

THE SPOUSAL EXEMPTION FOR CRIMINAL RAPE PROSECUTION

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INTRODUCTION

There is nothing more domestic and nothing more violent than marital rape.¹

Rape is rape. The identity of the rapist does not alter the fact of his act, nor lessen its traumatic effects on his victim. The marital status of the parties involved should have no bearing on the definition of the crime of rape any more than it should on the crime of battery. . . . I believe our society is now plagued with violence because it is allowed to run rampant in the family home.²

[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 herself in this kind unto her husband, which she cannot retract.³

One of the more enduring characteristics of the western world's legal tradition is the legality of forcible spousal rape. While one measure of the progress of women toward full legal equality is the growing number of areas where husbands are forbidden to commit criminal acts against their wives, forcible spousal rape in most jurisdictions throughout the world remains a total right, surrounded by a bulwark of legal defenses for the husband. Indeed, in the mid-1970's, every state in the United States retained an exemption for a husband from prosecution for forcible rape of his wife.⁴ This legal license could also be found in Canada,⁵ England,⁶

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1. This comment is from Laura X, National Clearinghouse on Marital Rape, 2325 Oak St., Berkeley, California 94208. (Ms. X is literally spearheading a national campaign to remove the spousal exemption to rape).

2. D. MARTIN, *BATTERED WIVES* 181 (1976).

3. M. HALE, *HISTORY OF THE PLEAS OF THE CROWN* 629 (Emlin ed. 1736).

4. Bienen, *Rape III—National Development in Rape Reform Legislation*, 6 *WOMEN'S RIGHTS L. REP.* 170, 185 (1980).

5. McFadyen, *Inter-Spousal Rape: The Need for Law Reform*, *FAMILY VIOLENCE* 193 (J. Eekelaar & S. Katz ed. 1978).

France,⁷ and in much of the rest of the western world.

The sparsity of legal criticism of this exemption illustrates the unity of legal thought on the subject. With some British understatement, one commentator was struck by the virtual lack of case law on the exemption in either England or the United States: "Considering the antiquity of the rule the amount of judicial comment upon it seems scarce. Yet the rule prevails, it seems."⁸ While in the past few years legal and scholarly articles have begun to appear on the issue, there exists very little commentary on the reasons for abolishing the exemption, and the literature is almost completely silent on justifications for the rule. Considering the virtual explosion of literature on the subject of forcible rape, matched by a proliferation of writings on the subject of domestic violence in the 1970's, it is mystifying that there has been so little written which treats forcible sexual assault as a form of spousal abuse.⁹

In fact, mounting an attack upon the concept of excluding husbands from prosecution for raping their wives is a difficult proposition. With only sparse case law and legal literature supporting the exclusion it is difficult to identify just what arguments to rebut. The prospective reformer is faced with almost complete silence — except for the fact that the rule exists.

As part of a cycle of rape law reform in recent years, however, reformers have argued for the removal of the exemption before numerous public and legislative forums, with mixed results. Several states have recently removed or modified the exemption,¹⁰ but most have refused to do so. More than a few states have actually expanded the exemption,¹¹ bringing more men than ever before within the legal immunity.

Wherever the debate has taken place, a variety of arguments has surfaced to support the rule. Few of these arguments have ever been supported in any logical, legal or scientific manner. The continued existence of the marital exemption, it seems, rests upon a Hydra-like existence — as each argument is refuted by scholars,

6. Maidment, *Rape Between Spouses—A Case for Reform*, 8 *FAM. LAW* 87, 89 (1978).

7. 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, 26 (1981).

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

9. See generally Freeman, *supra* note 7, at 6.

10. See *infra* text accompanying notes 30-41.

11. See *infra* text accompanying notes 58-59. See also Schulman, *The Marital Rape Exemption in Criminal Law*, 14 *CLEARINGHOUSE REV.* 538, 539 (Oct. 1980).

another one, equally spurious, rises to take its place. There is, unfortunately, a common thread which winds its way through all of these arguments, as we shall see. O'Donnell notes: "Over the years, a number of imaginative theories have been concocted in support of the rule, and although some have a certain intuitive appeal, the bulk of them rest on conceptions of marriage which are even more imaginative."¹²

The thread which ties these arguments together consists of two parts: (1) the same sort of misogyny which accounted for most of the problems in all rape laws until recently, and (2) a conception of the relative roles of man and woman in society and marriage. To the extent that one sees man as the dominant partner in marriage and society, and woman both as the submissive partner and as a "spiteful shrew," the exemption may make some sense. These stereotypes of sex roles and marriage can, arguably, lead one to believe that men have a right to beat or at least chastise their women, or that women have a duty to provide sex for their partners on demand.

To the extent that one believes in marriage based on equality and partnership, and in the equal worth of women, the spousal exemption to forcible rape prosecution makes little logical or legal sense. This article will explore these complex social and legal problems.

I. THE SPOUSAL EXEMPTION RULE

One logical place to begin an examination of the exemption is to investigate its origins. Despite more than 320 years of technological and social change, the quote by Lord Hale which began this paper, unsupported by argument or citation, by a man perhaps better known for burning women at the stake as witches,¹³ "remains, both in England and the United States, the most frequently cited support for the husband's immunity."¹⁴

12. W. O'Donnell, *Consensual Marital Sodomy and Marital Rape—The Role of the Law and the Role of the Victim* (March 1980) (paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Oklahoma City, Okla.).

13. Geis & Geis, *Rape Reform: An Appreciative Critical Review*, 6 *BULL. AM. ACAD. PSYCH. AND L.* 301, 302 (1978). See also Geis, *Lord Hale, Witches and Rape*, 5 *BRIT. J. OF L. AND SOC.* 26 (1978).

14. Note, *The Marital Rape Exemption*, 52 *N.Y.U. L. REV.* 306, 307 n.13 (1977). See also O'Donnell, *supra* note 12, at 5; Glasgow, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 *J. FAM. L.* 565, 565 (1980).

At a point in Western history where women were little more than chattels owned by their husbands, Lord Hale was making a simple argument: since a primary element of rape is the lack of consent by the victim to sexual intercourse, and since by taking marital vows a woman agrees in advance to all acts of sexual intercourse for the life of the marriage, lack of consent can never be present when the rapist is married to the victim. Despite extreme changes in the status of women in general and married women in particular in matrimonial,¹⁵ property,¹⁶ and other areas of law, neither the argument nor the basic assumptions of Hale has been seriously questioned in the intervening years. One major treatise on sex discrimination and the law, while virtually ignoring spousal rape, does note that "forced intercourse is one of the woman's matrimonial duties" under the law, and that "this assumption is virtually universal in the Western world."¹⁷

Geis cites an example of how this argument can be extended,¹⁸ quoting from the decision of a Malawi appellate court¹⁹ which reduced the culpability of a man convicted of murder for beating his wife to death after she refused him intercourse in a hut with two other women present. "[I]t would seem reasonable for a respectable wife to refuse her husband, for example, in a public place in front of other people. But in the normal way, I doubt whether she can do so. By 'in the normal way' I mean where there is no question of sickness, monthly period or some other factor which would make it physically wrong or improper to have intercourse."²⁰ The court reduced the conviction to manslaughter, since the victim had acted wrongfully.

