JOURNAL OF FAMILY LAW
University of Louisville School of Law
Volume Twenty-two 1983-84 Number Three

CONSENT, HARM, AND MARITAL RAPE*

by John D. Harman**

Marital rape—the violent, sexual assault of wives by their husbands—is being recognized as an important social and legal problem. Traditionally, common and statutory law have exempted husbands from rape prosecution for assaults on their wives. The situation is changing, however, as proposals are being advanced and reforms enacted in many jurisdictions to eliminate this exemption. Because of the justification originally offered for the marital exemption, though, most reformers propose that all sexual intercourse without the wife's express consent be criminalized as rape. While accepting the desirability of eliminating the marital exemption, this essay takes issue with such proposals as the best alternative.

I.

Unquestionably, sexual violence committed against wives by their husbands is a serious problem. On the basis of her survey, Russell estimates that as many as 14 % of married women may be victims

* I am grateful to Dorothy Holmes, Booth Fowler, Jennifer Nedelsky, Ruth Turner, and Anne Harper for their helpful comments in revising an earlier draft of this essay. I have also benefited greatly in research on this topic from the assistance of Laura X and the National Clearinghouse on Marital Rape of the Womens History Research Center.

** B.A., 1972, Idaho State University; M.A., Political Science, 1973, University of Wisconsin; Ph.D., Political Science, 1978, University of Wisconsin. Assistant Professor, St. John Fisher College.

of such violence at some time.[2] Groth and Gary estimate the incidence of marital rape to be in the millions each year.[3] While no one is certain of the exact causes of this behavior, most researchers are convinced that the legal exemption from rape prosecution that husbands enjoy in many jurisdictions is an important contributing factor. In Russell's words,

> The fact that it [wife rape] remains legal in most states and countries not only perpetuates the problem but probably helps cause it, because it allows men and women alike to believe that wife rape is somehow acceptable. The first step toward reversing the destructive attitudes that lead to this destructive act is to make wife rape illegal. . . .[4]

Bringing about this reform, however, requires a precise definition of the behavior that will subject a spouse to criminal penalties. In formulating their definitions nearly all reformers have been guided by the justification historically offered for the marital exemption. That justification is found in the claim by Justice Matthew Hale in the 17th century that "[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."[5] In other words, Hale argued that by entering into the marriage a woman gave her implied consent to sex with her husband. This consent nullified any subsequent charge of rape, since that crime was and is defined in the common law as intercourse without the victim's consent.

Hale's views were consistent with the idea of a marriage contract—a familiar conception, but one that subsequent jurists often interpreted as authorizing the husband to use any means, including the threat or application of violence, to enforce. In *Regina v. Clarence*,[6] for example, Baron Pollock argued that a husband's intercourse with his wife

> is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection [intercourse] itself is in a different position from any other women, for she has no right or power to refuse her consent . . . . Such a connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will suffer from such connection. . . .[7]

[2] D. RUSSELL, RAPE IN MARRIAGE 2 (1982).
[3] Groth and Gary, *Marital Rape*, 15 MED. ASP. OF HUM. SEXUALITY 122 (1981).
[4] D. Russell, *supra* note 2, at 357.
[5] 1 M. HALE, PLEAS OF THE CROWN 629 (1736).
[6] 22 Q.B.D. 23, 64 (1888).

And in *G v. G*[8] Lord Dunedin, referring to a husband's attempts to induce his wife to have intercourse before seeking annulment of the marriage for failure to consummate, noted that "[t]he learned judges in the Court below threw doubt on whether these attempts were characterized by what they term a sufficient virility. It is indeed permissible to wish that some gentle violence had been employed. . . ."[9]

Those who want the marital exemption eliminated have made several arguments against the implied consent or contract justification. One argument is that the notion of implied consent is part of the anachronism that a wife becomes her husband's property upon marriage. This view was also reflected in common-law rules that vested a woman's property in her husband and deprived her of any legal power to act individually. As the author of a 1977 comment notes,

> [t]hese legal fictions . . . should have been discarded by the end of the 19th century with the adoption of Married Women's Property Acts in virtually every state. Those acts allowed a wife to hold and convey property, make contracts, and sue and be sued as if she were unmarried. Although courts have carefully scrutinized property transactions and contracts between spouses, they have allowed them in recognition of a wife's legal capacity and independent interests. . . . In most areas of the law, then, interspousal immunities and wives' [sic] disabilities were discarded along with the legal fictions won which they relied. Abolishing the husband's rape immunity would be in harmony with modern developments in the legal status of married women.[10]

Reformers also argue that a marital exemption based on implied consent and contract stretches the concept of contract far beyond its normal application in law. Gonring, for example, contends that

> [t]he contract that breeds this implied consent is . . . a strange creation. It cannot be thought of as a typical commercial-type contract, where two parties agree to certain terms, bargaining at arm's length. . . . Furthermore, there is some question about the nature of a contract which may be enforced by whatever means one party chooses,

[7] Regina v. Clarence, 22 Q.B.D. at 64.
[8] G. v. G., 67 N.J. Eq. 30, 56 A. 736 (1903).
[9] *Id.*
[10] Comment, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 310-11 (1977).

