For Better or for Worse: Marital Rape

I. INTRODUCTION

"Damn it, when you get married you kind of expect you're going to get a little sex."[1]

"But if you can't rape your wife, who can you rape?"[2]

Over the past decade, marital rape has become a controversial social and legal issue. The fact is that in most states, it is legal for a man to rape his wife.[3] Although progress has been made in some states in the form of legislative or judicial action abolishing the spousal exemption from rape statutes,[4] the issue is far from resolved. Considering the magnitude of the studies which have demonstrated that marital rape is, in fact, a common phenomenon in the American family,[5] it becomes apparent that the issue needs to be confronted and given political priority until every state is willing to recognize marital rape as a criminal act.

The aim of this Comment is to encourage legislatures to abolish the marital rape exemption. The Comment begins with the historical treatment of the marital rape exemption and a critique of the theories justifying that position. The current status of marital rape laws will be discussed, along with the judicial responses to marital rape. The Comment then addresses the constitutional right to privacy and equal protection issues surrounding the marital rape exemption. Finally, a survey conducted in Hamilton County, Ohio, to determine what the public thinks about marital rape will be discussed. The Hamilton County study

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1. *When a Wife Says No. . .*, Ms., April, 1982, at 23 (quoting Alabama Senator Jeremiah Denton).

2. D. RUSSELL, RAPE IN MARRIAGE 18 (1982) (quoting California State Senator Bob Wilson).

3. For a summary of legislative responses to marital rape see text accompanying notes 72-85 *infra*.

4. *See* text accompanying notes 72-83 *infra*.

5. *See, e.g.*, D. RUSSELL, *supra* note 2, at 57. Russell's survey revealed that at least fourteen percent of married women were victims of one or more attempted or completed rapes by their husband. *See also* D. FINKELHOR & K. YLLO, LICENSE TO RAPE (1985). Finkelhor and Yllo's survey results indicate that at least ten percent of married women reported that their husbands had used physical force or threat of foce to try to have sex with them.

was undertaken with the idea that given the current salience of marital rape, it seems critical to know what people think about it.

II. The Origin of the Marital Rape Exemption

A. *The Historical Treatment*

The marital rape exemption originated at common law with a statement made in the seventeenth century by Lord Matthew Hale who declared, "[b]ut the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[6]

For over 300 years this statement alone served as a justification for a spousal immunity involving rape charges, and was the origin for judicial recognition of the marital rape exemption in the United States.[7] It also served to maintain the position of men in our society as dominators and women as their property.[8] Hale's statement has since been criticized on the basis that Hale cited no authority for this statement,[9] and because in actuality the common law does not support an absolute spousal exemption.[10]

Hale's comments were discussed in the Virginia case of *Weishaupt v. Commonwealth*[11] when the court was asked to consider whether a rape statute, which does not expressly preclude prosecution of a husband, nonetheless retains the common law marital rape exemption. Specifically, the court was asked to determine whether the reference to a provision in the state code which adopts the common law of England was repugnant to Virginia's constitution. The court never decided the constitutional question. Rather, the court held that "the true state of English common law was that marriage carried with it the implied consent to sexual intercourse; but that consent could be revoked."[12] Since the husband and wife in this case had been living separate and

6. 1 M. Hale, The History of the Pleas of the Crown 629 (S. Emlyn ed. 1778).
7. Note, *The Marital Rape Exemption*, 52 N.Y.U. L. Rev. 306, 307 (1977).
8. S. Brownmiller, Against Our Will (1975).
9. State v. Smith, 85 N.J. 193, 200, 426 A.2d 38, 41 (1981).
10. Weishaupt v. Commonwealth, 227 Va. 389, 396, 315 S.E.2d 847, 850 (1984).
11. 227 Va. 389, 315 S.E.2d 847 (1984).
12. *Id.* at 399, 315 S.E.2d at 852.

apart for nearly one year, the court reasoned that the wife had revoked her implied consent to marital sex. The court stated that "Hale's statement was not law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in 17th century England."[13] The court concluded that English common law never recognized an absolute irrevocable marital exemption that would protect a husband from rape charges in all circumstances.

Similarly, in *State v. Smith*,[14] the Supreme Court of New Jersey criticized Hale's statement when confronted with the defendant's argument that New Jersey's rape statute incorporates the common law marital rape exemption. The court criticized Hale for citing no authority for his extrajudicial proposition. The court stated that such a declaration cannot be considered binding as a definitive common law view and thus it "decline[d] to apply mechanically a rule whose existence is in some doubt and which may never have been intended to apply to the factual situation presented by this case."[15]

Nonetheless, Hale's statement has traditionally been accepted as the origin for the marital rape exemption.[16] However, in recent years, the positions and views emulating from his statement have been facing increased criticism.

B. *Critique of Theories Justifying the Marital Rape Exemption*

(1) *Permanent consent rationale*

Various justifications, including Hale's notion that the marriage contract implies permanent consent to sex, have been advanced in support of a spousal exemption in the law of rape. The rationale utilized by Hale is that when a woman marries, she gives up her rights to her body because she has formed a contract with her husband which cannot be retracted. As was previously discussed, the rationale of permanent consent has been criticized and rejected as being the definitive common law rule and is generally

13. *Id.* at 396, 315 S.E.2d at 850.
14. 85 N.J. 193, 426 A.2d 38 (1981).
15. *Id.* at 203, 426 A.2d at 43.
16. Comment, *Abolishing the Marital Exemption to Rape: A Statutory Proposal*, 1983 U. Ill. L. Rev. 201 [hereinafter cited as Comment, *Abolishing the Marital Exemption*].

no longer accepted as an adequate justification for the marital rape exemption.[17] In response, one commentator argues that "[t]he doctrine of permanent consent recently has been characterized as legal fiction, since it appears unrealistic to assume that modern women give unqualified consent to sexual relations with their husbands during marriage."[18] No one consents to violence when they marry. Though they may consent to sex in the marital relationship, women do not voluntarily consent to being raped by their husbands simply because they have entered into a contract for marriage.

(2) Preserving the sanctity of marriage rationale

Proponents of the marital rape exemption, who believe that the exemption preserves the sanctity of marriage, argue, among other things, that an abolishment of the exemption would violate the marital right to privacy and thwart efforts toward reconciliation.[19] One advocate of this position argues that "[a]llowing access to the criminal justice system for every type of marital dispute will discourage resolution by the spouses and will make their ultimate reconciliation more difficult."[20] Under this theory, it is inappropriate for the state to intervene with the institution of marriage and the family.

