sexual contact with any person fifteen or more years of age without consent of that person”	Marital immunity because marital defense is allowed. See 13-407 .
13-1406: Sexual assault	“Intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.” Punished as class 2 felony.	Spousal sexual assault is punished more lenient than sexual assault, shown by the lesser class felony and the judge’s ability to reduce the sentence even further at his or her discretion. Sexual assault of a spouse also requires the use of force, while sexual assault does not.
13-1406.01: Sexual assault of a spouse	“Intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.” Punished as class 6 felony; judge has “discretion for conviction of a class 1 misdemeanor with mandatory counseling.”	
13-1407: Defenses	It is a defense to a prosecution of sexual abuse “that the person was the spouse of the other person at the time of commission of the act. It is not a defense to a prosecution [of sexual assault of a spouse] that the defendant was the spouse of the victim at the time of commission of the act.”	

CALIFORNIA		
261.6: Consent	A current or previous dating or marital relationship shall not be sufficient to constitute consent where it is at issue in prosecution of a rape, rape of a spouse, sodomy, lewd or lascivious acts, or forcible acts of sexual penetration	
262: Rape of a spouse	“Rape of a person who is the spouse of the perpetrator is an act of sexual intercourse accomplished . . . [by] force, violence, . . . fear of immediate and unlawful bodily injury . . . ; where a person is prevented from resisting by any intoxicating . . . substance . . . ; [OR] where a person is at the time unconscious of the nature of the act” Violation must be reported within one year of the violation, unless the allegation can be corroborated by independent, admissible evidence. Sexual battery, rape, sodomy, lewd or lascivious acts and forcible sexual penetration are silent as to marital immunity	The reporting requirements required under the spousal rape charge do not exist for rape.
CONNECTICUT		
53A-65: Definitions	Definitions for sexual intercourse and sexual contact are limited to “persons not married to each other.”	
53a-67: Affirmative defenses	In any prosecution for an offense, except an offense [of 1st degree sexual assault, 1st degree aggravated sexual assault, spousal sexual assault, 2nd or 3rd degree sexual assault or 3rd degree sexual assault with a firearm], it shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship.”	Not only is there a marital immunity for 4th degree sexual assault (see 53a-73a), but cohabitation is an affirmative defense for 4th degree sexual assault.
53a-70: Sexual assault, 1st degree	Compelling “another person to engage in sexual intercourse by the use of force against such other person . . . or by the threat of use of force against such other person, . . . [OR] engages in sexual intercourse with another person and such other person is mentally incapacitated to the extent that such other person is unable to consent to such sexual intercourse.”	Marital immunity from 1st degree sexual assault, because the meaning of sexual intercourse “is “limited to persons not married to each other.”
53a-70a: Aggravated sexual assault, 1st degree	Committing sexual assault in 1st degree, “and in the commission of such offense such person uses or is armed with and threatens the use of . . . a deadly weapon, with intent to disfigure the victim seriously...under circumstances evincing an extreme indifference to human life”	Marital immunity from 1st degree aggravated sexual assault, because a spouse cannot be convicted of 1st degree sexual assault.

CONNECTICUT (CONTINUED)		
53a-70b: Sexual assault in spousal or cohabitating relationship	“No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.” Sexual intercourse is defined for purposes of this provision as including persons married to each other.	Requires the use of or threat of the use of force. No provision against engaging in sexual intercourse with a person who is mentally incapacitated, as in 1st degree Sexual Assault.
53a-71: Sexual assault, 2nd degree	Engaging in sexual intercourse with another person and “. . . such other person is physically helpless . . .”	Marital immunity from 2nd, 3rd degree sexual assault, because the meanings of sexual intercourse and sexual contact are limited to persons not married to the actor.
53a-72a: Sexual assault, 3rd degree	Compelling “another person to submit to sexual contact by the use of force . . . or by the threat of use of force against such other person or against a third person . . .”	Marital immunity from 3rd degree sexual assault with a firearm because a spouse can not be convicted of 3rd degree sexual assault.
53a-72b: Sexual assault, 3rd degree with a firearm	Committing sexual assault in 3rd degree, “and in the commission of such offense such person uses or is armed with and threatens the use of . . . a pistol, revolver, machine gun, rifle, shotgun or other firearm.”	Marital immunity from 4th degree sexual assault because of definition of sexual contact.
53a-73a: Sexual assault, 4th degree	Intentionally subjecting “another person to sexual contact who is . . . mentally incapacitated to the extent that he is unable to consent to such sexual contact, or physically helpless . . .”	Marital immunity from 4th degree sexual assault because of definition of sexual contact.
HAWAII		
707-700: Definitions	“‘Married’ includes persons legally married, and a male and female living together as husband and wife regardless of their legal status, but does not include spouses living apart.” ‘Sexual contact’ means any touching of the sexual or other intimate parts of a person not married to the actor.”	
707-732: Sexual assault, 3rd degree	“Recklessly subject[ing] another person to an act of sexual penetration by compulsion; . . . knowingly subject[ing] to sexual contact another person who is...mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor; [OR] knowingly, by strong compulsion, [having] sexual contact with another person or caus[ing] another person to have sexual contact with the actor.”	Marital and cohabitant immunity from 3rd and 4th degree sexual assault whenever the crime involves sexual contact because sexual contact is defined as “touching of the sexual or other intimate parts of a person not married to the actor” and “married” includes any male and female living together as husband and wife.