To understand the acceptance of this construct, however, it would be useful to examine the rape laws which existed at the time of Hale, and in prior times. It is no longer a radical idea to suggest that rape laws were originally designed to protect male property interests, rather than the victimization interests of women.²¹ For

15. *WOMEN & THE LAW* 145-78 (F. Haiman ed. 1978).

16. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, *WOMEN'S RIGHTS AND THE LAW* 160-77 (1977) [hereinafter B. BROWN].

17. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 820 (1975).

18. Geis, *Rape-in-Marriage: Law and Law Reform in England, The United States, and Sweden*, 6 *ADEL. L. REV.* 284 (1978).

19. *Republic v. Mwasumola*, 1966-68 A.L.R. Mal. 569 (1968).

20. *Id.*

21. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 *CAL. L. REV.* 919

unmarried women, the major concern of the law was the protection of the father's financial interest in having a virgin to present at marriage, or the father's interest in preventing the abduction of propertyed virgins who were later compromised into marriage,²² thus protecting the succession rights to landed property. "Once the law had accepted theft as the *sine qua non* of rape it was only logical to hold that a husband is no more capable of raping his wife than an owner is of stealing his own property."²³

A variation of this argument came from the doctrine developed by Blackstone in his *Commentaries* in the 18th century.²⁴ When a woman married, all of her property was automatically incorporated into that of the husband. Thus, a legal fiction was developed which maintained that the wife was the same person as her husband. Since a husband could not steal from himself, stealing from his wife was not a crime; a marital rape prosecution would hold the man raping himself, an interesting concept.

These historical artifacts, anomalies and anachronisms, though interesting, cannot be used to justify modern legal rules. For the most part, Blackstone's legal fiction has been dissolved in the 20th century, and, with the passage of the Married Women's Property Acts in every state, women today have an established separate legal identity. Married women can sign contracts, and acquire or dispose of property as if they were single.²⁵

Today there is no logical basis for a legal rule of marital exemption from rape unless one takes the position that the purpose of the rape law is to protect the husband's interest in the exclusive sexual possession of his wife. There may, in fact, never have been sufficient logic to defend the exemption in previous eras. Interestingly, one of the best discussions of this problem was published well over 100 years ago, in a time when married women often did not even have the option of divorce from an abusing husband. John Stuart Mill argued that the abolition of slavery for blacks left only the wives of the world as slaves.²⁶

It is the sole case, now that negro slavery has been abolished,

(1973); C. SMART, *WOMEN, CRIME AND CRIMINOLOGY* 78 (1977).

22. S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 8-13 (1975).

23. Mitra, . . . *For She Has No Right or Power to Refuse Her Consent*, 1979 *CRIM. L. REV.* 558, 560.

24. W. BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* (1965).

25. B. BROWN, *supra* note 16, at 160-77.

26. J. MILL, *THE SUBJECTION OF WOMEN* 79-80 (1970 ed.).

in which a human being in the plenitude of every faculty is delivered up to the tender mercies of another human being, in the hope foresooth that this other will use the power solely for the good of the person subjected to it. Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.²⁷

Moreover, Mill points out that the plight of the wife may be worse than that of the slave, who is often allowed to go home to his or her own life after work is done. While Mill can perhaps be accused of overstating the freedom of slaves,²⁸ he argued that the female slave was "considered under a moral obligation" to refuse to have sexual intercourse with her master, but

not so with the wife: however brutal a tyrant she may unfortunately be chained to — though she know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loath 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.²⁹

II. THE MARITAL EXEMPTION TODAY

Until only a few years ago, it was possible to state the marital rape exemption rather simply: husbands cannot be prosecuted for raping their wives, except under a few collateral circumstances. A husband may be guilty of rape if he abets the commission of a crime on his wife by another male. This rule is also often attributed to Hale.³⁰ Today there is a broad spectrum of laws, ranging from total exemption to no exemption, with a confusing and ever changing variety of partial exemptions between these two extremes.³¹ As of this writing, only five states have completely removed their exemptions. Three have done so by legislative action: Oregon,³² Nebraska³³ and New Jersey.³⁴ In the other two states,

27. *Id.*

28. S. BROWNMILLER, *supra* note 22, at 165-84.

29. J. MILL, *supra* note 26, at 32.

30. M. HALE, *supra* note 3, at 636.

31. *See supra* text accompanying note 10.

32. OR. REV. STAT. § 163.305 (1979) (amended by 1977 c. 844, deleting the marital rape exemption).

33. NEB. REV. STAT. §§ 28-319, 28-320 (1979) (repealing and replacing §§ 28-403.03 and .04).

34. N.J. STAT. ANN. § 2C:14-5(b) (West Supp. 1981) (affirmatively abrogated the com-

recent appellate court decisions in Massachusetts³⁵ and Florida³⁶ have removed presumed exemptions, although the presumption came from common law usage, not by statutory or case rulings. Three other states have removed the marital exemption for most or some sexual offenses: Minnesota,³⁷ Iowa³⁸ and New Hampshire.³⁹ Both Connecticut⁴⁰ and California⁴¹ have established a separate crime of spousal rape, which is a lesser crime than first degree forcible rape. Finally, Delaware⁴² and Hawaii⁴³ have removed the spousal exemption, but the effect of this removal may have been partially counteracted by another exemption instituted by these two states.⁴⁴ At present, therefore, there is either no marital exemption, or a new crime has been created to cover spousal rape, in at least ten states, with the situation in two additional states still uncertain.

Presumably, an example of the opposite of a complete removal of the marital rape exemption would be a state which has a total exemption, that is, where the exemption applies until the final di-

mon law exemption).

35. In *Commonwealth v. Chretien*, — Mass. —, 417 N.E.2d 1203 (1981), a unanimous decision of the Massachusetts Supreme Judicial Court held that the modernization of the statutory language defining rape in 1974 effectively eliminated the common law spouse exemption.

36. *Florida v. Smith*, — Fla. —, 401 So.2d 1126, 1127 (1981), held that Florida's new sexual battery statute does not include a marital rape exemption.

37. MINN. STAT. ANN. § 609.349 (West Supp. 1981) (affirmatively deletes the marital rape exemption in most cases).

38. IOWA CODE ANN. §§ 709.2-709-4 (Supp. 1981) (no exemption for first and second degree sexual abuse but retained in third degree).

39. 1981 N.H. LAWS (to be codified as N.H. REV. STAT. ANN. § 632-A:5) (exemption deleted).

40. CONN. GEN. STAT. ANN. § 53a-67(b) (West Supp. 1981) (effective October 1, 1981) (exemption removed from first degree forcible rape, but retained in all lesser degrees).