In *Weishaupt v. Commonwealth,*[21] the Supreme Court of Virginia responded to this argument by stating:

> [i]t is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.[22]

An analogy can be drawn between punishing marital rape and incest. If we are prepared to argue that the state should not meddle in family matters, we must ask ourselves if we are ready

17. *See* text accompanying notes 9-15 *supra.*

18. Note, *Rape in Marriage: The Law in Texas and the Need for Reform,* 32 BAYLOR L. REV. 109, 114 (1980) (citations omitted) [hereinafter cited as Note, *Rape in Marriage*].

19. Hilf, *Marital Privacy and Spousal Rape,* 16 NEW ENG. 31 (1980) [hereinafter cited as Hilf, *Marital Privacy*].

20. *Id.* at 34.

21. 227 Va. 389, 315 S.E.2d 847 (1984).

22. *Id.* at 405, 315 S.E.2d at 855.

to decriminalize incest just because it is a family affair.

It has been further suggested that an argument in favor of the marital rape exemption based on the theory that it preserves marital harmony by encouraging reconciliation is just one more attempt to promote inequality between the sexes.[23] Thus, one commentator has noted that "[w]hile perhaps the concern with reconciliation was appropriate in the 1700s when divorce was nearly unthinkable, such an approach today is harmful to the individual, to women, and to the society purporting to be democratic and protective of freedom."[24]

Supporters of the marital rape exemption, who focus on the marital right to privacy, tend to view the couple as one entity.[25] Therefore, the public should not be permitted to examine the intimacies of a marital relationship when one party (*i.e.*, the husband-rapist) objects to such intrusion. These supporters question "whether the complaining spouse alone has the right to waive the marital privacy right of the couple by presenting the matter before the courts and the public."[26]

This position is mistaken for two reasons. First, modern developments in the legal status of married women do not support the view that a married couple is one entity.[27] The United States Supreme Court has declared that "[n]owhere in the common-law world—[or] in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."[28] Second, the marital right to privacy does not extend to violent sexual assaults.[29] In *People v. Liberta,* addressing the marital right to privacy issue, New York's highest court aptly stated "[j]ust as a husband cannot invoke a right of marital privacy to

23. Barshis, *The Question of Marital Rape,* 6 WOMEN'S STUDIES INT'L F. 383 (1983).

24. *Id.* at 388.

25. Hilf, *Marital Privacy, supra* note 19, at 41.

26. *Id.* at 34.

27. *See, e.g.,* Note, *The Marital Rape Exemption, supra* note 7, at 310 which discusses areas of law which do not support the idea that husband and wife are one. For example, since the adoption of the Married Women's Property Acts women have had recognized rights separate from their husbands.

28. Trammel v. United States, 445 U.S. 40, 52 (1980).

29. People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), *cert denied,* 471 U.S. 1020 (1985), *habeus corpus denied,* 657 F. Supp. 1260 (W.D.N.Y. 1987), *aff'd,* 839 F.2d 77 (2d Cir. 1988).

escape liability for beating his wife, he cannot justifiably rape his wife under the guise of the right to privacy."[30]

(3) Problems with evidence and proof rationale

Supporters of a spousal immunity for rape charges offer as a basis for the exemption that marital rape would be a difficult crime to prove.[31] Legislatures which are considering abolishing the marital rape exemption, the argument goes, should be aware that marital rape is simply one spouse's word against the other, making it difficult to prosecute. A related argument is that women will use the criminal justice system to file false charges should the exemption be removed. The commentator conjures up images of "a horde of spiteful wenches ... 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."[32]

The fact that prosecutions will be difficult is not a reasonable justification to forbid them. As was stated in *State v. Smith*,[33] proving lack of consent, an essential element in a rape prosecution, is a difficult problem in any rape case. However, the court did not accept this as a sufficient rationale for maintaining the marital rape exemption. Furthermore, even if marital rape is a difficult crime to prove, there is another reason for abolishing the exemption. The law sometimes operates both as an educational tool and as a deterrence.[34] In theory then, an unknown number of husbands will be deterred from raping their wives by the abolishment of the exemption, while an unknown number of other persons will come to recognize marital rape as a criminal act. Men need to realize that they are going to be held responsible for any behavior that violates a woman's right to her own body. The only way to promote this goal is to remove the marital rape exemption thereby "mak[ing] an important statement about the relative position of women in society ... [which is the assertion of] the right of married women to the physical integrity of their

30. *Id.* at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.

31. *See, e.g.*, Note, *Rape in Marriage*, *supra* note 18, at 115.

32. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33, 51 (1982) [hereinafter cited as Schwartz, *The Spousal Exemption*].

33. 85 N.J. 193, 426 A.2d 38 (1981).

34. *See generally* Schwartz, *The Spousal Exemption*, *supra* note 32.

bodies, and of the right to choose what uses their bodies will be put to."[35]

As far as vindictive women taking advantage of a law allowing them to charge their husbands with rape, several courts have responded that this is also a meritless argument.[36] The Florida Court of Appeals stated that it is doubtful that women will file false complaints against their husbands out of spite "because the offense of battery which can now be exerted by one spouse against another has not been used for such purpose, at least not to the point that law enforcement has been taxed."[37] Furthermore, in *Liberta*, the court reasoned that the possibility that married women will fabricate rape charges is no greater than the possibility of unmarried women doing so.[38] In the court's opinion, "[t]he criminal justice system, with all of its built-in safeguards, is presumed to be capable of handling any false complaints. Indeed, if the possibility of fabricated complaints were a basis for not criminalizing behavior which would otherwise be sanctioned, virtually all crimes other than homicides would go unpunished."[39]

Another weakness with the rationale that women will fabricate charges is its failure to recognize that a social stigma is still attached to rape.[40] Thus, it is much more likely that a woman bent on revenge or blackmail would do so through an avenue which is less embarrassing for her and more likely to result in a conviction for him.[41]

(4) Spousal rape is not as serious as non-spousal rape rationale

Another group of theories advocating the spousal exemption perceive that there is both a quantitative and a qualitative difference between marital rape and non-spousal rape.[42] The quantitative argument is that marital rape does not occur often enough

35. *Id.* at 51.

36. State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981); State v. Smith, 401 So. 2d 1126 (Fla. Dist. Ct. App. 1981); People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 107 (1984), *cert. denied*, 471 U.S. 1020 (1985).

37. State v. Smith, 401 So. 2d at 1129.

38. *Liberta*, 64 N.Y.2d at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.

39. *Id.* at 166, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.

40. *See* Note, *The Marital Rape Exemption*, *supra* note 7, at 314-15; Schwartz, *The Spousal Exemption*, *supra* note 32, at 54-55.