HAWAII (CONTINUED)		
707-733: Sexual assault, 4th degree	Knowingly subjecting “another person to sexual contact by compulsion or caus[ing] another person to have sexual contact with the actor by compulsion; . . . knowingly expos[ing] the person’s genitals to another person under circumstances in which the actor’s conduct is likely to alarm the other person or put the other person in fear of bodily injury; [OR] . . . knowingly trespass[ing] on property for the purpose of subjecting another person to surreptitious surveillance for the sexual gratification of the actor.”	
1st and 2nd degree sexual assault are silent as to marital immunity		
IDAHO		
18-6107: Rape of a spouse	“No person shall be convicted of rape for any act or acts with that person’s spouse, except [where she is overcome by force, threatened with immediate and great bodily harm, or intoxicated against her will by the offender].” Forcible sexual penetration by use of foreign object is silent as to marital immunity	Marital immunity from rape unless force or nonconsensual intoxication is used.
ILLINOIS		
5/12-18: General provisions	“Prosecution of a spouse of a victim . . . for any violation by the victim’s spouse of [criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse] is barred unless the victim reported such offense to a law enforcement agency or the State’s Attorney’s office within 30 days after the offense was committed, except when the court finds good cause for the delay.”	Marital immunity from all charges of sexual assault and sexual abuse made more than 30 days after offense was committed, except where court finds good cause for delay.
IOWA		
709.4: Sexual abuse, 3rd degree	Committing “sexual abuse in the third degree when the person performs a sex act . . . [and] the act is done by force or against the will of the other person, whether or not the other person is the person’s spouse or is cohabitating with the person; . . . the act is performed while the other person is under the influence of a controlled substance, . . . and the controlled substance prevents the other person from consenting to the act and the person performing the act knows or should have known that the other person was under the influence of the controlled substance . . . ; [OR] the act is performed while the other person is mentally incapacitated, physically incapacitated, or physically helpless.	No marital immunity when force is used against the will of the person. Implicit marital immunity when the act is performed while the other person is under the influence of a controlled substance or when the act is performed while the other person is mentally or physically or physically helpless.
1st and 2nd degree sexual abuse are silent as to marital immunity.		

KANSAS		
21-3501: Definitions	Spouse is defined as "a lawful husband or wife, unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance or divorce or for relief under the protection from abuse act."	Must file some kind of legal separation action in order to be considered not married.
21-3517: Sexual battery	"The intentional touching of the person of another who is 16 or more years of age, who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another." Rape, Aggravated criminal sodomy and Aggravated sexual battery are silent as to marital immunity.	Marital immunity from sexual battery.
LOUISIANA		
43: Simple rape	Committing "anal, oral, or vaginal sexual intercourse . . . without the lawful consent of a victim who is not the spouse of the offender . . . when the victim is incapable of resisting or of understanding the nature of the act by reason of a stupor or abnormal condition of mind produced by an intoxicating agent or any cause, other than the administration by the offender of any narcotic or anesthetic agent or other controlled dangerous substance and the offender knew or should have known of the victim's incapacity; [OR] when the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act and the offender knew or should have known of the victim's incapacity." "For purposes of this Section, a person shall not be considered to be a spouse if a judgment of separation from bed and board has been rendered, or if the person and the offender are not legally separated but are living separate and apart [AND] the offender knows that a temporary restraining order, preliminary or permanent injunction, or other order or decree has been issued . . . restraining the offender . . ."	Marital immunity from simple rape, defined as raping one's spouse when she is incapable of resisting because of intoxication or because she is incapable of understanding the nature of the act, through unsoundness of mind. In order to be considered not a spouse, one must have a judgment of separation or must be living separate and apart from her spouse and have a temporary restraining order issued.
43.1: Sexual battery	Intentionally "engaging in any of the following acts with another person, who is not the spouse of the offender, where the offender acts without consent of the victim . . .: the touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender; [OR] the touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim." Rape, Aggravated rape, Forcible rape, and Aggravated sexual battery are silent as to marital immunity	Marital immunity from sexual battery