41. CAL. PEN. CODE §§ 262, 264 (West Supp. 1981) (effective January 1, 1980) (establishes the separate crime of marital rape). Exemption applies to other charges, and to a marital rape charge unless a crime is reported within 30 days or the victim is incapable of giving legal consent (mentally or physically handicapped, intoxicated or drugged, or unconscious). See Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A.J. 1088, 1090 (1980); Braverman, *Prosecution May be Difficult Under New Marital Rape Law*, 1980 WESTERN L.J. 4.

42. DEL. CODE ANN. tit. 11, §§ 763, 764 (Supp. 1981) (exemption for marriage deleted in first and second degree rape, but another exemption applies to "voluntary social companions," which presumably would include spouses in most cases. Exemption still applies to lesser charges, and includes both married and unmarried cohabitants).

43. HAWAII REV. STAT. §§ 707-730, 707-731, 707-732 (Supp. 1981) (marital exemption deleted, but new exemption for "voluntary social companion" may include spouses. *Id.* § 707-730 (1)(a)(i)).

44. See *infra* text accompanying note 59.

voiced decree is handed down, even if the couple lives apart or under a separation order. A flurry of legislative activity in recent years has reduced the number of states which adhere to the total exemption to eight,⁴⁵ with several of those expected to change soon.

In eleven additional states, the exemption for spouses is total until an official court separation order is handed down, at which point it ends.⁴⁶ In seven states the marital exemption is ended when one spouse files in an appropriate court for annulment, divorce, separation, or, in some cases, separate maintenance, as long as the couple is already living apart.⁴⁷

Either the filing of legal papers to end the marriage, or the act of living apart ends the protection of the marital rape exemption in Idaho⁴⁸ and New Mexico.⁴⁹ Simply living apart ends the marital exemption in another six states.⁵⁰ In the remaining seven American jurisdictions, the situation is a bit different. There is no mention of the marital exemption at all in their statutes, so application of any common law exemption is left to judicial interpretation.⁵¹ The ar-

45. ALA. CODE §§ 13A-6-60(4), 13A-6-61 (1978); ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd Supp. 1981); KAN. STAT. ANN. § 21-3502 (Supp. 1980); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1981); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1981); TEX. PENAL CODE ANN. tit. 5, § 21-02(a) (Vernon Supp. 1980); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1981); W. VA. CODE § 61-8B-1 (Supp. 1981).

46. KY. REV. STAT. ANN. §§ 510.010 (3),(8) (Baldwin 1975); LA. REV. STAT. ANN. § 14:41 (West Supp. 1981); MD. ANN. CODE art. 27, § 464D (Supp. 1981); MO. ANN. STAT. § 566.010 (Supp. 1981); N.Y. PENAL LAW § 130.00 (McKinney Supp. 1981) (exemption also ends if parties enter into a separation agreement which includes an express provision that the husband will be criminally liable for raping his wife); N.C. GEN. STAT. § 14-27.8 (1979); N.D. CENT. CODE § 12.1-20-01 (1976 & Supp. 1981); R.I. GEN. LAWS § 11-37-1 (Supp. 1980); S.C. CODE § 16-3-658 (Supp. 1981); UTAH CODE ANN. § 76-5-407 (Supp. 1981); WYO. STAT. ANN. § 6-4-307 (1977).

47. IND. CODE ANN. § 35-42-4-1(b) (Burns 1979); MICH. STAT. ANN. § 28.788 (Callaghan Supp. 1981); NEV. REV. STAT. § 200.373 (1979); OHIO REV. CODE ANN. § 2907.01(L) (Baldwin 1979); TENN. CODE ANN. § 39-3709 (Supp. 1981); WASH. REV. CODE ANN. §§ 9A.44.010, 9A.44.040, 9A.44.050, 9A.44.060 (Supp. 1981); WIS. STAT. ANN. § 940.225(6) (West Supp. 1981).

48. IDAHO CODE § 18-6107 (1979 & Supp. 1981) (parties must be living apart at least 180 days).

49. N.M. STAT. ANN. § 30-9-10E (1978).

50. ALASKA STAT. § 11.41.445(a) (Supp. 1978) (marriage is an affirmative defense, except where parties are living apart, or defendant causes serious physical injury); ARIZ. REV. STAT. ANN. § 13-1401.4 (1978); COLO. REV. STAT. § 18-3-409 (1978); IOWA CODE ANN. § 709.4 (West 1979) (exemption in third degree only); MONT. REV. CODES ANN. § 45-5-506 (1979); PA. STAT. ANN. tit. 18, § 3103 (Purdon Supp. 1981) (also applies if written separation agreement, even though still living together).

51. See, e.g., ARK. STAT. ANN. §§ 41-1801, -1803 (1977); GA. CODE ANN. § 26-2001

gument against application of the presumption has been made forcefully by Drucker,⁵³ and evidently some courts have agreed with his analysis, notably Florida⁵⁴ and Massachusetts.⁵⁴ The New Jersey Legislature decided to end the controversy over whether common law applied when statutory law was silent⁵⁵ by affirmatively denying in a statute that such an exemption existed.⁵⁶

The end result of this extensive legislative activity is a complicated set of laws. This confusing situation, however, represents an improvement in that most states have either removed or relaxed the marital exemption. Unfortunately, an alternate argument can be made that the situation is actually worse today than it was ten years ago.

In only ten states today can a married woman living in the same household as her husband be protected against forcible rape by him.⁵⁷ The remaining forty states give little, if any, regard to the actual circumstances involved. For example, all too often people assume that the rape exemptions apply only to a situation where the wife pleads a headache but is verbally coerced into sexual intercourse with her husband. Yet, these exemptions apply as well to forcible spousal rape at gunpoint in a public place.

More importantly, gains which have been made by reducing the marital rape exemption have been counteracted by a move in some states to expand the marital rape exemption to unmarried persons who had never before been considered exempt by law. Unmarried cohabitants, or persons who act as man and wife, or similar arrangements now come under the marital rape exemption in thirteen states.⁵⁸ In five of these states, the exemption has been

(Supp. 1981); MISS. CODE ANN. § 97-3-65(2) (Supp. 1980); VA. CODE § 18.2-61 (Supp. 1981); D.C. CODE ANN. § 22-2801 (1973 & Supp. VII 1980).

52. Comment, *The Common Law Does Not Support a Marital Exemption for Forcible Rape*, 5 WOMEN'S RIGHTS L. REP. 181 (1979).

53. *Florida v. Smith*, ___ Fla. ___, 401 So.2d 1126 (1981).

54. *Commonwealth v. Chretien*, ___ Mass. ___, 417 N.E.2d 1203 (1981).

55. *See State v. Smith*, 146 N.J. Super. 219, 372 A.2d 386 (1977).

56. N.J. STAT. ANN. § 2C:14-5(b) (Supp. 1981).

57. *See supra* statutes cited at notes 32-41.