41. Note, *The Marital Rape Exemption*, *supra* note 7, at 315.

42. Schwartz, *The Spousal Exemption*, *supra* note 32, at 42-43.

for the criminal justice system to be concerned.[43] The qualitative argument is that marital rape victims do not suffer much damage from the incident; that it is really just a bedroom squabble that should not be treated like rape by a stranger.[44]

Although far from voluminous, the data which exist, as to the quantitative issue of marital rape, suggest that marital rape is a common phenomenon in as much as fourteen percent of American families.[45] However, there are a number of reasons as to why there is not a massive amount of quantitative data in this area. For one, the fact that marital rape is not a crime in many jurisdictions can only lead to the conclusion that wives are not reporting such incidents as rape.[46] There is a tendency for people to associate conduct as immoral if it is defined "criminal."[47] Thus, spousal rape victims may fail to perceive the incident as rape and simply accept their submissive position in the relationship.[48] As one commentator points out, "[o]ur entire culture perpetuates both the high incidence of rape and the level of family violence. Insofar as male aggressiveness is applauded in every realm of our society, including that of sexuality, rape becomes but a matter of degree along a socially approved continuum."[49] To the same extent that women fail to perceive the experience as rape, the husband offenders who have been interviewed thought that they had a right to take what they wanted.[50]

There is simply no merit to the argument that marital rape is qualitatively different from nonmarital rape. In fact, at least one

43. *Id.*

44. *Id.*

45. *See* D. RUSSELL AND D. FINKELHOR & K. YLLO, *supra* notes 2 & 5. Russell randomly interviewed 930 women 18 years of age and older in the San Francisco area. Of the 644 women who had ever been married, 14% were victims of at least one attempted or completed rape by their husbands. Russell defined marital rape as forced intercourse, forced oral sex, forced anal sex and forced digital penetration.

46. Schwartz, *The Spousal Exemption, supra* note 32, at 43.

47. *Id.*

48. D. RUSSELL, *supra* note 2, at 359. The fact that it is legal in most states for a man to rape his wife perpetuates the problem because it allows men and women to establish a value system which tolerates wife rape. Outlawing rape in marriage is the first and easiest step to reversing this ideology.

49. Barshis, *The Question of Marital Rape, supra* note 23, at 385.

50. D. FINKELHOR & K. YLLO, *supra* note 5, at 66. One man spoke of his frustrations due to his wife's lack of interest in sex. When he finally took her by force, this is how he explains his feelings: "I'm not proud of it, but, damn it, I walked around with a smile on my face for three days. You could say, I suppose, that I raped her. But I was reduced to a situation in the marriage where it was absolutely the only power I had over her."

study suggests that marital rape is frequently quite violent and generally has more severe and traumatic effects on the victim than non-marital rape.[51] If accounts of the incident by victims are to be given any merit at all, then it is clear that marital rape victims are often emotionally scarred for life.[52] Frequently these women are also battered.[53] One study found that fifty-two percent of marital rape victims suffer extreme long-term effects.[54] Moreover, psychologists tend to agree that the identity of the rapist does not lessen the traumatic effects on the woman who is raped.[55] The worst part about being a victim of marital rape is that the woman has to confront her rapist the next day and is reminded that this man violated her love and trust.

Certainly, there is enough evidence to argue that marital rape is a serious problem both quantitatively and qualitatively warranting concern.

(5) Alternate remedies rationale

Closely related to the argument that marital rape is not as serious as nonmarital rape, is the argument that women can seek redress in other areas of the law. For example, proponents argue, because marital rape is not as serious as stranger rape, women should be allowed to file assault and battery charges but a husband should not be treated as a "rapist." It has been argued that "[p]roceedings for separation or divorce can be instituted soon after a single nonconsensual encounter ... [and] serious cases of physical abuse will be taken care of by spousal assault and battery laws."[56]

Responding to this argument, the court in *Liberta*[57] recognized that allowing a woman who has been raped by her husband to

51. D. RUSSELL, *supra* note 2, at 359.

52. D. FINKELHOR & K. YLLO, *supra* note 5, at 117-38. These authors provide examples where the marital rape victim is left, if not physically disabled, phychologically destroyed for a long time. Some examples, as reported by the victims include: one [woman] was jumped in the dark by her husband and raped in the anus while slumped over a woodpile; one had a six centimeter gash ripped in her vagina by a husband who was trying to "pull her vagina out"; one was forced to have sex with her estranged husband in order to see her baby, whom he had kidnapped.

53. D. RUSSELL, *supra* note 2, at 90 (noting that ten percent of married women experience *both* wife rape and wife beating).

54. *Id.* at 192-93.

55. D. MARTIN, BATTERED WIVES 181 (1976).

56. *See* Hilf, *Marital Privacy, supra* note 19, at 42.

57. People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984).

charge him with assault is not an adequate remedy. "The fact that rape statutes exist, however, is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault. . . ."[58] Thus, the court recognized a qualitative difference between these crimes. Prosecuting a husband for assault and battery would not redress the more serious harm caused by rape.[59] Rape is a "crime of violence"[60] and not just in a sexual sense since it is also a crime of humiliation, degradation, and domination designed to leave scars on the victim.[61]

The other problem that is raised by arguing that a woman has remedies in assault and battery laws is that not all women who are raped by their husbands are physically abused.[62] Thus, in a situation where a wife is raped by her husband but not beaten by him, he has effectively been given a license to rape since no criminal liability attaches to the act if her body lacks signs of physical abuse.[63] The possibility of an interesting paradox was raised in *People v. DeStefano*,[64] when a New York county court suggested that a husband who sets out to commit a simple assault and battery might decide to go further and commit the more heinous crime of rape in an effort to hide behind the marital rape exemption.[65] The court suggested that the exemption would lead to increased violence since permitting any kind of exemption was equivalent to giving "a husband a right to control his wife's bodily integrity."[66]

The argument that divorce is an alternative remedy justifying the marital rape exemption fails to acknowledge that divorce provides little relief for a woman who has been raped by her

58. *Id.* at 166, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.
59. Comment, *Abolishing the Marital Exemption*, *supra* note 16, at 208.
60. State v. Smith, 401 So.2d 1129.
61. S. BROWNMILLER, *supra* note 8, at 377-78.
62. D. RUSSELL, *supra* note 2. Of the fourteen percent of the respondents who were victims of wife rape, four percent were victims of wife rape only. If marital rape is viewed as one of the aspects of the battered women, Russell cautions, those wife rape only victims will be excluded from seeking a remedy in crimnial laws. The result will be a situation where a husband can only be charged with rape if there are clear signs of injury to other parts of the body, a black eye or bruises, for example.
63. Comment, *Abolishing the Marital Exemption*, *supra* note 16, at 209.
64. 121 Misc. 2d 113, 467 N.Y.S.2d 506 (Soffolk County Ct. 1983).
65. *Id.* at 124, 467 N.Y.S.2d at 514.
66. *Id.*

husband.[67] Proponents of this argument believe that abolishment of the exemption is not necessary because a raped wife is able to obtain a divorce, thus avoiding the criminal courts. Rather than arguing that the raped wife has legal avenues of redress available other than prosecution for rape, at least one commentator[68] and one court[69] has responded that the husband who cannot obtain his wife's consent has *his* remedy in matrimonial court. Thus, the New Jersey Supreme Court in *State v. Smith* stated "[i]f her repeated refusals are a 'breach' of the marriage 'contract,' his remedy is in a matrimonial court, not in violent or forceful self help."[70]

Thus, like the aforementioned theories justifying the marital rape exemption, little merit should be given to the argument that marital rape victims have alternative remedies available to them. To summarize the position that critics of the exemption have taken, one writer offers the following: "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."[71] If our goal is to promote a society where women have the right to control sexual access to their own bodies, then the repeal of any marital rape exemption is the next logical step toward promoting that goal.