MARYLAND		
3-304: Rape, 2nd degree	Engaging "in vaginal intercourse with another by force, or the threat of force, without the consent of the other; [OR] if the victim is a . . . mentally incapacitated individual or a physically helpless individual, and the person performing the act knows or reasonably should know" this.	Marital immunity from rape in 2nd degree, defined as raping victim who is mentally incapacitated, but no immunity when force used
3-307: Sexual offense, 3rd degree	Engaging "in sexual contact with another person without the consent of the other;" and using any of the attendant circumstances listed under Rape in the 1st degree [OR] engaging "in sexual contact with another if the victim is a mentally . . . incapacitated individual or a physically helpless individual, and the person performing the act knows or should know" this.	Marital immunity from 3rd degree rape when person is mentally incapacitated or physically helpless. No immunity when force and non-consent are used or when couple is under decree of limited divorce.
3-318: Spousal defense	"A person may not be prosecuted under [1st or 2nd degree rape, or 3rd degree sexual offense] for a crime against a victim who was the person's legal spouse at the time of the alleged rape or sexual offense" except for the following: "A person may be prosecuted under [1st degree rape], [2nd degree rape by force or threat of force without consent of the other], or [3rd degree sexual offense employing a dangerous weapon or seriously injuring the victim without consent of the victim] if at the time of the alleged crime the person and the person's legal spouse have lived apart, without cohabitation and without interruption under a written separation agreement executed by the person and the spouse; or for at least 3 months immediately before the alleged rape or sexual offense; [OR] the person in committing the crime uses force and the act is without consent of the spouse." "A person may be prosecuted under [1st or 2nd degree rape], or [3rd degree sexual offense] for a crime against the person's legal spouse if at the time of the alleged crime the person and the spouse live apart, without cohabitation and without interruption, under a decree of limited divorce."	Marital immunity from forcible crimes unless the parties have lived apart under a written separation agreement or have been living apart for at least 3 months following the crime OR unless force is used without consent. Marital immunity from all rape and 3rd degree sexual offense unless "at the time of the alleged crime the person and the spouse live apart, without cohabitation and without interruption, under a decree of limited divorce." Marital immunity from 2nd degree rape or 3rd degree sexual offense involving a mentally incapacitated individual, unless the couple is under a decree of limited divorce.
MICHIGAN		
750.5201: Married persons	"A person may be charged and convicted [for first, second, third, or fourth degree criminal sexual conduct] even though the victim is his or her legal spouse. However, a person may not be charged or convicted solely because his or her legal spouse is . . . mentally incapacitated."	Marital immunity only from all criminal sexual conduct charges when committed against a mentally incapacitated spouse.