58. *See, e.g.*, ALA. CODE § 13A-6-60(4) (1978); CONN. GEN. STAT. ANN. § 53a-67(b) (West Supp. 1981); DEL. CODE ANN. tit. 11, § 772(b) (1979); HAWAII REV. STAT. § 707-730(1)(a)(i) (1976 & Supp. 1980); IOWA CODE ANN. § 709.4 (West 1979); KY. REV. STAT. ANN. §§ 510.010(3),(8) (Baldwin 1975); ME. REV. STAT. ANN. tit. 17-A, § 252.2 (Supp. 1981); MINN. STAT. ANN. § 609.342 (West Supp. 1981); MONT. REV. CODE ANN. § 45-5-506 (1979); N.D. CENT. CODE § 12.1-20-03:3 (Supp. 1979); PA. STAT. ANN. tit. 18, § 3103 (Purdon Supp. 1981); TEX. PENAL CODE ANN. tit. 5, § 21.12 (Vernon 1974); W. VA. CODE § 61-8B-1(2) (1977).

broadened even further to apply to voluntary social companions, such as dates, or to men who have had consensual sexual relations with their victims within the previous year.⁵⁹ In these states, one might argue that not only have husbands been given a license to rape their wives, but that men have been licensed to forcibly rape any woman they might date, or with whom they have had sexual relations. In some cases the exemption relationship would apply even though the relationship had been ended for as long as a year.

III. THE ARGUMENTS AGAINST REMOVING THE EXEMPTION

As mentioned above, it is not a particularly easy task to rebut the arguments for retaining the marital exemption. More precisely, the arguments which exist are rebuttable, but the sources of those arguments are difficult to find. There is very little literature in existence defending the rule, other than two case notes written more than 25 years ago,⁶⁰ one 1981 law review article,⁶¹ and assorted judicial comments which briefly refer to a well-accepted rule or cite Lord Hale.⁶² Recently, legislative and public debate have spawned at least five sometimes overlapping and occasionally contradictory arguments which deserve examination.

A. *Marital Rape is Not a Serious Problem*

There are actually two separate arguments here, one quantitative and one qualitative. The quantitative argument is that the

59. DEL. CODE ANN. tit. 11, § 764(2) (1979) (exemption from first degree rape if defendant was a voluntary social companion and had previously been permitted sexual contact); HAWAII REV. STAT. § 707-730 (1)(a)(i) (1976 & Supp. 1980) (exemption from first degree rape if defendant was a voluntary social companion and had been permitted sexual intercourse within 30 days preceding alleged rape—provided no serious physical injury involved); ME. REV. STAT. ANN. tit. 17A, § 252.3 (Supp. 1970) (exemption from *Class A* rape if defendant was a voluntary social companion); N.D. CENT. CODE § 12.1-20-03.3 (Supp. 1979) (exemption from *Class A felony* if defendant was a voluntary social companion and was ever previously permitted to take "sexual liberties"); W. VA. CODE § 61-8B-3(a)(1)(iii) (1979).

60. Note, *Two Problems in the Law of Rape*, 2 U. QUEENSL. L. J. 246 (1956); Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719 (1954).

61. Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31 (1981).

62. See, e.g., *Regina v. Clarke*, [1949] 2 All E.R. 448, where Justice Byrne ruled that a husband was liable for prosecution for rape upon his wife if he so acted after the issuance of a separation order which explicitly ended all sexual rights. See also *Regina v. Miller*, [1954] 2 Q.B. 282, where Justice Lynskey ruled that Miller could not be prosecuted for rape of his wife, although a petition for divorce had been filed, since the marriage and sexual rights were still intact. While these two cases make up virtually all of the United Kingdom's 20th century case law on the subject, in neither case was the exemption defended or discussed, but rather simply presumed.

problem does not occur frequently enough to concern the criminal justice system. The qualitative argument suggests that marital rape either does not do serious damage to the victim, or alternatively, that the damage caused is not comparable with that resulting from other forms of rape (and therefore the forcible rape law should not apply).

On the quantitative issue, the information that exists is merely suggestive of the extent of the problem. Several reported studies of rape victims, for example, have shown that the percentage of cases where the rapist was the husband is quite low.⁶³ Most of the information we do have is anecdotal, consisting of case studies and interviews with raped wives.⁶⁴

There are reasons why this lack of data exists. In jurisdictions where marital rape is not a crime, it is unrealistic to expect wives to report such incidents as rape,⁶⁵ even to rape crisis centers. Presumably, married women would only report sexual assault by their husbands in the context of other serious assaults, and perhaps not even then, if they believe that, under the law of that jurisdiction, the crime of rape has not been committed.

One of the problems with some studies is improper methodology. Rather than questioning rape victims on the identity of their assailants,⁶⁶ researchers should have interviewed victims of serious spousal assaults and asked whether this assault included forcible rape. In two studies conducted in this way, a significant number of battered wives reported one or more episodes of marital rape. Pagelow, for example, in a survey of 325 spousal assault victims, found that 119 (37%) reported being sexually assaulted by their husbands.⁶⁷ Frieze found that 34% of 137 battered women reported marital rape.⁶⁸ In one study of the general population, Russell's probability sample of 644 married or formerly married women in the San Francisco area, 78 (or 12%) reported that they

63. I. Frieze, *Causes and Consequences of Marital Rape* 4-6 (Sept. 1980) (paper presented at the annual meeting of the American Psychological Association, Montreal).

64. D. MARTIN, *supra* note 2, at 1-10; D. RUSSELL, *THE POLITICS OF RAPE* (1974); L. WALKER, *THE BATTERED WOMAN* (1979); Gelles, *No Place to Go: The Social Dynamics of Marital Violence in BATTERED WOMEN* 46 (M. Roy ed. 1977).

65. See Freeman, *supra* note 7, at 6.

66. See, e.g., P. Bart, *Rape Doesn't End With a Kiss*, *VIVA*, June 1975, at 39.

67. M. Pagelow, *Double Victimization of Battered Women: Victimized by Spouses and the Legal System* 7 (Nov. 8, 1980) (paper presented at the annual meeting of the American Society of Criminology, San Francisco).

68. Frieze, *supra* note 63, at 15.

had experienced rape or attempted rape by their husbands or then-husbands.⁶⁹ These figures can be considered as conservative, both Pagelow and Russell argue, since they do not include women who later reported that they had answered no to the question because they had always submitted to prevent forcible rape, or women who had been the victims of forcible sexual acts other than vaginal intercourse (although in many states, such acts may be considered to be rape under current legal definitions of the crime).⁷⁰

Frieze, interestingly, used a matched sample of women as a control group of women who had not ever reported battering or rape, and discovered instances of battering among this group, including some cases of marital rape.⁷¹ She suggests that the incidence of marital rape could be considered to be about 3% of the sample of non-battered women, and about 6% of the entire sample of married women.⁷² Even assuming the accuracy of the lower figure, 3%, she argues that the incidence of marital rape is far higher than the projections of women raped by strangers,⁷³ a suggestion which others who have studied marital rape have made.⁷⁴

When one considers other surveys which have shown that women are less likely to report sexual assault when the assaulter is related to or an acquaintance of the victim,⁷⁵ it can be assumed that there are substantial numbers of victims and potential victims who would be served by a law criminalizing marital rape.