> including violence. This surely exceeds the traditional contract remedies. The whole idea of viewing the marriage agreement in strict contract terms, with consent to on-demand sex as part of it, is ludicrous when taken to the extreme.[11]

The improper enforcement of an implied contract leads reformers to another criticism that this notion, applied to the wife's choice, leaves the husband unfairly empowered to decide the occasions and circumstances of intercourse without regard for his spouse's well-being. Freeman suggests that

> [t]he notion that women imply consent to their husbands' sexual demands may have been meaningful when husbands made all decisions. But society has changed enormously since those times and the change has been reflected in both legislation and case law. What Judge Denning said over thirty years ago in the English Court of Appeals about the location of the matrimonial home is surely also apposite with reference to sexual relationships in marriage. "The decision where the home should be," he said, "is a decision which affects both parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has a casting vote. . . ." Why, then, should one party have the "casting vote" in relation to sexual activities?[12]

Finally, reformers note that this exemption and the contractual theory underlying it create a grave inequality between married and unmarried women. The latter are protected by the criminal justice system from sexual assaults from which the former are denied protection merely because the assailants are their husbands. As Gonring points out, this leads to the anomalous situation in which "a man can lie in wait and attack and rape an unsuspecting woman, and if it turns out that that woman is his wife, he cannot be prosecuted."[13] Thus, the Superior Court of New Jersey, in critiquing the consent doctrine as a basis for the marital exemption, argued that

> [t]o continue to perpetuate such approval leads to insidious deprivation of sexual privacy to a victimized married woman. Policy considerations labels should not be permitted to thwart justice. Rather, having recognized that *all* women are entitled to this uniquely female

[11] Gonring, *Spousal Exemption to Rape*, 65 MARQ. L. REV. 120, 124 (1981).
[12] Freeman, *'But If You Can't Rape Your Wife, Who[m] Can You Rape?'*, 15 FAM. L.Q. 1, 16 (1981).
[13] Gonring, *supra* note 11, at 120.

> right of privacy, policy considerations should propel us to insist that such lawless invasions not be condoned under the guise of nice applications of contract law.[14]

These arguments make the idea of implied consent seem implausible and outrageous. The notion of implied consent and contract is as intelligible an agreement as one could reasonably be expected to make if the provisions of the contract were made explicit. But, if the ramifications of the implied consent doctrine were made explicit, no reasonable woman would agree to them. As Barry phrases it, "[a] new bride would be surprised indeed to find that she has agreed to give up her right to bodily privacy and to submit to any force, brutal or otherwise, her new spouse might use against her."[15]

Nearly all reformers seem determined to define marital rape so as to avoid any suggestion of implied consent because of its use to justify the marital exemption. This is easily accomplished. The common law defines rape as "intercourse against the will of the victim" or "without the victim's consent." The phrases are construed to mean the same thing.[16] The equivalence between "against the will" and "without consent" is incorporated into the operational definition of rape by criminalizing not only intercourse achieved by force or threat of violence, but also sex with a woman who is unable to consent because she is unconscious, drugged or asleep. Applying an "absence-of-consent" clause, with its traditional connotations, to marital sex avoids any notion of implied consent. It would not only criminalize intercourse *against* a wife's consent (by force or threat of force), but intercourse *without* her consent as well (when she is unconscious, drugged, intoxicated, or asleep). The net effect would be to criminalize all intercourse between husband and wife except that having the wife's express or explicit agreement.

That such an extensive definition of marital rape is the goal of most reformers is quite evident. Brownmiller, for example, writes that, "[c]onsent is better arrived at by husband and wife afresh each time, for if women are to be what we believe we are—equal partners—then intercourse must be construed as an act of mutual desire."[17] Geis notes

[14] State v. Smith, 148 N.J. Super. 219, 228, 372 A.2d 386, 390 (1977).
[15] Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088 (1980).
[16] 65 Am. Jur. 2d *Rape* § 1 (1972).
[17] S. BROWNMILLER, AGAINST OUR WILL 381 (1975).

that the major Parliamentary supporter of reform in England warned his colleagues at the reform's defeat in 1976 that, "I give notice that I shall raise the matter again as soon as possible because I am convinced that every man should ask every woman for her consent on every occasion."[18] Scutt contends that, "[t]he decision as to sexual activity is clearly a decision affecting both parties; therefore it must be the duty (if not the desire!) of the parties to decide by agreement whether in the particular instance they will partake of sexual intercourse."[19] And the author of the 1977 Note cited earlier argues, following Brownmiller, that "[c]onsent should be given by husband and wife for each sexual act, for if women are to be equal marital partners, sexual intercourse must be mutually desired."[20] Such comments certainly bespeak a desire on the part of these reformers to define and punish as rape any sex other than that to which the wife explicitly agrees on each occasion.