MINNESOTA		
609.344: Criminal sexual conduct, 3rd degree	Engaging "in sexual penetration with another person . . . if . . . the actor uses force or coercion to accomplish the penetration; [OR] the actor knows or has reason to know that the complainant is mentally . . . incapacitated or physically helpless . . ."	Marital and cohabitant immunity from sexual conduct in 3rd and 4th degree, which is sexual penetration or contact with someone who is
609.345: Criminal sexual conduct, 4th degree	Engaging "in sexual contact with another person . . . if . . . the actor uses force or coercion to accomplish the sexual penetration . . . ; [OR] the actor knows or has reason to know that the complainant is mentally . . . incapacitated or physically helpless . . ."	incapacitated or physically helpless or unless the actor uses force or coercion to accomplish the act.
609.349: Voluntary relationships	"A person does not commit criminal sexual conduct [in the 3rd or 4th degree when the actor knows or has reason to know that the complainant is mentally incapacitated or physically helpless], if the actor and complainant were adults cohabiting in an ongoing voluntary sexual relationship at the time of the alleged offense, or if the complainant is the actor's legal spouse, unless the couple is living apart and one of them has filed for legal separation or dissolution of the marriage. Nothing in this section shall be construed to prohibit or restrain the prosecution for any other offense committed by one legal spouse against the other."	Marital and cohabitant immunity from sexually penetrating or contacting the complainant if she is mentally incapacitated or physically helpless at the time, unless the couple is living apart and one of them has filed for legal separation.
	No immunity from 1st, 2nd, or 5th degree sexual conduct	
MISSISSIPPI		
97-3-99: Defense of marriage	"A person is not guilty of [sexual battery] if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim."	Marital immunity for sexual battery when victim is mentally incapacitated physically helpless or when she does not consent. No immunity for forcible penetration or if couple is separated and living apart.

NEW YORK		
130.00: Definitions	Deviate sexual intercourse is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva. Sexual contact is defined as "any touching of the sexual or other intimate parts of a person not married to the actor" Not married is defined as "the lack of an existing relationship of husband and wife between the female and the actor which is recognized by law, [OR] the existence of the relationship of husband and wife between the actor and which is recognized by law at the time the actor commits an offense . . . by means of forcible compulsion against the female [AND] the female and actor are living apart at such time pursuant to a valid and effective order issued by a court, decree or judgment of separation, or written agreement of separation subscribed by them."	
130.20: Sexual misconduct	Engaging "in sexual intercourse with another person without such person's consent; [OR] engag[ing] in deviate sexual intercourse with another person without such person's consent"	Marital immunity from sexual misconduct involving deviate sexual intercourse because deviate sexual intercourse can only be between "persons not married."
130.40: Sodomy, 3rd degree	Engaging "in deviate sexual intercourse with a person who is incapable of consent by reason of some factor other than being less than 17 years old; [OR] engag[ing] in deviate sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent."	Marital immunity from all sodomy crimes because deviate sexual intercourse can only be between "persons not married."
130.45: Sodomy, 2nd degree	Engaging "in deviate sexual intercourse with another person who is incapable consent by reason of being mentally disabled or mentally incapacitated."	
130.45: Sodomy, 1st degree	Engaging "in deviate sexual intercourse with another person by forcible compulsion; [OR] who is incapable of consent by reason of being physically helpless"	

NEW YORK (CONTINUED)		
130.55: Sexual abuse, 3rd degree	Subjecting "another person to sexual contact without the latter's consent."	Marital immunity from all sexual abuse crimes because sexual contact can only be the touching of "a person not married to the actor."
130.60: Sexual abuse, 2nd degree	Subjecting "another person to sexual contact and when such other person is incapable of consent by reason of some factor other than being less than 17 years old."	
130.65: Sexual abuse, 1st degree	Subjecting "another person to sexual contact by forcible compulsion; [OR] when the other person is incapable of consent by reason of being physically helpless." 1st, 2nd, 3rd degree rape, 1st, 2nd, 3rd, 4th degree aggravated sexual abuse are silent as to marital immunity	
NEVADA		
200.373: Sexual assault of spouse by spouse	"It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force."	Marital immunity from sexual assault unless committed by force or threat of force.
OHIO		
2907.01: Definitions	Spouse is defined as "a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when . . . the parties have entered into a written separation agreement . . . ; during the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation."	In order to not be considered a spouse of another, the parties must have entered into a written separation agreement.
2907.02: Rape	Engaging "in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when . . . for the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception; [OR] . . . the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe" this.	Marital immunity from rape when the offender administers an intoxicant against the will of the other or when the other person is impaired because of a mental or physical condition, unless the couple is living apart.
	"No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." "It is not a defense to a charge [of forced rape] that the offender and the victim were married or were cohabiting at the time of the commission of the offense."	Marital rape immunity unless force is used.