The qualitative argument is that marital rape is not a serious

69. D. Russell, *The Prevalance and Impact of Marital Rape in San Francisco* 2 (Aug. 1980) (paper presented at the annual meeting of the American Sociological Association, New York City).

70. D. Russell, *Rape in Marriage: A Case Against Legalized Crime* 7-9 (Nov. 8, 1980) (paper presented at the annual meeting of the American Society of Criminology, San Francisco). See, e.g., OHIO REV. CODE ANN. §§ 2907.01, 2907.02 (Baldwin 1979).

71. Frieze, *supra* note 63, at 15.

72. *Id.* at 16.

73. *Id.* at 14.

74. See, e.g., A. GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* (1979); Gelles, *Power, Sex and Violence*, 26 *FAM. COORDINATOR* 339 (1977).

75. M. AMIR, *PATTERNS OF FORCIBLE RAPE* (1971); Freeman, *supra* note 7; U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CRIMINAL VICTIMIZATION IN THE U.S.* 1978 73-74 (1981); KLEMMACK & KLEMMACK, *THE SOCIAL DEFINITION OF RAPE, SEXUAL ASSAULT* 135, 142 (Walker and Brodsky, eds. 1976); P. Rhoades, *Acquaintance Rape: Implications for Policing* (1979) (paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Cincinnati, Ohio); L. Braithewaite and S. Caringella-MacDonald, *Criminal Sexual Conduct in a Midwestern City* 41 (1981) (unpublished paper, Western Michigan University).

crime, since the victim does not suffer, or at least does not suffer as much as the victim of assault by a stranger. Hilf states the case for this argument:

[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. Moreover, the harm caused by spousal rape would seem to be less severe than the harm caused by non-spousal 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.⁷⁶

It is unclear from Hilf's argument whether he is saying that the lack of harm from spousal rape is that the victim does not suffer, or whether he is saying that society is not harmed by a victim's suffering, since she should expect some suffering when she gets married. The latter is not a particularly useful notion, unless one wishes to use it to decriminalize spousal murder, spousal aggravated assault, spousal kidnapping or other felonies committed upon one's spouse.

Amir has suggested that, in rape situations, the closer the relationship between the victim and the offender, the greater the likelihood that the woman will resist and be subject to violence.⁷⁷ Workers in rape crisis centers often argue that marital rapes are characterized by some of the most serious physical abuse. Like robbery, rape commonly depends on surprise and fear to paralyze victims, or at least to gain compliance. An armed stranger is often able to convince his victim of the futility of struggle and most often accomplishes the rape with a minimum of physical injury (leaving out for the time being questions of mental or emotional harm). While there are different types of rapists, it is known that serious resistance by the victim scares the rapist who fears being apprehended, who may then run off leaving the victim physically unharmed.⁷⁸ In many household situations, neither of these elements is present. The husband is neither afraid of the law nor scared off by struggles. Further, the woman is not confronted by an armed stranger, but a man she knows intimately. She is less afraid of him, and much more willing to resist his attack. This leaves the

76. Hilf, *supra* note 61, at 41.

77. AMIR, *supra* note 75, at 239-46.

78. See, e.g., Selkin, *Rape: When to Fight Back*, PSYCH. TODAY, Jan. 1975, at 71.

husband who is determined to complete his attack no alternative but to use superior physical force to accomplish the rape. Rape crisis center counselors have claimed that some of the most seriously injured women, particularly in injuries to vaginal walls, are raped spouses.

While there has been little work done on the long-term effects of rape on victims in general, there has been even less done on the long-term effects on spousal rape victims. Russell found that women raped by their husbands reported at a higher rate a great and upsetting effect on their lives than did women raped by a stranger.⁷⁹

The evidence, while certainly very preliminary, should still be recognized as sufficient to argue that marital rape is a significant enough problem for concern, both quantitatively and qualitatively.

B. *The Criminal Law is Not an Appropriate Forum to Deal with Marital Rape*

The argument that criminal law is inappropriate to deal with spousal rape takes many forms. It suggests that the solution requires counseling and mediation, and that the criminal law should not diminish the possibility of reconciliation between the victim and the rapist. Other versions of the argument suggest that the law should not invade the sanctity of the marital relationship, or that the public should not interfere with the marital intimacy.

Some of these arguments are not even worthy of lengthy rebuttal. A major parliamentary argument in England against removing the exemption was that women might file charges and then reconcile with their husbands, thus wasting police time.⁸⁰ Freeman points out that, although this already happens in assault cases, there has been little demand for the exemption of husbands from prosecution for aggravated assault against their wives.⁸¹ This argument ignores the deterrent, moral and educative functions of law.

Hilf supports reconciliation rather than “[a]llowing access to the criminal justice system for every type of marital dispute [which] will discourage resolution by the spouses and make their

79. Russell, *supra* note 69, at 8.

80. Freeman, *supra* note 7, at 20.

81. *Id.*

ultimate reconciliation more difficult."⁸² Certainly charging one's husband with a serious felony may make it more difficult for the couple to get together to reach a compromise.⁸³ If the law does not intervene, couples will be required to "resolve their problems and differences on their own," which would result in "a greater mutual respect and bond . . . than if the couple had to resort to the legal system for resolution."⁸⁴

While the argument may have intuitive appeal, it has major drawbacks. First, it separates marital rape from other marital torts and felonies. Second, it ignores the reality of a dangerous and explosive situation, depending on pious statements about the sanctity of marriage in a world where such concepts may no longer be relevant. Further, it presumes that sexual violence by husbands is normative and expected—a minor problem to be ironed out. While perhaps "ironing out" may occasionally be feasible, this concept could be applied to virtually every other felony short of murder. Prosecutorial discretion is based on the possibility that some offenses will be "ironed out."

Contrary to the argument that rape prosecutions will deter reconciliations by the time a woman is willing to testify in open court against her husband in a major violent felony case, the marriage has already suffered irreparable damage.⁸⁵ Rape prosecutions may break up marriages, but the argument is irrelevant and proposes improper goals for the criminal law. It removes the law's protection of all potential victims on the theoretical supposition that some couples can be convinced or coerced to continue together. If this were the goal of criminal law, then prosecution of most acquaintance crime, such as aggravated assault, rape, incest, child abuse, battering or even theft could be eliminated in favor of counseling, therapy or training.

Although Armstrong was talking about incest, her protest over calls for the preservation of the family unit after the father commits a serious and traumatizing felony is relevant here: "With a close to fifty percent divorce rate—with people divorcing over a difference in preferred style of eggs—why, when a man gets caught

82. Hilf, *supra* note 61, at 34.

83. Comment, *supra* note 60, at 725.

84. Hilf, *supra* note 61, at 34. See also McFadyen, *supra* note 5, at 197.

85. Trammel v. United States, 445 U.S. 40, 52 (1980). See also Maidment, *supra* note 6, at 90; Note, *supra* note 14, at 315; Note, *Marital Rape in California; For Better or Worse*, 8 SAN FERN. V.L. REV. 239 (1980).

sexually abusing his daughter, is it suddenly vital that the family be kept intact?"⁸⁶ The same question might be asked when the victim is the wife, particularly in the case where the woman is willing to press charges.