III. CURRENT STATUS OF MARITAL RAPE LAWS

A. Statutory Treatment

Although marital rape has been gaining increased attention nationwide, the fact remains that in all but eleven states,[72] it

67. Comment, *Abolishing the Marital Exemption*, *supra* note 16, at 209.
68. Schwartz, *The Spousal Exemption*, *supra* note 32.
69. State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981).
70. *Id.* at 206, 426 A.2d at 44.
71. Schwartz, *The Spousal Exemption*, *supra* note 32, at 35.
72. Nine state legislatures have abolished the marital rape exemption. See FLA. STAT. ANN. § 794.011 (West Supp. 1988); KAN. STAT. ANN. § 21-3502 (Supp. 1986); MASS. GEN. LAWS ANN. ch. 265, § 22 (West Supp. 1988); NEB. REV. STAT. § 28 319, -320 (1985); N.J. STAT. ANN. § 2C:14-5(b) (West 1982); OHIO REV. CODE ANN. § 2907.02(G) (Baldwin 1986); OR. REV. STAT. § 163.355- .375 (1985); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1987); WIS. STAT. ANN. § 940.225(6) (West Supp. 1987). New York and Georgia have removed their marital rape exemptions through judicial action. *See* People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), *cert. denied*, 471 U.S. 1020 (1985) and Warren v. State, 225 Ga. 151, 336 S.E.2d 221 (1985), *aff'd*, 185 Ga. App. 108, 363 S.E.2d 357 (1987).

remains legal for a man to rape his wife without fear of prosecution while they are living together. In three states,[73] the exemption ends only when there is a final decree of divorce. As long as the parties remain married, regardless of whether they are living separate, under a court order, or together, a husband cannot be prosecuted for the rape of his wife.

State statutes prohibit prosecution of a spouse in a number of ways. For example, the statue may define rape as nonconsensual sexual intercourse by a man with a female who is not his wife.[74] Other states simply refer to intercourse with a female or person and then define that person to exclude the spouse of the actor.[75] Still others define sexual intercourse as any act of sexual gratification between persons not married and then these statutes qualify that persons living apart under a judicial order are not married.[76]

The majority of the state statutes contain a partial exemption. For example, in eight states,[77] the exemption applies unless the parties are separated under a court order. In three states,[78] the husband cannot be prosecuted for the rape of his wife unless the parties are living apart *and* one spouse has filed a petition for divorce, separation, annulment, or separate maintenance. In other states,[79] the exemption ends when the parties are living apart *or* one spouse has initiated legal proceedings at the time of the rape. In still other states,[80] as long as the parties were living apart at the time of the incident, the husband can be prosecuted.

73. *See* ALA. CODE § 13A-6-60, -61 (1982); ILL. REV. STAT. ch. 38, para. 12-18(c) (Supp. 1985); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1987).

74. *See, e.g.*, UTAH CODE ANN. § 76-5-402 (Supp. 1987).

75. *See, e.g.*, ALA. CODE § 13A-6-60(4) (1982).

76. *See, e.g.*, KY. REV. STAT. § 510.010(1) & (3) (Baldin Supp. 1986).

77. *See, e.g.*, KY. REV. STAT. § 510.010(3) (Baldwin Supp 19 86); LA. REV. STAT. ANN. § 14.41 (West 1986); MD. ANN. CODE art. 27, § 464D (1982); MO. ANN. STAT. § 566.010.2 (Vernon 1988); N.C. GEN. STAT. § 14-27.8 (1986); R.I. GEN. LAWS § 11-37-I-2 (Supp. 1987); S.C. CODE ANN. § 16-3-658 (Law Co-op 1985); UTAH CODE ANN. § 76-5-402, -407 (1978 & Supp. 1987).

78. *See, e.g.*, IND. CODE ANN. § 35-42-4-1-(b) (Burns 1985); NEV. REV. STAT. § 200.373 (1985); TENN. CODE ANN. § 39-2-610 (1982).

79. *See* IDAHO CODE § 18-6107 (1987); N.M. STAT. ANN. § 30- 9-10 (1978); OKLA. STAT. ANN. tit. 21, § 1111(B) (West Supp. 1988); TEX. PENAL CODE ANN. § 22.011(C)(2) (Vernon Supp. 1988).

80. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1401.4, 1407(D) (Supp. 1987); COLO. REV. STAT. § 18-3-409(2) (1986); ME. REV. STAT. ANN. tit. 17A, § 251.1.A (1983); MISS. CODE ANN. § 97-3-99 (Supp. 1987); MONT. CODE ANN. § 45-5-511(2) (1987).

In those states, no court order or separation agreement is required.

Other states recognize marital rape in limited circumstances.[81] These states allow the prosecution of husbands for charges of first or second degree rape, but do not allow prosecution for lesser sexual offenses.

While the marital rape exemption allegedly protects harmony and the intimacy of the marital relationship, this argument cannot be used to explain why some states have expanded the marital rape exemption to cover unmarried cohabitors[82] and voluntary social companions.[83] One commentator offers the following explanation:

> [T]he expansion of the exemption beyond the marital relationship reflects the deeply discriminatory vision of women inherent in the theories used to justify the exemption; in particular, the expansion reflects a modern version of Hale's theory that women who enter into relationships with men give an implied consent to sexual intercourse or that those who consent to sexual intercourse once are forever bound.[84]

Knowing that many states do not permit a woman to bring rape charges against her husband, the question is raised why is it that some states have moved in the direction of abolishing the marital rape exemption while others have not and still others deny, not only wives, but also unmarried women who are either cohabitors or voluntary social companions the right to file a complaint against their male counterparts for rape? One explanation is rooted in the views of the two senators quoted in the Introduction. Perhaps we should not be surprised that Alabama

81. *See, e.g.*, CAL. PENAL CODE § 261-262 (West Supp. 1988); CONN. GEN. STAT. ANN. § 53a-67(b), -70(b) (West 1985); DEL. CODE ANN. tit. 11, § 761-762 (1987); IOWA CODE ANN. § 709.2, -.4 (West 1979); 18 PA. CONS. STAT. ANN. § 3128 (Purdon Supp. 1987); WASH. REV. CODE ANN. § 9A.44.040, .050, .060(1) (West 1988); W. VA. CODE § 61-8B-6 (1984); WYO. STAT. § 62-307 (1983).