It is clear from their criticisms of reform proposals that do *not* include an absence-of-consent clause, that such reformers interpret that clause as accomplishing this definition of marital rape. Gonring, for example, criticizes the recent California reform legislation, which lacks an absence-of-consent clause, as follows:

> California also revised its statutes to eliminate the spousal exemption, but the California statute requires resistance overcome by force or threats of "great and immediate bodily harm." Thus, for example, a husband could drug his unsuspecting wife, or wait until she was unconscious, before having intercourse with her, and escape the bite of the California statute. The Model Penal Code endorses this approach, pointing out that a man who has sexual 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." Violating the person of a woman who has not consented, no matter what the circumstances, should be enough.[21]

Barry likewise complains about the shortcomings of the California

[18] Geis, *Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden*, 6 ADEL. L. REV. 284, 292 (1978).

[19] Scutt, *Consent in Rape: The Problem of the Marriage Contract*, 3 MONASH U.L. REV. 255, 272 (1977).

[20] *Marital Rape Exemption*, *supra* note 10, at 313.

[21] Gonring, *supra* note 11, at 136.

statute, revealing at the same time the underlying reason for these reformers' distaste for it.

> The legislature also expressly refused to extend to spousal rape . . . subsections that define rape as an act of intercourse in which a person is prevented from resisting because he or she is administered a narcotic, intoxicating, or anesthetic substance by or with privity of the accused. Thus, if a spouse is legally unable to consent, under the influence of a narcotic substance, that spouse is unable to revoke his or her "consent." This clearly means that the contractual consent theory is alive and well in the California Penal Code.[22]

Although the case for reforming rape legislation to incorporate marital rape is strong, the case for criminalizing all intercourse except that with the spouse's express consent is not.

II.

The idea that adequate reform of the marital exemption must criminalize all intercourse but that expressly consented to leads to difficulties that detract from the effort to protect women from domestic violence—the professed goal of most reformers. It does so by changing the issue from punishing and deterring violence to eliminating unwanted sex. This has important practical and conceptual results.

One result is to obscure the fact that women are the primary victims of marital rape. By defining as rape any intercourse for which the spouse has not expressed a desire, reformers shift the focus from rape as violence to rape as simply unwanted sex. Investigators and reformers are thus led to characterize as rapes incidents that are not violent in any urgent sense. For example, Russell describes as an instance of continued rape the experience related in this interview:

> He insisted on it. He would use force, but not physically as much as verbally. If I neglected my 'wifely duties' he wouldn't speak to me, or he wouldn't bother to come home, or he would pick quarrels for weeks on end. His vocabulary was frightening. He grew more and more adept at word imagery that was dreadful. . . . *Verbal threats*? He had an aura of violence about him. He was very verbally abusive. His dreadful word or idea images could have every bit as much effect on a woman's sexual responses as a razor.[23]

[22] Barry, *supra* note 15, at 1090.

[23] Russell, *supra* note 2, at 124-25.

Elsewhere she cites as instances of rape incidents where sex was induced by a husband's threats to have sex with someone else, to leave, or to try and get custody of his son (apparently a separated couple).[24] Groth and Gary likewise characterize as marital rape occasions when the wife is "coerced" into unwanted sex by threats to leave, to cut off her source of money or to humiliate her in some way.[25]

Use of these kinds of devices—threats to leave, have sex with another, humiliate one, or pick quarrels—to "force" their *husbands* into unwanted sex is certainly within the capability of most women. The fact that many men may thus be categorized as "victims" of marital rape obscures the reality that women are the actual victims of real physical violence. The urgency of the problem of marital rape is diminished in this way.

The urgency of the problem is diminished in other ways as well by this shift in emphasis. The appropriateness of social intervention via criminal sanctions is itself brought into question by the impossibility of objectively and impartially determining in many cases what constitutes duress—how much humiliation, or the threat of it, constitutes "force" or coercion, for example. Further, a focus on rape as unwanted sex suggests that the "problem" of marital rape largely concerns women and men who are unable to deal with verbal abuse or spousal selfishness; if so, it hardly seems a fit object for redress by the complex, expensive, and grim machinery of police, courts, and prisons.