Whatever the merits of the argument that marital rape is best handled by family court, by private counseling, or by any other noncriminal mechanism, the question remains why rape is the only felony crime to retain a marital exemption. The extreme difficulties in prosecution guarantee that only a few cases will ever reach the courts, but that is no reason to preclude the possibility of prosecution of any case. Interestingly, when legal experts have considered the idea of bringing family violence cases to family courts, which have limited powers of sanction, the only problem they often can identify is that such laws "take away from the defendant safeguards that would apply in a criminal prosecution."⁸⁷

C. *It Will Be Extremely Difficult Ever to Prove a Case of Marital Rape*

The chances for many prosecutions under a permissive law are slim,⁸⁸ but to say that such prosecutions will be rare and difficult is not necessarily a reasonable excuse to forbid them. Many types of prosecutions are rare and difficult — treason, for example — and yet we strongly uphold the need to keep such laws on the books. The Supreme Court has ruled that the infrequent use of a law does not "bear upon the continuing validity of the law."⁸⁹

Certainly, there is no reason to expect that there will be many prosecutions under the law. Early experience in Nebraska, Oregon and New Jersey has not revealed any trend by prosecutors to make extensive use of their new powers to try husbands under rape law. In California, on the other hand, prosecutors have been willing, under some circumstances, to prosecute for spousal rape.⁹⁰ The National Clearinghouse on Marital Rape, located in Berkeley, attempted to locate and trace prosecutions brought in 1980 and 1981⁹¹ under Section 262, which established the crime of marital

86. L. ARMSTRONG, *KISS DADDY GOODNIGHT* 205 (1978).

87. H. KRAUSE, *FAMILY LAW* 91 (1977).

88. Geis, *supra* note 18.

89. *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 117 (1953).

90. See Laura X, Nat'l. Clearinghouse on Marital Rape, worksheets (Women's History Research Center, 2325 Oak St., Berkeley, CA 94208).

91. *Id.*

rape in California.⁹² Twenty-four cases were located statewide which were resolved by May, 1981, with not unacceptable results.

Much of the concern over the difficulties associated with proving a rape charge relates to trial evidentiary issues.⁹³ Despite the argument that abolition of plea bargaining would flood the courts with new trials, the experience in jurisdictions which have abolished plea bargaining has been that the majority of offenders continue to plead guilty, removing the need for complicated trial strategy.⁹⁴ Similarly, the California experience with marital rape was that some offenders will plead guilty when formally accused.⁹⁵

Of the twenty-four cases, two were dropped but later were replaced with murder charges — in both, the wife was the victim. A total of nine cases were dropped by the prosecutor, most due to the withdrawal or unwillingness of the victim to testify. Of the remaining thirteen cases, nine pled guilty or no contest, one was acquitted, and three were found guilty at trial.⁹⁶ Interestingly, of the twenty-three cases where this information was available, only five were couples living together at the time of the rape. These cases resulted in two pleas of guilty, two dropped cases, and one case where the victim refused to continue with the case. Most of the cases prosecuted here were therefore cases where the couple was estranged or separated, a situation which would allow similar prosecution in many other states. Thus, the California experience shows two things: that the act of legislative change under some conditions might serve as an educational device to spur use of the new law, and that the predicted problems for the system have not

92. CAL. PENAL CODE § 262 (West Supp. 1981).

93. Hilf, for example, suggests that a person is subject to criminal liability if he engages in sexual intercourse with an unconscious woman because such activity is without the woman's consent. "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." Hilf, *supra* note 61, at 43. Hilf also approvingly quotes perhaps the least useful comment in the history of marital rape literature: "[A] seeming lack of consent may be simply a manifestation of the fact that resistance during preliminary lovemaking greatly increases the sexual pleasure of some women." *Id.* (quoting 6 STAN. L. REV. 719, 728 (1954)). It is hard to comprehend just who the complainant making charges at the local police station would be. The wife who enjoyed the attention? A "peeping tom" police officer? One must have an extremely interesting conception not only of sex but of the criminal justice system not to understand that there is a difference between feigned resistance during "preliminary lovemaking" and testifying at the trial of a violent felony.

94. See, e.g., Rubinstein & White, *Alaska's Ban on Plea Bargaining*, 13 LAW & SOCIETY 367, 373-74 (1979); Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621 (1976).

95. See Laura X, *supra* note 90.

96. This information was extrapolated from worksheets provided by Laura X, *Id.*

yet occurred. In all of the cases but one, where the case went to plea or trial, a conviction of some sort was obtained.⁹⁷

Even if only a few convictions result, there are excellent reasons for allowing such prosecutions under the law. The National Commission on the Observance of International Women's Year felt that proving a marital rape charge in the face of almost certain presumption of innocence in the minds of the jury would be most difficult. "Including this provision in the law will probably result in conviction in only the most aggravated cases," they argue, suggesting that removal of the marital exemption would provide some sort of fairness which "would be in harmony with other criminal statutes."⁹⁸

Despite any practical problems we might identify in obtaining convictions under such a law, there is another reason for adopting such a reform — one which speaks to political needs. Obtaining convictions has not always been the sole reason for criminalizing certain behavior. Zimring and Hawkins argue that, in terms of general deterrence, laws are written to influence only a few people.⁹⁹ The majority of citizens are not going to break most laws. It is safe to assume that most husbands are not going to, at any time, forcibly rape their wives. An unknown minority will continue their behavior despite a new law making that behavior illegal, either knowing a conviction is unlikely or defying the law for whatever reason. There is a middle group which may be deterred from some unlawful activity by the existence of penalties.¹⁰⁰ In theory at least, the potential exists for an unknown number of husbands to be deterred from raping their wives by the enactment of a statute making it illegal.¹⁰¹

Tied to this concept is the use of the law as an educational tool. There is little reason to believe that most people regulate their behavior on a knowing calculation of the risks versus the gains, as Jeremy Bentham¹⁰² and his utilitarian descendants envi-

97. See *supra* Laura X, note 90.

98. NAT'L COMM. ON THE OBSERVANCE OF INT'L WOMEN'S YEAR . . . TO FORM A MORE PERFECT UNION . . . JUSTICE FOR AMERICAN WOMEN 263 (1976).

99. F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT OF CRIME CONTROL (1973).

100. *Id.* at 114-15.

101. Parnas, *The Relevance of Criminal Law to Inter-Spousal Violence* in FAMILY VIOLENCE 188 (J. Eekelaar & S. Katz ed. 1978).