82. *See, e.g.*, ALA. CODE § 13A-6-60(4) (1982); CONN. GEN. STAT. § 53a-67(b) (1985); IOWA CODE ANN. § 709.4 (West 1979); KY. REV. STAT. ANN. § 510.010(3) (Baldwin Supp. 1986); MONT. CODE ANN. § 45-5-511(2) (1985); PA. STAT. ANN. tit 18, § 3103 (Purdon Supp. 1987); W. VA. CODE § 61-8B-1.(2) (1984).

83. *See,e.g.*, DEL. CODE ANN. tit. II, § 761(h) (1987).

84. Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1260 (1986) [hereinafter cited as Note, *To Have and To Hold*].

is one of three states that maintains an absolute exemption until the final divorce decree is issued since one of its own senators was quoted as saying "Damn it, when you get married you kind of expect you're going to get a little sex."[85]

B. *Judicial Recognition*

There is not a great deal of case law currently addressing the subject of marital rape. The reasons for this vary, but are probably attributed to the fact that most states do not recognize marital rape as a crime.[86] The result is that victims fail to perceive the incident as rape and thus the crime is grossly underreported.[87] It has been suggested that because marital rape is seldom recognized as a criminal act, men and women are allowed to establish a value system which tolerates wife rape.[88] This serves to perpetuate the failure to report the crime and also explains why there is not an abundance of case law regarding marital rape.

Much of the case law that does exist fails to meet with precision the factual situation where the husband and wife are still living together and married when the rape occurs. For example, cases are universal which hold that the spousal rape exemption does not apply when a husband aids and abets in the rape of his wife by a third party.[89] Aside from this situation, case law which does not include third person involvement is not abundant.

The first American case in which the husband and wife were married and living together at the time the rape occurred was *Frazier v. State*[90] in which the wife attempted to obtain a divorce from her husband but was refused by the court. Therefore, she stayed in the same house with her husband, but slept in a separate bedroom. When the husband forced himself upon his wife, the wife brought charges. The court adopted the common law, stating, "all the authorities" hold that a man cannot rape his wife.[91] Thus, the husband's conviction was reversed.

85. *See* Ms., *supra* note 1.
86. *See* notes 72-83, *supra*.
87. D. Russell, *supra* note 2, at 359.
88. *Id.*
89. R. Perkins & R. Boyce, Criminal Law 203 (1982).
90. 48 Tex. Crim. 142, 86 S.W. 754 (1905).
91. *Id.* at ——, 86 S.W. at 755.

The common law view was also approved in *State v. Parsons*.[92] However, in this case a divorce had been granted at the time of the rape. As such, the court determined that the wife's consent to unrestricted sex had been terminated and the husband's argument that sexual intercourse involved mutual agreement was unsuccessful. Thus, although the court adopted the common law view that when a woman marries she gives her consent to sex, this consent is retracted when a divorce has been granted. As a result, the wife was able to press charges against her ex-husband and the fact that the defendant was once the victim's husband was not a defense to the rape charge.

The rape trial of John Rideout in 1978 was perhaps the first case to make public the issue of marital rape.[93] Prior to this case, no husband living with his wife at the time of the alleged offense had been prosecuted. The case was brought under Oregon's newly revised statute,[94] which abolished the exemption preventing prosecution of the husband for raping his wife. Although John Rideout was acquitted, the issue had been raised and the public was made aware that husbands do not have unrestricted access to their wive's bodies.

The more recent cases in which a wife-rape victim has successfully pressed charges against her husband generally arise in the context where the couple is separated at the time of the offense.[95] It has been suggested that rape victims in general, in order to prove they are deserving of the status of rape victim, must establish their legitimacy as victims.[96] The fact that the reported cases tend to adhere to the same factual pattern may support the notion that the criminal justice system responds only

92. 285 S.W. 412 (Mo. 1926).
93. State v. Rideout, No. 108866 (Or. Cir. Ct., Dec. 27, 1978).
94. Or. Rev. Stat. § 163.375 (1985).
95. *See, e.g.*, State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981) (the couple was legally married but had lived separately for approximately one year); State v. Morrison, 85 N.J. 212, 426 A.2d 47 (1981) (the parties had been living apart for 6 months and the wife had filed a complaint for divorce); State v. Smith, 401 So. 2d 1126 (Fla. Dist. Ct. App. 1981) (the parties were separated and the wife had filed for divorce); Commonwealth v. Chretien, 417 N.E.2d 1203 (Mass. 1981) (the wife had separated from her husband and instituted divorce proceedings); People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984) (the parties were separated and the wife had obtained temporary order of protection); Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847 (1984) (the parties had been living apart for 11 months).
96. *See* text accompanying notes 170-72, *infra*.

to cases where similar characteristics are present. Thus, it could be argued that the lack of reported cases where the husband and wife were living together at the time of the alleded rape is attributable to the fact that the women in this factual pattern are unable to establish that they are legitimate victims of rape.

One of the more recent cases which did not arise in a situation where the couple was separated at the time of the alleged rape was *State v. Rider*.[97] Rather, in this case, Mr. and Mrs. Rider were living together as husband and wife, no dissolution of marriage action had been instituted, and no temporary restraining order or judicial decree of separation had been obtained at the time of the rape. In addition, it was apparent that this was the first time Mr. Rider had sexually abused his wife. Although this factual pattern seems contrary to the general trend established in previous cases, the court nonetheless refused to recognize a common law "interspousal exception" to prosecution under Florida's sexual battery statute.[98]

Thus, the more recent cases that have confronted the issue of marital rape appear to be favoring the wife-victim, particularly where the parties were separated at the time of the alleged offense. Similarly, the *Rider* case seems to suggest that the courts are beginning to respond favorably to the wife who is raped by her husband even though they were living together as husband and wife. Perhaps legislatures can be similarly favorable to the woman and persuaded that abolishment of the marital rape exemption is the simplest guarantee of individual liberty.

IV. The Marital Rape Exemption and Constitutional Considerations

A. *Right to Privacy*

The right to privacy is an argument that has been advanced both on behalf of the husband-rapist and the wife-victim. In defense of the husband, the focus is on the constitutional right of marital privacy,[99] while on behalf of the wife, the focus is on

97. 449 So. 2d 903 (Fla. Dis. Ct. App. 1984).