That this shift in focus brought on by the emphasis on express consent tends to trivialize the issue and encourage opposition to reform is brought home by the reformers themselves. Several of them note the slow pace of reform.[26] Russell notes that women find it difficult "to relate to male legislators 'the physical and emotional horrors that have been committed by husbands.'"[27] She describes with obvious irritation as an instance of sexist obstructionism the circulation of a "consent form" by a Montana legislator during debate over reform in that

[24] *Id.* at 112.

[25] Groth and Gary, *supra* note 3, at 122.

[26] *See* Note, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 J. FAM. L. 565 (1979-80); Geis, *supra* note 18, at 294; Comment, *The Marital Exception to Rape: Past, Present and Future*, 2 DET. C.L. REV. 261, 275 (1978); Freeman, *supra* note 12, at 28-29.

[27] Russell, *supra* note 2, at 23-24.

state, complete with the facetious recommendation to "Montana males" that no sexual contact be made without such forms being signed "for their protection."[28] Clearly it is the reformers' insistence on the absence-of-consent clause and emphasis on express consent that lend an air of plausibility to this sort of ploy.

Even if one dismisses the notion of consent forms as an aspect of reform, one may well have reservations about the impact of an express consent requirement on marital stability. The reality of marriage seems to involve complex adjustments and compromises between persons who are not always in agreement about priorities or purposes. One of the keys to maintaining a relationship under these circumstances is the development of areas of settled agreement and routine, offsetting areas of disagreement, to which marriage partners can resort to avoid conflict. It does not require much imagination to anticipate that making a spouse criminally liable for failing to secure express consent must prevent sexual relations from becoming such an area of settled agreement. Instead, sex must become a fixed point of chronic, debilitating controversy—a point at which other conflicts (over money, children, household division of labor, friends, etc.) will inevitably become focused and sharpened. If there is a social interest in avoiding the creation of structural impediments to marital stability, then imposing an express-consent requirement would certainly impair that interest.

The tendency of the absence-of-consent clause to trivialize the issue of marital rape and hamper reform efforts, together with its anticipated effect on marital stability, should be sufficient to discourage reformers from proposing it. But it might be objected that the incidence of wives being subjected to intercourse while asleep, drugged or intoxicated is so great as to demand specific attention in the course of reform. Although statistics on this behavior are understandably scarce, Russell provides some evidence from her interviews with a random sample of San Francisco women. Out of a sample of 930 subjects, approximately four to five wives reported being subjected to intercourse when unable to consent, while an additional six to seven reported such intercourse in addition to violence or the threat of force.[29] These figures suggest

[28] *Id.*

[29] *Id.* at 110-11. (Figures are approximate due to reconstruction from the percentages provided).

that around one-half of one percent of married women may have intercourse when unable to consent, with another one-half of one percent experiencing this in addition to violent sexual assaults. By contrast, seventy-four to eighty wives reported forced sexual intercourse. It thus appears that wives are fifteen to sixteen times more likely to experience forced or sexual intercourse than intercourse when unable to consent. The case for including an absence-of-consent clause because of the magnitude of the problem is not really compelling.

It may also be argued that the absence-of-consent clause is an essential feature of any criminalization of rape in marriage, since the essence of the crime is intercourse against a person's will. Sex *without* consent, it may be claimed, is the same as sex *against* consent. Literally, of course, this is false. Failure to secure someone's consent is not identical to acting against someone's consent (or more accurately, against that person's objections). The latter implies the victim is forced to do or endure something despite active opposition, and constitutes a denial of that person's capacity to choose. The former has no such implications.

Regardless of this difference it might be urged that the effects on the victim of intercourse without and against consent are the same and merit the same treatment. Russell's analysis of the trauma of wife rape, however, does not support this claim. She notes that a significantly smaller proportion of wives who experienced intercourse without consent described themselves as being very upset by it or reported long-term effects than those who were forced into intercourse against their objections. Russell herself comments that, "these findings seem understandable, since rape when one is unable to consent does not involve a battle of wills, nor the sense of being overcome."[30] Intercourse in the absence of consent thus appears neither conceptually nor empirically equivalent to intercourse against objection.

Despite these problems and the difficulties that the absence-of-consent clause and emphasis on express consent generate for reform, those who see the need for reform may well be reluctant to leave this provision out. Failure to criminalize all intercourse but that expressly consented to logically results in the acceptance of some notion of implied consent. Like Barry, most reformers apparently believe that any

[30] *Id.* at 200.

acceptance of implied consent entails acceptance of the whole contract justification of the marital exemption which they are trying to eliminate. This not only seems to them to risk revival of the marital exemption, but also appears to run afoul of the objectionable ideas about women and marriage identified as ramifications of the notion of implied consent by the exemption's critics. To decide if this reluctance is warranted, the critique of implied consent and the marital exemption must be re-examined.