OHIO (CONTINUED)		
2907.03: Sexual battery	“No person shall engage in sexual conduct with another, not the spouse of the offender, when the offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution; the offender knows that the other person’s ability to appraise the nature of or control the other person’s own conduct is substantially impaired; [OR] the offender knows that the other person submits because the other person is unaware that the act is being committed.”	Marital immunity from sexual battery when the sexual conduct is coerced, the other person’s ability to understand what is going on is substantially impaired or the other person is unaware the act is being committed.
2907.05: Gross sexual imposition	“No person shall have sexual contact with another, not the spouse of the offender; or cause another, not the spouse of the offender, to have sexual contact with the offender . . . when . . . the offender purposely compels the other person, or one of the other persons, to submit by force or threat of force; for the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception; [OR] the ability of the other person to resist or consent . . . is substantially impaired because of a mental or physical condition . . .”	Marital immunity from gross sexual imposition when the victim is compelled to submit by force, the offender administers an intoxicant against the will of the person to prevent resistance, or the victim is substantially impaired because of a mental or physical condition.
2907.06: Sexual imposition	“No person shall have sexual contact with another, not the spouse of the offender; or cause another, not the spouse of the offender, to have sexual contact with the offender . . . when . . . the offender knows that the sexual contact is offensive to the other person . . . or is reckless in that regard; the offender knows that the other person’s . . . ability to appraise the nature of or control the offender’s or touching person’s conduct is substantially impaired; [OR] the offender knows that the other person . . . submits because of being unaware of the sexual contact.”	Marital immunity from sexual imposition when the offender knows that the contact is offensive, that the other person’s ability to understand the act is substantially impaired, or that the other person is unaware of the contact.

OKLAHOMA		
1111: Definition of rape	<p>“An act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator . . . where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent; where force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person; where the victim is intoxicated by a narcotic . . . administered by or with the privity of the accused as a means of forcing the victim to submit; [OR] where the victim is at the time unconscious of the nature of the act and this fact is known to the accused.”</p> <p>“Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.”</p>	<p>Marital rape immunity where the victim is incapable of giving legal consent because of unsoundness of mind, the victim is administered an intoxicant against her will, or the victim is unconscious.</p> <p>Marital rape immunity unless force or the threat of force is used.</p>
1111.1: Rape by instrumentation	<p>“An act within or without the bonds of matrimony in which any inanimate object or any part of the human body, not amounting to sexual intercourse is used in the carnal knowledge of another person without his or her consent and penetration of the anus or vagina occurs to that person.”</p>	<p>No marital rape immunity from by instrumentation.</p>
1114: Rape, 1st & 2nd degree	<p>“Rape in the first degree shall include: rape committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime; or rape accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the person committing the crime; [OR] rape by instrumentation resulting in bodily harm . . .”</p> <p>“In all other cases, rape or rape by instrumentation is rape in the second degree.”</p>	<p>Marital rape immunity for 1st & 2nd degree rape unless force or threat of force is used.</p> <p>See 1111.</p> <p>No marital rape immunity for rape by instrumentation.</p>

RHODE ISLAND		
11-37-1: Definitions	Spouse is defined as "a person married to the accused at the time of the alleged sexual assault, except that the person shall not be considered the spouse if the couple is living apart and a decision for divorce has been granted, whether or not a final decree has been entered."	In order to not be considered a spouse of another, the parties must be living apart and a decision for divorce must have been granted.
11-37-2: Sexual assault, 1st degree	Engaging "in sexual penetration with another person . . . if . . . the accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated . . . or physically helpless; the accused uses force or coercion; [OR] the accused, through concealment or by the element of surprise, is able to overcome the victim . . ."	Marital immunity from sexual assault if the accused knows that the victim is mentally incapacitated or physically helpless.
	2nd degree sexual assault is silent as to marital immunity.	
SOUTH CAROLINA		
16-3-615: Spousal sexual battery	"Sexual battery . . . when accomplished through use of aggravated force, defined as the use of or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse if they are living together, constitutes a felony of spousal sexual battery and, upon conviction, a person must be imprisoned not more than ten years." "The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for that spouse to be prosecuted for this offense."	Conviction of spousal sexual battery results in a prison term of not more than ten years, less than given for 1st or 2nd degree criminal sexual conduct, and requires aggravated force. Must report spousal sexual battery within 30 days of the offense.
16-3-652: Criminal sexual conduct, 1st degree	Engaging "in sexual battery with the victim . . . if . . . the actor uses aggravated force to accomplish sexual battery; . . . [OR] the actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering . . . a controlled substance . . ." "Punishable by imprisonment for not more than thirty years . . ."	Marital immunity from 1st and 2nd degree sexual conduct unless spouses are living apart. Punished more harshly than spousal sexual battery