102. Bentham, *An Introduction to the Principles of Morals and Legislation* in COLLECTED WORKS (J. Burns & J. Hart ed. 1970).

sioned.¹⁰³ Rather, for most people, criminal behavior is avoided because it is "wrong." Moral concepts of right and wrong have many roots, however, one being the criminal law itself.¹⁰⁴ The public is more likely to view conduct as immoral if it is "criminal." A few prosecutions publicly reaffirm the moral blameworthiness of persons who commit the act and help to delineate the boundaries of proper behavior. Andenaes refers to this phenomenon as "punishment as an eyeopener."¹⁰⁵

This phenomenon is particularly important in the context of the relative power position of married women in American society. Male sexual dominance in law only serves to reinforce and to perpetuate existing sex role stereotypes, and the continued dependency of women.¹⁰⁶ To define rape as excluding marital rape serves to reinforce the belief of many women that they are only the chattels of their husbands.¹⁰⁷ Removing the marital exemption would make an important statement about the relative position of married women in society. If the continuation of the marital rape exemption protects male property interests, removal of the exemption asserts the right of married women to the physical integrity of their bodies, and of the right to choose what uses their bodies will be put to. It is unlikely that spousal rape differs in intent from any other rape in that it is not a crime of sex, but one of humiliation and degradation.¹⁰⁸ As an educational tool for both men and women, removing the spousal exemption from rape laws is a powerful statement about the rights of partners in a marital relationship.

D. *Women Are Vindictive and Will Lie or File False Rape Charges*

One of the most common arguments against removing the marital rape exemption is that a horde of spiteful wenches are lying in wait for such a change, ready to blackmail their husbands into favorable divorce settlements or get even for some real or imagined wrong. A powerful argument used in England to oppose

103. See, e.g., G. NEWMAN, *THE PUNISHMENT RESPONSE* 161-69 (1978).

104. F. ZIMRING & G. HAWKINS, *supra* note 98, at 81-83.

105. *Id.* at 83 (quoting J. ANDENAES, *SOME FURTHER REFLECTIONS ON GENERAL PREVENTION* (1968)).

106. McFadyen, *supra* note 5, at 194.

107. R. GELLES, *FAMILY VIOLENCE* 124 (1979).

108. Schwarz & Clear, *Toward a New Law on Rape*, 26 *CRIME & DELINQUENCY* 129 (1980); S. BROWNMILLER, *supra* note 22.

the removal of the exemption was the spectre of opening "the floodgates to endless numbers of matrimonial complaints that wives have been raped."¹⁰⁹

This argument has its roots not in marital rape, but in forcible rape. For generations it was used to support the extraordinary roadblocks that most jurisdictions erected to preclude rape convictions (i.e. requirements of corroboration, proof of resistance, proof of lack of consent, testimony on previous sexual history of the victim). Most of the traditional problems with rape laws identified by feminists and scholars have stemmed from the historical male belief that the female gender is rife with spiteful shrews who often falsely accuse innocent men of sexual attacks.¹¹⁰ The dramatic changes in rape laws in the United States during the 1970's¹¹¹ was achieved by pointing out that there is no basis in fact for the belief that women make false reports of rape more than other alleged crime victims make false reports.¹¹²

While the argument of the inherent mendacity of women is rarely heard today in connection with false allegations of forcible rape, it is still used against removing the marital rape exemption. The argument conflicts with another often heard argument: that marital rape prosecutions will be difficult to prove. If it is impossible to obtain a conviction for marital rape, one need not worry that a false accusation of marital rape will lead to a miscarriage of justice.

In light of the social stigma still attached to being raped, most

109. Freeman, *supra* note 7, at 19 (quoting PARL. DEB. H.L. (5th Cir.) 21 (March 24, 1976), Official Report of Standing Committee F).

110. Schwartz & Clear, *supra* note 108, at 130 (discussing Comment, *The Corroboration Rules and Crimes Accompanying Rape*, 118 U. PA. LAW REV. 458 (1970)).

111. Bienan, *Rape I*, 3 WOMEN'S RIGHTS L. REP. 45 (1976); Bienan, *Rape II*, 3 WOMEN'S RIGHTS L. REP. 90 (1977).

112. Schwartz & Clear, *Feminism and Rape Law Reform*, 6 BULL. AM. ACAD. PSYCH. & L. 313, 314 (1978). *See also*, E.J. Donovan, *Woman's Credibility: A Lingering Issue in Rape Cases* (1976) (research paper, Pennsylvania State University Administration of Justice Department). Donovan cites an unpublished study of the New York City Police Department Sex Crimes Investigation Unit by Henry T. O'Reilly, where 2,046 rapes reported to police in 1975 were examined. While 284 of these were classified as "unfounded," O'Reilly suggests that 214 of these were "wholly unfounded," such as in cases where a victim falsely reported rape in order to increase police response time, or where there was no complainant located by the responding officer. Only 3% of the calls were what has traditionally been termed false reports, and O'Reilly was only able to categorize five of the reports (0.25%) as malicious, where a woman was attempting to get a specific man in trouble with the law. Interestingly, the 3% figure for false reports includes a case of a wife reporting a marital rape, which was classified a false report because such rapes are legal in New York.

women would not care to be publicly identified as rape victims, even marital rape victims.¹¹³ In the few jurisdictions which currently allow such prosecutions, there is no reason to believe that false reporting is a problem. In Oregon, one district attorney stated:

The one thing that has *not* happened, and which I stressed in my testimony to [the California] Senate Judiciary Committee, is that embittered and vengeful wives are not rushing to their District Attorney to falsely claim rape in order to gain leverage on their husbands in a divorce. Victims are very reluctant to report the crime.¹¹⁴

Of course, a married woman out to "get" her husband could avoid this stigma by charging her husband with another crime. There is no evidence that wives use the system to file false felony reports today, and there is no reason to believe they would do so just because one more felony was added to the list.¹¹⁵

Additionally, personal injury suits provide wives with an alternative to reporting marital rapes.¹¹⁶ Courts have also upheld the prosecution of a husband for forcing his wife to commit fellatio¹¹⁷ in spite of a marital exemption from rape prosecution. There has been no horde of vengeful wives taking advantage of these opportunities.

While false reports are received by the criminal justice system with some regularity, in every other instance we rely on a combination of the investigatory powers of the police and prosecutor, plus the inherent power of the judge and jury to determine truthfulness of witnesses, to discover if a victimization claim is false. Only in marital rape do we remove an entire class of potential victims from the protection of the law in order to protect some abstract possibility of a false claim that the criminal justice system is unable to

113. Note, *supra* note 14, at 314-15.

114. Letter from Peter F. Sandrock Jr., District Attorney, Benton County, Oregon, to the Women's History Research Center, Berkeley, CA (July 7, 1980).

115. See *State v. Smith*, 146 N.J. Super. 219, ___, 372 A.2d 386, 389-90 (1977).

116. Karell, *Toward Abolition of Interspousal Tort Immunity*, 36 MONT. L. REV. 251, 251 (1975). The trend seems to indicate that more states are allowing such suits. Note, *Interspousal Tort Immunity*, 30 BAYLOR L. REV. 291 (1978); Note, *Interspousal Immunity, A Policy Oriented Approach*, 21 RUTGERS L. REV. 491 (1967).