III.

As discussed earlier, the common-law justification of the marital exemption turns on the idea that a wife impliedly consents to a marriage contract, one provision of which is the legal right of the husband to have access to his wife for sexual purposes. Subsequent interpretation of this contract tended to invest the husband with authority to secure this right to sex by force. Against this justification reformers have made the points described earlier: that it is based on an outmoded view of the wife as her husband's property, that it abuses the idea of contract, and that it improperly gives the husband a deciding vote in sexual matters. While these arguments have appeared to rule out the idea of implied consent entirely, careful reflection shows that they apply instead to one specific aspect of implied consent—"promissory" implied consent.

Hale's argument for the marital exemption interprets the implied consent as the equivalent of a contractual promise. This consent, as a promise, creates a legal right in the promissee to performance of the act impliedly promised. Such an understanding of implied consent has a venerable history, as evidenced by Hobbes' account of consent or "compact" in *Leviathan*.[31] Further, the traditional marriage vows, with their reciprocal express promises of protection, support, honor, etc., support this understanding by suggesting basically the establishment of a contractual relationship.

The idea that implied consent is essentially a contractual promise leads to the notion that it creates a legal right in the husband to sexual relations. The essence of a legal right, in turn, is that the right-holder enjoys a power to compel the performance of (or abstinence from)

[31] T. HOBBES, LEVIATHAN 64 (Manson, England 1969) (1st ed. 1651).

some act by another.[32] When such a right derives from a contract, the other who can be compelled is usually the other party(ies) to the contract. "Power to compel" means at least noninterference by the state when the right-holder attempts to insure performance. Most often it means intervention by the state on the side of the right-holder to insure performance or compensation by the other party. The exemption of the husband from prosecution for forced intercourse is thus bound intimately to an interpretation of implied consent as a right-establishing contractual promise. This interpretation can be termed a "promissory" conception of implied consent.

This, however, is not the only way the law regards the idea of consent. Consent is also interpreted as a grant of permission for another to act or as an authorization to act. Such a grant of permission does not have the same implications as a promise. Although we sometimes speak of the authorized person's "right" to perform the permitted act, this "right" is not a legal one in the sense described above. Instead of suggesting that the authorized person has a legal power to compel another's performance, we mean that it is proper for the permitted act to occur. This emphasis on propriety is intended to relieve the authorized person of some kind of liability for performing the act. This release from liability is technically termed a liberty or license.[33] Thus a patient's consent to an operation creates a liberty in the physician from liability, at least for committing battery if not for the results of the operation.[34] Parental consent creates a liberty in the school official from liability for the results of a student's participation in specified activities. Such consent does not furnish the physician with a right to compel the patient, nor the principal with a right to compel the parent. This interpretation of consent can be termed "permissive" consent.

Consent, whether permissive or promissory, involves indications of an intent to permit or promise. These indications can be either express or implied. Both are not equally telling, however. In the case of promissory consent courts routinely weigh express indications of consent (signatures or witnessed speech) more heavily than implicit ones (inference from action or inaction) on the supposition that the former

[32] *See* Hart, *Are There Any Natural Rights?*, in HUMAN RIGHTS 63-64 (A. Melden, ed. 1970).

[33] W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 42-49 (1946).

[34] *See* Gifis, Law Dictionary 103 (1975).

are less prone to misinterpretation.[35] The same consideration seems to apply to permissive consent. Signatures on a consent form under the appropriate circumstances ("informed consent") will be taken to relieve the authorized actor of liability despite subsequent claims that consent was not given. The dictum that "silence means consent," which seems to apply primarily to permissive consent, suggests that implied consent operates in the absence of express permission or objection. Overt expressions of intent thus override, correct, or confirm any tacit indications inferred from actions or inactions.

These points argue the priority of express objections over implied permission where the two occur. Thus, one's toleration of an act to which one could object is usually taken to imply a grant of permission for that act. This grant, however, remains revocable. Yet until one objects to the act and revokes the grant, such permission frees the actor from liability. If I allow my neighbor to pick apples off my tree by not interfering or objecting to that picking, I do not necessarily create in him a legal right to continue picking. That is, my tolerance does not give him a legal power to compel me to allow such picking in the future. But I do establish, as a result, a liberty or license in him for the picking already done. I can revoke the implied permission on which that liberty is based, expressly by a letter or implicitly by building a fence, but I cannot sue the neighbor for trespass or damages for picking done before that revocation. Such an action would violate the requirement that punishable acts be knowable as such at the time of commission, a basic principle of equity.[36]

Once the permissive conception of implied consent is recognized, the urgency of including an express-consent requirement in the definition of marital rape dissipates. Permissive consent does not establish contractual or legal rights. Instead, it leads to a revocable presumption of permission that creates a freedom from liability for acting on that presumption. When and if the presumption is revoked or corrected, subsequent activity becomes punishable.