SOUTH CAROLINA (CONTINUED)		
16-3-653: Criminal sexual conduct, 2nd degree	Using "aggravated coercion to accomplish sexual battery . . . Punishable by imprisonment for not more than twenty years . . ."	
16-3-654: Criminal sexual conduct, 3rd degree	Engaging "in sexual battery with the victim . . . if . . . the actor uses force or coercion to accomplish the sexual battery in the absence of aggravating circumstances; the actor knows or has reason to know that the victim is . . . mentally incapacitated or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery . . . Punishable by imprisonment for not more than ten years . . ."	Marital immunity from 3rd degree criminal sexual conduct. Punishment is equal to spousal sexual battery.
16-3-658: Criminal sexual conduct: where victim is spouse	"A person cannot be guilty of criminal sexual conduct [in 1st, 2nd, or 3rd degree] if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree . . . The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses."	Victim and offender must be living apart, the offender's conduct must be that of 1st or 2nd degree criminal sexual assault, and the conduct must be reported within 30 days in order to convict spouse for criminal sexual conduct.
SOUTH DAKOTA		
22-22-7.2: Sexual contact with person incapable of consenting	Knowingly engaging "in sexual contact with another person, other than his spouse . . . if the other person is incapable, because of physical or mental incapacity, of consenting to sexual contact."	Marital immunity from sexual contact with person incapable of consenting.
22-22-7.4: Sexual contact without consent with person capable of consenting	"No person . . . may knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, has not consented to such contact." 1st and 2nd degree rape are silent as to marital immunity.	Marital immunity from sexual contact without consent with person capable of consenting.

TENNESSEE		
39-13-507: Spousal exclusion	<p>“A person does not commit an offense...if the victim is the legal spouse of the perpetrator except” for: “Spousal rape’ means the unlawful sexual penetration of one spouse by the other where the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon, or the defendant causes bodily injury to the victim; [OR] the spouses are living apart and one of them has filed for separate maintenance or divorce.” Spousal rape is class C felony.</p> <p>“Aggravated spousal rape’ is the unlawful sexual penetration of one spouse by the other where the defendant knowingly engaged in conduct that was especially cruel, vile and inhumane to the victim during commission of the offense; [AND] either causes serious bodily injury to the victim or is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.” Class B felony.</p> <p>“Spousal sexual battery’ means the unlawful sexual contact by one spouse of another where the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon; the defendant causes serious bodily injury to the victim; [OR] the spouses are living apart and one of them has filed for separate maintenance or divorce.” Class D felony.</p>	<p>Spousal rape requires either a weapon, bodily injury or spouses living apart.</p> <p>Aggravated spousal rape requires especially cruel, vile and inhuman conduct against the spouse and either serious bodily injury or being armed with a weapon. Spousal sexual battery requires either a weapon, bodily injury or spouses living apart. A spouse can be convicted of spousal rape, aggravated spousal rape and spousal sexual battery but they are punished less severely and require more force than rape, aggravated rape and aggravated sexual battery.</p>

VIRGINIA		
18.2-61: Rape	<p>Having "sexual intercourse with a complaining witness who is not his or her spouse . . . and such act is accomplished against the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person; [OR] through the use of the complaining witness's mental incapacity or physical helplessness . . ."</p> <p>"If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse of another, he or she shall be guilty of rape."</p> <p>"All or part of any sentence imposed for a violation of [spousal rape] may be suspended upon the defendant's completion of counseling or therapy . . . if . . . the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness."</p> <p>"Upon a finding of guilt [of spousal rape] . . . the court, without entering a judgment of guilt . . . may defer proceedings and place the defendant on probation pending completion of counseling or therapy If such counseling is completed . . . , the court may discharge the defendant and dismiss the proceedings against him if . . . the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness."</p>	<p>Marital rape immunity unless defendant uses force. Sentence may be suspended if the defendant completes counseling. If tried without a jury, his conviction may even be deferred and ultimately dismissed if he completes counseling.</p>
18.2-67.1: Forcible sodomy	<p>Engaging in "cunnilingus, fellatio, analingus, or anal intercourse with a complaining witness who is not his or her spouse, or caus[ing] a complaining witness whether or not his or her spouse, to engage in such acts with any other person, and . . . the act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness."</p> <p>"An accused shall be guilty of forcible sodomy if [he engages in forcible sodomy] and such act is accomplished against the will of the spouse, by force, threat or intimidation of or against the spouse or another person."</p> <p>"However, no person shall be found guilty . . . unless, at the time of the alleged offense, the spouses were living apart, or the defendant caused bodily injury to the spouse by the use of force or violence."</p> <p>The court may commute or defer sentences for spousal forcible sodomy in the same way as listed under Rape.</p>	<p>Marital immunity unless the defendant uses force and causes bodily injury or unless living apart from his spouse. Sentence may be suspended if the defendant completes counseling. If tried without a jury, his conviction may even be deferred and ultimately dismissed if he completes counseling.</p>