98. *Id.* at 907. The defendant argued that since the Florida statute is silent as to the common law exemption, it therefore had not abrogated it.

99. *See* Hilf, *Marital Privacy*, *supra* note 19, at 35.

the right of individual privacy.[100] In any event, the few courts[101] that have addressed these arguments appear to have accepted the wive's individual right to privacy argument over the husband's right to marital privacy argument. However, a review of the cases interpreting the right to privacy is appropriate in an attempt to establish whether a marital right to privacy in any way supersedes an individual's right to privacy.

(1) *Early cases interpreting the Right of Privacy*

The right of privacy is not mentioned in the United States Constitution. Nevertheless, in a series of early cases,[102] the Supreme Court recognized that a right of privacy, or at least a guarantee of certain areas or zones of privacy, is constitutionally protected.

In *Meyer v. Nebraska,* the Supreme Court held that a statute which prohibited teaching any language except English until the child reached the ninth grade was unconstitutional.[103] The constitutional issue involved was whether the statute unreasonably infringed the "liberty" guaranteed by the fourteenth amendment due process clause.[104] The Court recognized that liberty is a fundamental right, including not only the right to make educational decisions, but also the right to contract, to marry, and to establish a home and bring up children.[105] The concept of liberty thus included the freedom to control one's destiny.

In *Skinner v. Oklahoma,*[106] a state law provided for involuntary sterilization of criminals convicted two or more times of crimes of moral turpitude. The Court struck down the statute on equal protection grounds, and expanded the right to privacy to include sexual matters, such as the capacity to reproduce, by stating, "[m]arriage and procreation are fundamental to the very existence and survival of the race."[107] Thus, this case established the

100. *See* Note, *To Have and To Hold*, *supra* note 84, at 1262.

101. State v. Rider, 449 So. 2d 903 (Fla. Dist. Ct. App. 1984); State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981).

102. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942).

103. Meyer v. Nebraska, 262 U.S. 390 (1923).

104. *Id.* at 397.

105. *Id.*

106. 316 U.S. 535 (1942).

107. *Id.* at 541.

interest in marriage or procreation as one of special constitutional significance.

2. Modern cases

In *Griswold v. Connecticut,*[108] the Supreme Court struck down a statute which prohibited all persons from using contraceptive devices and prevented the counseling of individuals on the use of contraceptives. The statute was challenged by a doctor and Planned Parenthood who had been convicted for giving information to married persons about contraception. The majority opinion, written by Justice Douglas, found that the "penumbras" of the first, third, fourth, fifth, and ninth amendments established a right of privacy.[109] The Court held that the statute invaded married persons' rights to privacy by interfering with their decision whether to use contraceptives.[110] The state had no legitimate reason for an interference of this type and, therefore, the Court declared the statute unconstitutional.[111]

Some commentators suggest that *Griswold* articulated a right of marital privacy and thus argue that abolishment of the marital rape exemption violates that right.[112] However, the Court in *Eisenstadt v. Baird,*[113] which also involved a statute prohibiting the dispensing of contraceptives to unmarried persons, dispensed with the notion that the Court recognizes a marital right over the *individual* right of privacy. The Court specifically stated:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[114]

108. 381 U.S. 479 (1965).
109. *Id.* at 484.
110. *Id.* at 485.
111. *Id.* The state argued that it had an interest in preventing sexual immorality. Even if this is a legitimate state interest, it is not furthered by this statute because people can be immoral without the use of contraceptives.
112. *See* Hilf, *Marital Privacy, supra* note 19 and Part II.B.2 of this paper for a critique of this argument.
113. 405 U.S. 438 (1972).
114. *Id.* at 453.

Furthermore, the right to marital privacy, recognized in *Griswold,* involved freedom from state intrusion into *consensual* sexual behavior in marriage.[115] Since marital rape involves nonconsensual sexual conduct, it cannot be said that *Griswold* in any way promotes the marital exemption to rape.[116]

The *Baird* emphasis on personal, as opposed to marital privacy, was reinforced in *Roe v. Wade.*[117] There, the right of a woman, whether single or married, to obtain an abortion during certain stages of pregnancy, was recognized as being within the right of privacy.[118] Beyond this decision, the Court in *Planned Parenthood of Central Missouri v. Danforth*[119] held that a state could not require the prior written consent of a husband before his wife could obtain an abortion.[120] The Court's rationale was that it was the woman who has to carry the baby; therefore, she should be given the ultimate veto power over her body.[121] The Court thus confirmed that the right to privacy extends to the individual and is not a right of the marital couple.[122]

In *Roe,* the Court adopted a balancing test to be applied when considering whether to invalidate a statute which threatens fundamental rights. The Court stated that when a statute threatens a fundamental right, the state must show a compelling interest to override the individual's right of privacy.[123] Applying this test to marital rape cases, support can be established for the elimination of the marital rape exemption. For example, based upon the *Griswold* decision, the right to privacy includes the decision of both parties whether to attempt or prevent conception.[124] However, the marital exemption allows a husband to impregnate his wife against her will in denial of her reproductive freedom.[125]

115. Comment, *Abolishing the Marital Exemption, supra* note 16, at 215.
116. *Id.*
117. 410 U.S. 113 (1973).
118. *Id.* at 154.
119. 428 U.S. 52 (1976).
120. *Id.* at 69.
121. *Id.* at 71. The state argued that requiring a husband's written consent would strengthen the marital relationship. The Court responded that no such goal could be achieved by giving the husband the ultimate power over his wife.
122. *Id.*
123. Roe v. Wade, 410 U.S. at 155.
124. Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). In *Carey,* the Court held that the personal decision whether to use birth control merits constitutional protection under the right to privacy.
125. Note, *To Have and To Hold, supra* note 84, at 1263.

"Rape statues which include the marital exemption impermissibly burden a woman's decision to use sexual abstinence as a method of contraception."[126] Thus, such statutes should be invalidated as unconstitutional, unless justified by the showing of a compelling state interest attained through a narrowly drawn statute.[127] (For example, the state could argue that it has a compelling interest in maintaining marital harmony.)[128]

The abortion and contraception cases recognizing the personal liberty of women were applied in *State v. Smith* when the New Jersey Supreme Court was confronted with defendant's argument that he was deprived of due process.[129] The defendant argued that his due process rights had been violated because he was not put on notice that marital rape is a crime. The Court ruled that because women's personal rights have been increasingly recognized through judicial and legislative actions, this was sufficient to put defendant on notice that "the people of this State would no longer tolerate a husband's violent sexual assault of his wife."[130] The Court also declined to view as compelling defendant's arguments that the state has an interest in maintaining the marital rape exemption.[131]

One commentator, however, has suggested that the Supreme Court has maintained a place for marital privacy.[132] In cases involving consensual sodomy, the Court has been willing to draw a distinction based upon marital privacy.[133] Although, as the commentator writes, "[t]hese cases illustrate the continued vitality of marital privacy as a constitutional doctrine,"[134] they do so only on the basis of consensual contact. The commentator would also like the reader to believe that when a person marries they lose some degree of personal autonomy and therefore, "the affront

126. Comment, *Abolishing the Marital Exemption, supra* note 16, at 218.

127. Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977). In *Carey*, the Court stated that to be constitutional the statute must be narrowly drawn to express the compelling state interest.