117. *State v. Bateman*, 25 Ariz. App. 1, 540 P.2d 732 (1975), *rev'd* 113 Ariz. 107, 547 P.2d 6 (1976). See also, *Towler v. Peyton*, 303 F. Supp. 581 (W.D. Va. 1969); *People v. Bales*, 189 Cal. App.2d 694, 11 Cal. Rptr. 639 (Dist. Ct. App. 1961) *cert. den.* 368 U.S. 866 (1961).

deal with appropriately.

E. *Other Remedies Are Available to the Victim*

Some people argue that wives do not need to charge their husbands with rape; they already have sufficient protection under family, divorce, and assault law.¹¹⁸ This argument fails to differentiate rape from all other offenses. Such alternatives exist to the prosecution of any crime a husband could commit against his wife. "[R]ape is not just matrimonial misconduct. It may leave emotional and psychological scars or lead to the birth of a child. It is an offense of sufficient moment for women to be able to claim the protection of the criminal law."¹¹⁹

While it is commonly suggested that a wife who does not like being raped can always get a divorce from her rapist, it is seldom suggested that a man who is dissatisfied with marital sexual relations could do the same. The Israeli jurist, Mr. Justice Halevi, noted:

In my view this doctrine does not do justice to the dignity of man nor to the dignity of matrimony, and in Israel it should not be adopted except by express order of the legislator. Even though a woman agrees by her marriage to live with her husband as man and wife, she does not thereby agree to suffer severe bodily harm. A wife is not like a "captive taken with the sword" in her husband's house and she has the same right of corporal freedom as he. If she should, without sufficient reason, refuse to maintain matrimonial relations with her husband, he has such legal remedies as the personal law of the parties provides; but no one is allowed to take the law into his own hands and enforce his right by an act of violence.¹²⁰

Rather than arguing that the raped wife has legal avenues of redress available to her other than rape prosecution, Halevi suggests that the husband who cannot obtain his wife's consent to intercourse has other legal avenues of redress open to him.

118. Freeman, *supra* note 7, at 20-21; See generally, Comment, *Expert Testimony on Eyewitness Perception*, 82 DICK. L. REV. 608 (1978); Hilf, *supra* note 61; Note, *Rape on Wife?* 46 S. AFRICAN L. J. 92, 93 (1955).

119. Freeman, *supra* note 7, at 21.

120. *El Fakir v. Attorney General*, vol. 4, 18 P.D. 200 (Israel) (1964) (as quoted in Livneh, *On Rape and the Sanctity of Marriage*, 2 ISRAEL L. REV. 415, 415-16 (1967)).

CONCLUSION

It is sometimes difficult to know how to attack the continued existence in most states of the marital rape exemption. One can attempt to identify the logical and theoretical reasons for a continuation of the exemption. This is, however, all too often a futile exercise, if the continued existence and current expansion of the exemption can be traced to our patriarchal and misogynistic heritage.

Perhaps the major theoretical obstacle to change has been the common confusion of forcible rape with "marital problems." The California law on rape has recently been amended to read: "The essential guilt of rape consists in the outrage to the person and feelings of the victim of rape."¹²¹ Forcible rape is not a sexually motivated crime; it is a crime of humiliation, domination, and subjugation designed to leave emotional scars on the victim.¹²² Married women are not only vulnerable to such scars from their husbands, they might be more harmed by such actions than if the attacker was a stranger.¹²³

Thus, the argument has been made that if forcible rape laws are no longer designed to protect male property or sexual interest, but to criminalize victimization of women, there is no reason to deny the protection of the criminal law to women who are raped by their spouses.¹²⁴ If this is true an attack on the continued existence of the spousal exemption to rape prosecution can be made through the fourteenth amendment equal protection clause.¹²⁵ This argument, advanced by Clancy, reads that "because the statute sets up a dichotomy whereby identical acts may or may not be the basis of criminal liability depending on the participants' marital status,"¹²⁶ such statutes are unconstitutional. While differential treatment might be allowed if the state's interest in such treatment were strong enough, Clancy argues that no such interest exists. He attacks the effect of the exemption statutes to place marital relations above the fundamental constitutional rights of the individual.¹²⁷

121. CAL. PENAL CODE § 263 (West 1981).

122. S. BROWNMILLER, *supra* note 22, at 423-24; Schwartz & Clear, *supra* note 107, at 135.

123. Griffin, *In 44 States, It's Legal to Rape Your Wife*, 9 STUDENT LAW. 20, 59 (1980).

124. S. BROWNMILLER, *supra* note 22, at 427-28.

125. Clancy, *Equal Protection Considerations of the Spousal Sexual Assault Exclusion*, 16 NEW ENG. L. REV. 1 (1981).

126. *Id.* at 3.

127. *Id.* at 29.

Clancy may be only partially correct. Certainly one of the cornerstones of the spousal exemption has been a patriarchal view of marriage. Another important element of such laws, however, is the stereotype of women as liars, schemers, troublemakers and homebreakers who want to ruin innocent men to suit their own vindictive or irrational ends. One of major rape law reforms in the 1970's has been the removal of such stereotypes from statutory language.¹²⁸

Clancy attacks the differential treatment accorded to married women, who have no protection from forcible rape by their husbands, when unmarried cohabitants still enjoy the protection of rape laws. Politically, this may be an inappropriate argument because a legislature bent on maintaining misogynistic views of women can respond by exempting cohabitants from prosecution for rape. In recent years thirteen states have expanded the spousal exemption to include unmarried cohabitants.¹²⁹ In five states, recent statutory changes have gone even further in removing this unequal treatment; men who are "voluntary social companions" need not even be cohabitants in order to receive partial protection from prosecution.¹³⁰

It is difficult to understand the rationale for such an expansion of immunity. In North Dakota, for example, the exemption to the Class A felony of Gross Sexual Imposition now applies not only to husbands, but to any defendant who has at any time previously been allowed "sexual liberties" by the victim.¹³¹ The immune class thus not only includes ex-husbands or former lovers, but dating partners from many years past. It would be hard to imagine the North Dakota Legislature providing prosecutorial immunity from robbery to any defendant who had previously concluded satisfactory business transactions with the victim. The example is apt: just as robbery is not a simple "business dispute," violent forcible rape is not a simple "lover's spat."

The spousal exemption is one of the last vestiges of truly unequal treatment of women embodied in statutes. Under common law concepts developed over hundreds of years, unmarried cohabitants, former lovers, ex-husbands and "voluntary social compan-

128. Schwartz & Clear, *supra* note 107; Bienen, *supra* note 4.

129. See *supra* statutes cited at note 58.

130. See *supra* statutes cited at note 59.

131. N.D. CENT. CODE § 12.1-20-03.3 (Supp. 1979).

ions" were never granted statutory exemption from prosecution,¹³² even if the criminal justice system often acted as if such exemptions were in place. The continued vitality of the exemption demonstrates that legislators view a modicum of family violence as the norm; some violence by men ought to be expected. Only a legislative view that accepts at least some domestic violence as proper and normal could lead to the current move to decriminalization.

132. See, e.g., Geis, *Lord Hale*, *supra* note 13.