Applied to marital sexual relations, these considerations suggest the legitimacy of a husband's presumption that his wife's past consent to intercourse, implicit and express, indicates her willingness and

[35] *See* L. SMITH & G. ROBERSON, BUSINESS LAW: UNIFORM COMMERCIAL CODE 235-47 (1977).

[36] *See* L. FULLER, THE MORALITY OF LAW 49-62 (1964).

likelihood to engage in intercourse in the present, even though she is unconscious, asleep or intoxicated.[37] They also suggest that this presumption and permission implied by her past consent can be revoked or corrected by her subsequent objection. This could render future intercourse under those conditions subject to punishment as an action against her objections. Understood in these terms, implied consent does not provide any leverage for a marital exemption for husbands who inflict violent sexual abuse on their wives.

The permissive conception of implied consent also dispels any reasonable fear that failure to include an absence-of-consent clause will legitimate or codify a view of the wife as her husband's property. Russell expresses such misgivings when she asks

> what it means for a wife or a husband to think it is acceptable for a husband to have sex with his wife when she neither consents nor participates. This acceptance often stems from the belief that wives are the sexual property of their husbands, and that it is natural male behavior to be able or willing to have sex with a woman who is passive or noncooperative. This acceptance also implies the belief that it is appropriate for wives to accommodate their husband's needs and desires as long as it doesn't hurt them. The notion that it is of little consequence for a husband to have intercourse with his wife when she cannot consent is another version of the view that wives have no right to refuse their husbands' sexual advances. For if it doesn't matter whether a woman says 'no' what does it mean for her to say 'yes'?[38]

From the standpoint of a permissive conception of implied consent, it certainly makes a difference whether a wife says "no," for this would nullify the presumption of permission implied by her previous intercourse. Russell's failure to conceive of implied consent in any but a promissory sense is also evident in her claim that a wife's accommodation to her husband's desires necessarily reflects her lack of a right to refuse. Apparently Russell assumes that the appropriateness of actions depends entirely on the presence or absence of legal rights. Thus, if intercourse without express consent is thought "appropriate," it must reflect belief that the husband has a legal right and the wife

[37] "Statistics intimate that if a female consented once to a man, she might very likely consent to that same man on subsequent occasions." Comment, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U.L. REV. 127, 145 (1976).

[38] Russell, *supra* note 2, at 45-46.

has none. Such a conclusion does not follow, of course, once the permissive sense of implied consent is taken into account; then, the appropriateness of a wife's accommodation becomes logically divorced from the question of legal rights, since such accommodation does not affect her right to object on subsequent occasions.

Russell's initial point about sex in the absence of consent and viewing the wife as property is similarly suspect. While such a view of the wife might imply that sex in the absence of consent is legitimate, the reverse is not necessarily true (she falls into the textbook fallacy of affirming the consequence here). Other views and circumstances can also legitimate sex without express consent. One such circumstance could be the recognition that a wife wakened from sleep or intoxicated slumber can say things, including the express giving of permission for sex, that she cannot later recall.[39] This could well lead to misunderstandings for which it would be foolish to subject a spouse to criminal prosecution. Likewise, the permissive interpretation of implied consent, by affirming the wife's right to object and negate implicit authorization, legitimizes sex in the absence of express consent without depriving the wife of meaningful choice. Thus, fear that lack of an absence-of-consent clause must necessarily imply that a wife is her husband's property proves unwarranted.

The same is true of the belief that acceptance of implied consent must lead to abuse of the idea of contract or provide the husband with a deciding vote in sexual matters. The idea of contract is a product of promissory rather than permissive consent and is irrelevant to the latter. The wife's right to object and override a presumption of permission preserved in the permissive sense of implied consent ultimately insures that she will have at least an equal voice in sexual matters, if not the deciding vote herself.

IV.

The existence of a plausible alternative conception of implied consent along permissive lines should dispel reasonable fears that acceptance of implied consent would necessarily encourage reversion to a marital exemption and some of the abuses of the idea of consent it involved. However, some problems remain. Among these is the dif-

[39] Russell relates just such an incident from her interviews, characterizing it as an instance of rape. *Id.* at 45.

ficulty concerning unequal treatment of married and unmarried women. By accepting and urging the elimination of the marital exemption the most outrageous inequality—permitting married women to be violently sexually attacked by their husbands while protecting unmarried women from such behavior—should be likewise eliminated. Yet a noteworthy inequality seems to remain if the arguments advanced above against the absence-of-consent clause are accepted. Such clauses are a standard feature of statutory and case law criminalizing extramarital rape. Hence married women seem deprived of a protection that the law routinely affords unmarried ones. Is there any plausible justification for thus distinguishing married and unmarried women?