128. *See* § II.B.1-.5 for a discussion of this and other arguments in support of the exemption.

129. 85 N.J. 193, 426 A.2d 38 (1981).

130. *Id.* at 210, 426 A.2d at 46.

131. *Id.* at 207, 426 A.2d at 44.

132. *See* Hilf, *Marital Privacy, supra* note 19, at 39.

133. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) *aff'd*, 425 U.S. 901 (1976), *reh'g denied* 425 U.S. 985 (1976).

134. *See* Hilf, *Marital Privacy, supra* note 19, at 40.

to one's autonomy is less in the case of spousal rape than in the case of ordinary rape."[135]

B. *Equal Protection*

The equal protection clause of the fourteenth amendment of the United States Constitution is based on the premise that those who are similarly situated should be similarly treated.[136] Since almost all laws are going to make some sort of classification, the issue becomes whether the classification is reasonable. If the classification relates to a proper state interest, then the classification will be upheld.[137] The standard employed for reviewing the sufficiency of the relationship between the classification and the alleged state interest depends upon the nature of the individual's affected interest. Ideally, the challenger is going to argue that he or she qualifies for heightened scrutiny. In order to qualify for "strict scrutiny," the challenger must show either that the measure violates a fundamental right or that it involves a suspect classification.[138] If the challenger qualifies for heightened scrutiny, the state has to show that there is a compelling state interest which is necessary to justify this classification.[139] If the state cannot establish a compelling state interest, the regulation will be invalidated.

Another standard of review that may be applied in equal protection decisions is the rational basis test. Applying this test, the courts generally defer to the legislature and the regulation will be upheld as long as the classification bears some, however remote, rational relationship to a conceivable state purpose.[140] As established by the court in *People v. Liberta,*[141] the marital rape exemption cannot even pass the rational basis test.

Aside from the strict scrutiny and rational basis standards of review, the courts may also apply an intermediate test. Applying this standard, the courts will generally uphold a classification

135. *Id.* at 41.

136. 2 J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 317 (1986) [hereinafter cited as J. NOWAK].

137. *Id.*

138. *Id.* at 324-25.

139. *Id.* at 324.

140. *Id.*

141. *See* notes 149-151 and accompanying text *infra*.

only when the state can demonstrate that the classification is "substantially related" to "important governmental objectives."[142] Some commentators adopt the position that a statute which classifies on the basis of gender is automatically subject to intermediate scrutiny.[143]

The validity of a statute which fails to treat those similarly situated in a similar manner largely depends upon the standards under which the court reviews the relationship between the classification and the alleged state interest.[144] The nature of the individual's interest may be given great consideration.[145] Like the right to privacy argument, the equal protection argument has also been invoked on behalf of the husband-rapist and wife-victim. In *Liberta*, the husband argued that a statute containing a marital exemption for rape is a denial of equal protection because "it classifies unmarried men differently than married men"[146] in an arbitrary fashion. The wife argued that allowing some women to press rape charges while denying others that right based on their marital status is unduly burdensome.[147] Although the court did not articulate its reasoning, it appears they rejected the defendant's argument by recognizing that "the equal protection clause does not prohibit a State from making classifications, provided the statute does not arbitrarily burden a particular group of individuals. . . ."[148] The court applied the lowest standard available but nonetheless found that "there is no rational basis for distinguishing between marital rape and nonmarital rape."[149] The court declared the marital exemption for rape in the New York statute unconstitutional as a violation of the equal protection guarantees of the fourteenth amendment.[150] The court stated

142. Craig v. Boren, 429 U.S. 190, 197 (1976). In *Craig*, the Court was faced with a gender classification. The Oklahoma statute which permitted the sale of 3.2% beer to women at age 18 but required males to be 21 was invalidated for failing to pass the intermediate scrutiny test.

143. Note, *To Have and to Hold*, *supra* note 84, at 1267. This author cites City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) for this position.

144. J. NOWAK, *supra* note 136, at 322.

145. *Id.*

146. *Liberta*, 64 N.Y.2d at 163, 474 N.E.2d at 573, 485 N.Y.S.2d at 213.

147. *Id.* at 163, 474 N.E.2d at 573, 485 N.Y.S. at 213. The court agreed with the wife's position.

148. *Id.*

149. *Id.* at 163, 474 N.E.2d at 573, 485 N.Y.S.2d at 213.

150. *Id.* The fourteenth amendment provides that no state may enforce any law which deprives any person within its jurisdiction the equal protection of the laws.

that "[t]he various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny."[151]

The rights of the wife-victim include several recognized fundamental rights: marriage,[152] procreation,[153] and individual autonomy.[154] The marital rape exemption makes a distinction which affects these fundamental rights.[155] Statutes which contain a marital rape exemption provide protection of such rights as the ability to control procreation for non-spouses but denies this same protection to a wife by allowing nonconsensual sexual acts to occur.[156] Thus, it can be argued, that such statutes should be subject to strict scrutiny.[157]

Whether a court applies heightened scrutiny, intermediate scrutiny, or a rational basis test, the exemption for men who rape their wives does not serve a compelling state interest,[158] nor is it substantially related to any important governmental objective,[159] nor is there a rational basis for the exemption.[160] Whether the state argues that the exemption protects the sanctity of marriage and encourages reconciliation of the spouses, or that it prevents the filing of false charges,[161] these justifications alone cannot withstand even the lowest standard of review. As the court in *Liberta* noted, the various rationales advanced in favor of the exemption are "archaic" and "simply unable to withstand even the slightest scrutiny."[162]

151. *Id.*

152. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

153. Roe v. Wade, 410 U.S. 113, 153 (1973); Buck V. Bell, 274 U.S. 200, 207 (1927); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69 (1976).

154. Eisenstadt v. Baird, 405 U.S. 438 (1972) (married couples maintain an independent indentity with separate intellectual and emotional makeups).

155. Clancy, *Equal Protection Considerations of the Spousal Sexual Assault Exclusion*, 16 NEW ENG. L. REV. 1, 13 (1980) [hereinafter cited as Clancy, *Equal Protection Considerations*].