VIRGINIA (CONTINUED)		
18.2-67.2: Object sexual penetration	<p>Penetrating "the labia majora or anus of a complaining witness who is not his or her spouse with any object, . . . or caus[ing] a complaining witness to so penetrate his or her own body with an object or caus[ing] a complaining witness, whether or not his or her spouse, to engage in such acts with any other person or to penetrate, or to be penetrated by, an animal, and . . . the act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness."</p> <p>"An accused shall be guilty of [spousal object sexual penetration] . . . if such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another person."</p> <p>"However, no person shall be found guilty . . . unless, at the time of the alleged offense, the spouses were living separate and apart or the defendant caused bodily injury to the spouse by the use of force or violence."</p> <p>The court may commute or defer sentences for object sexual penetration in the same way as listed under Rape.</p>	<p>Marital immunity unless the defendant uses force and causes bodily injury or unless living apart from his spouse. Sentence may be suspended if the defendant completes counseling. If tried without a jury, his conviction may even be deferred and ultimately dismissed if he completes counseling.</p>
18.2-67.2:1: Marital sexual assault	<p>Engaging "in sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with his or her spouse, or penetrat[ing] the labia majora or anus of his or her spouse with any object . . . or caus[ing] such spouse to so penetrate his or her own body with an object, and such act is accomplished against the spouse's will by force or a present threat of force or intimidation of or against the spouse . . ." The court may commute or defer sentences for marital sexual assault in the same way as listed under Rape. Punishable by confinement of not more than twenty years. Sexual battery and aggravated sexual battery are silent as to marital immunity.</p>	<p>Spouse must use force or a present threat of force. Sentence may be suspended if the defendant completes counseling. If tried without a jury, his conviction may even be deferred and ultimately dismissed if he completes counseling.</p>

WASHINGTON		
9a.44.010: Definitions	Married is defined as “one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.”	In order not to be considered married, one must be living separate and apart from her spouse and have filed for legal separation or divorce
9A.44.060: Rape, 3rd degree	Engaging “in sexual intercourse with another person [under circumstances not constituting rape in 1st or 2nd degrees], not married to the perpetrator where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim’s words or conduct; [OR] where there is threat of substantially unlawful harm to property rights of the victim.”	Marital rape immunity from 3rd degree rape when the victim did not consent and such lack of consent was clearly expressed by the victim’s words or conduct.
9A.44.100 Indecent liberties	“Knowingly caus[ing] another person who is not his or her spouse to have sexual contact with him or her or another by forcible compulsion; [OR] when the other person is incapable of consent by reason of being . . . mentally incapacitated or physically helpless.”	Marital immunity from indecent liberties.
	1st and 2nd degree rape are silent as to marital immunity.	
WYOMING		
6-2-304: Sexual assault, 3rd degree	Subjecting “a victim to sexual contact under any of the circumstances of [1st or 2nd degree sexual assault] without inflicting sexual intrusion on the victim and without causing serious bodily injury to the victim.”	Marital immunity when no serious bodily injury is inflicted on the victim and no sexual intrusion occurs.
6-2-307: Evidence of marriage as defense	“The fact that the actor and the victim are married to each other is not by itself a defense to a violation of [1st or 2nd degree sexual assault].	By inference, marriage is a defense for 3rd degree sexual assault and sexual battery.
6-2-313: Sexual battery	“Except under circumstances constituting a violation of [1st, 2nd or 3 rd degree sexual assault], an actor who unlawfully subjects another person to any sexual contact is guilty of sexual battery.”	Marital immunity.