Justice requires that people in the same circumstances be treated equally. At first glance it appears that married women will be treated unjustly if they are left "unprotected" by an absence-of-consent clause that presently applies to unmarried women. Yet, people in different circumstances can and often should be treated differently. Careful reflection suggests that married women are in a different situation from unmarried women with regard to intercourse in the absence of express consent.

The absence-of-consent clause is designed to protect a woman who is unconscious, intoxicated, or asleep from being subjected to intercourse by a stranger. This is the equivalent of the paradigmatic rationale for rape laws in general, which several commentators have described as protecting a woman from being ambushed by a stranger.[40] The plausibility of equating sex in the absence of express consent with sex against objection (as the law does by penalizing both as rape) hinges on the plausibility of assuming that a woman in such circumstances would be likely to object if given the opportunity. If we had every expectation that a woman would welcome, consent, and participate in the activity if given the chance, the plausibility of treating the two cases as equivalent would be diminished. Since in the ordinary marriage the expectation exists that a wife will consent, welcome and participate in intercourse with her husband (she has usually done so when given earlier opportunities), the plausibility of equating intercourse in the absence of consent and intercourse against consent in these circumstances is greatly diminished. Hence, there are reasonable grounds

[40] *See* Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 723 (1954).

for treating married and unmarried women differently as regards the absence-of-consent clause.

It may be argued that such grounds derive, however, from speculations about typical cases and expectations, rather than something more tangible. Several commentators have recommended that "harm to the victim" be used as a standard to design criminal legislation. Glasgow, for example argues that "[t]he objective of the criminal law is to assess a penalty which is commensurate with the actual or potential harm involved. In the final analysis, the law should focus on the harm or injury involved regardless of the relationship of the parties."[41] And Geis urges that

> [r]ape law should focus on the consequences of the criminal act and not on the status or the intimacy of the relationship between the parties, except as they modify the consequence in fact and not by presumption. In this enterprise, the principle of harm to the victim appears to be the cutting tool which can be best employed to fashion a satisfactory delineation of the crime of rape and sexual assault.[42]

Is the harm suffered by married and unmarried women from sex in the absence of express consent equal?

Unfortunately, there is no direct evidence comparing the trauma experienced by married and unmarried women from sex in the absence of express consent. Yet some considerations suggest that the harms are not equivalent. Russell's data on victims' reactions to different types of assailants indicates that they experienced significantly greater trauma from rape by a stranger than from rape by a friend/date/lover.[43] She explains this difference in terms of the victims being less concerned about death or injury at the hands of the former, though there is no supporting evidence of this. Indeed, the incidents she relates from interviews with unmarried women who were raped by their lovers all involve a great deal of violence.[44] In light of this, it seems likely that part of the explanation of the difference in trauma experienced by Russell's respondents may have to do with the fact that a prior sexual relationship may serve to moderate the trauma or harm that the rape

[41] Note, *supra* note 10, at 584.
[42] Geis, *supra* note 18, at 303.
[43] Russell, *supra* note 2, at 191-93.
[44] *Id.* at 261-68.

involves. This likelihood is increased when the effect of consent on harm generally is taken into account.

I have argued elsewhere[45] that harm is primarily dependent on the distress that an act occasions. Such distress, in turn, can be divided analytically into two sorts. The first I term "situational" distress—one's shock, surprise and anxiety at being involved in an unanticipated situation. The other sort of distress—"reactive" distress—refers to the shock and trauma that occur in reaction to the hostile acts of another. Adequately informed consent serves to diminish or eliminate the first type of distress since the consentor anticipates the situations that will be encountered. Consent cannot similarly reduce reactive distress, however, since people can change or present hitherto unknown sides of themselves at any time.

If this analysis is correct, then there is reason to suppose that a wife whose husband has sex with her when she is asleep or intoxicated will feel less trauma or distress than an unmarried woman (or married one) with whom a stranger has intercourse when she is unable to consent. The wife, through her prior intercourse with her husband, has certainly anticipated finding herself having sex with him. Thus the experience should not be nearly as surprising (thus occasioning situational distress) as the unmarried woman's discovery that a stranger has had sexual relations with her. For the latter, the situation is clearly fraught with unexpected implications (regarding security, pregnancy, effects on the future, reactions of others, etc.) that are not a part of the former. Hence, there appears to be a reasonable case for the notion that the harm from sex when unable to consent is different for the married woman with her husband and the unmarried woman and so for treating them differently.

It may be asked at this point, if implied consent eliminates the harm from sex when the wife is unable to expressly consent, won't it also eliminate the harm from sex against her objection? If so, then this argument seems to confirm the reformers' misgivings about allowing implied consent into the picture. The answer, fortunately, is negative. As noted above, while implied consent can diminish or eliminate situational distress, it cannot eliminate or diminish reactive distress. In fact, when this sort of distress is taken into account, the case for criminalizing sex coerced through force, violence or the threat of violence in marriage is strengthened.

[45] Harman, *Harm, Consent and Distress* 15 J. VALUE INQUIRY 293 (1981).

Sex in the absence of consent inside marriage is less harmful than outside marriage at least partially because of the prior relationship between husband and wife. This relationship is usually marked by intimacy and some degree of trust and reciprocal confidence. Where the husband resorts to violence or threats to achieve sexual satisfaction, the relationship is destroyed. A wife's shock at such treatment by someone from whom she is or should be accustomed to more consideration is likely to be even greater than another woman's shock at such treatment from a stranger. Russell's data comparing the trauma of rape from different types of assailants seems to bear this out. Reflecting, as it does, the overwhelming preponderance of violent and threat-effected rapes, this data indicates that the degree of trauma (proportion of victims reporting they were "extremely upset" by the attack) was nearly the same for husbands/ex-husbands and strangers (59% to 61%).[46] The duration or impact of that trauma (proportion reporting "great" long-term effects), on the other hand, was greater from attacks by husbands than strangers (52% to 39%).[47] The likelihood of reactive distress, and with it harm to the victim, thus adds to the urgency of criminalizing sexual assaults in marriage.

There remains one final problem. Even if permissive implied consent is not vulnerable to the perversions attending the promissory conception, what guarantee exists that those who interpret the law—judges and juries—will recognize the permissive over the promissory interpretation and avoid abusing the idea of implied consent?

While there can be no guarantees about the behavior of judges or juries, wider recognition of the distinction between the two conceptions of consent introduced here will help avoid the confusion that results in the marital exemption. The discussion of harm above clearly suggests that it is a legal confusion that is responsible for continued acceptance of the exemption. Part of the plausibility of the exemption came from the notion that consent to an activity renders it harmless. This notion, embodied in the legal dictum, "*Volenti non fit injuria*" ("No injury is done a willing one"), seems readily applicable to sexual

[46] Russell, *supra* note 2, at 192.
[47] *Id.*

relations. Yet it is the permissive conception of consent, rather than the promissory one, that operates here. Consent as the agent's permission or authorization conveys anticipation of the results of that activity by the consentor. Consent as a promise given in exchange for something, creating a legal power in the promisee to compel the consentor, does not as clearly convey such anticipation. Further, as we have seen, consent only makes an activity harmless where the harm comes from unanticipated changes in the situation of the subject. Where the harm, in contrast, derives from reaction to the malevolence or hostility of another, consent does not diminish or eliminate the harm. Permissive consent, conveying anticipation and permission, seems compatible with the idea that harm is diminished in a limited way.[48] That limit seems to be reached when another begins acting in a malevolent fashion, as in resorting to violence or serious threats to do violence to accomplish his/her ends at the expense of the consentor. The promissory interpretation of consent, however, seems irrelevant to the idea of limited application. Indeed, it seems indifferent to another's malevolence or the consentor's interests once the promise has been given and the right established.

The fact that promissory consent thus fails to account for the way consent operates to reduce harm within the limited range in which it works, or even to explain the idea of limits itself, suggests its ultimate irrelevance to the question of marital sexual relations. Yet the justification, as we have seen, of a husband's "marital right" to sex and his "enforcement" of that right spring from this conception. Thus, it is in large part a confusion over these interpretations of consent that results in the mistaken creation and maintenance of an exemption for the husband from criminal liability for sexual assaults against his wife. Recognition of this should help jurists avoid a similar mistake in the future.

Reluctance of reformers to accept the idea of implied consent for fear of the kinds of abuses involved in the marital exemption clearly depends on accepting the promissory conception of consent advocated by Hale and others as the only relevant interpretation. The plausibility of an alternative view along permissive lines should dispel that reluctance. This, together with the difficulties that the express-consent provision raises for reform efforts should be sufficient to argue the abandonment of an emphasis on express consent and with it the absence-of-consent clause. The urgency of preventing violent sexual assaults against wives can then be more clearly established, the case for eliminating the marital exemption strengthened, and the pace of this important reform substantially quickened.

[48] One of the criticisms of consent as it is applied generally to rape cases is that it does not seem to recognize the notion of "limited consent." *See* Comment, *Towards a Consent Standard in the Law of Rape* 43 U. CHI. L. REV. 614, 640-41 (1976).