156. *Id.*

157. *Id.*

158. Clancy, *Equal Protection Considerations*, *supra* note 155, at 13.

159. Note, *To Have and to Hold*, *supra* note 84, at 1269.

160. *Liberta*, 64 N.Y.2d 152, 474 N.E.2d at 567, 485 N.Y.S.2d 207.

161. *See* Part II.B.1-.5 for suggested rationales.

162. *Liberta*, 64 N.Y.2d at 163, 474 N.E.2d at 573, 485 N.Y.S.2d at 213.

In sum, an individual's right to privacy is a right which is being denied by the spousal rape exemption. There is no rational basis for denying this right. "[T]he marriage relationship cannot be favored in the law at the expense of the fundamental rights of the individuals within that relationship. . . ."[163] Married women are being denied equal protection of the laws on the basis of their marital status despite the absence of an overriding state interest. The justifications that have been offered do not reflect current modern thinking. For these reasons, and others, it is urged that any marital rape exemption be abolished.

V. A Study of Public Perceptions

Undoubtedly, it is difficult for some people to imagine such a phenomenon as marital rape. In an attempt to determine what people think about marital rape, researchers have turned to the public for their opinions.[164] Although the research provides information assessing what people think about marital rape, there have been no conclusive studies analyzing what people think should be done to men who force their wives to have sex with them. In connection with the University of Cincinnati's Department of Criminal Justice, a survey was conducted to provide this information.

A. The Survey

The data examined was derived from 300 telephone interviews conducted with adult respondents residing in Hamilton County, Ohio. The sample population was selected from a computer generated random sample of 1200 residential telephone numbers in Hamilton County.[165]

163. *See* Clancy, *Equal Protection Considerations*, *supra* note 155, at 20.

164. *See, e.g.*, D. Finkelhor & K. Yllo, *supra* note 5. These researchers asked groups of undergraduate students for their opinions and found that, indeed, many people are likely to deny that marital rape exists; C. Jeffords & R. Dull, Demographic Variations in Attitudes Towards Marital Rape Immumity, J. Marriage & Family, 755-62 (1982). According to Jeffords and Dull, of 1300 Texas respondents asked if they were in favor of a law in which husbands could be charged with rape by their wives, only thirty-five percent responded they were in favor of eliminating the marital rape exemption.

165. The computer generated random sample was provided by Survey Sampling, Inc. of Westport, Connecticut. The questionnaire was administered by seven interviewers, all trained in conducting the interviews. The survey was administered to adults only who were eighteen years of age or older and who lived in the household called. All interviews were conducted during the months of February and March, 1986. The survey was administered between the hours of 6:30 p.m. and 9:30 p.m. weekdays and 10:30 a.m. and 9:30 p.m. Saturdays and Sundays. A sex split was maintained with a maximum of ten percent differences in the number of men and women interviewed. These guidelines were established to assure the most accurate representation of the population as possible.

The questionnaire was designed to determine public perceptions about a variety of issues. The survey included questions on demographic characteristics, religiosity, and a variety of criminal justice issues, including attitudes toward punishment, pornography, the death penalty, and prison policies. Attitudes toward marital rape were assessed by the following question:

> There has been a considerable amount of discussion in the mass media about "marital rape," that is, husbands who force their wives to have sex with them. In your opinion, what should happen to men who force their wives to have sex with them?

The choices they were presented with included:

1. Long term in a state prison.
2. Short term in a local jail.
3. Mandatory counseling and/or community service work.
4. He should not be treated as a criminal but this should definitely be grounds for divorce.
5. Nothing.

B. Results

Table 1[166] summarizes the results of the survey question assessing opinions about marital rape. Of the 300 respondents, nearly half (48.7%) would impose mandatory counseling and/or community service work as a way of dealing with men who force

166. Table 1: What should happen to men who force their wives to have sex with them?

Sanction for Marital Rape	Number	Percent
1. Long term in a state prison	40	13.3
2. Short term in a local jail	21	7.0
3. Mandatory counseling and/or community service work	146	48.7
4. Not treated as a criminal but grounds for divorce	66	22.0
5. Nothing	12	4.0
6. Don't know/Not applicable	15	5.0
TOTALS	300	100.0

their wives to have sex with them. Another twenty-two percent reported that, in their opinion, marital rape should be grounds for divorce but the husband should not be treated as a criminal. Four percent thought nothing should happen to men who rape their wives. In other words, nearly three-fourths of the respondents are opposed to punishing husband-rapists by confinement to a prison or jail. What is significant, however, is the fact that with the exception of the four percent who would do nothing, all of the respondents favored some form of state intervention. This suggests that progress is being made with regard to an awareness of the problem. The fact that most people favor some form of state intervention reflects a raised consciousness on the part of the public.

With regard to those who favored criminal sanctions, 13.3% thought men who rape their wives should serve a long term in a state prison. Another seven percent thought husband-rapists should serve a short time in a local jail. Therefore, when people are in favor of imposing criminal sanctions on marital rapists, they are more likely to favor the more punitive measure—a long term in state prison as opposed to a short jail sentence.

To determine if responses varied by sex, age, and marital status, statistical techniques were employed to analyze the data further. The results reveal that the differences were statistically significant with regard to all three variables. That is, patterns emerged when the respondent's sex, age, and marital status were statistically tested.

Table 2[167] summarizes the various responses by sex. Although men and women were as likely to impose criminal sanctions for

167. Table 2: Response by Sex

Sanction for Marital Rape	Male		Female	
	Number	Percent	Number	Percent
1. Long prison term	19	13.4	21	13.3
2. Short jail sentence	9	6.3	12	7.6
3. Mandatory counseling and/or community service work	54	38.0	92	58.2
4. Not treated as a criminal but grounds for divorce	45	31.7	21	13.3
5. Nothing	9	6.3	3	1.9
6. Don't know/Not applicable	6	4.2	9	6.7
TOTALS	142	99.9	158	100.0

men who rape their wives, they differed with regard to treating the man as a criminal. Women were more likely to favor mandatory counseling and/or community service work. Men were more in favor of treating marital rape as grounds for divorce but not treating the rapist as a criminal. Whereas 31.7% of the male respondents were opposed to treating the husband as a criminal, only 13.3 % of the females were similarly opposed. Furthermore, men were more likely to respond that nothing should happen to men who force their wives to have sex (6.3% of the men versus 1.9% of the women).

Table 3[168] summarizes responses by age. Two categories were established with eighteen to thirty-five year olds considered the younger group and thirty-six to ninety-two years olds the older group. Younger people were more likely to favor imposing criminal sanctions. Whereas 29.8% of the younger respondents were in favor of either a long term in prison or a short term in a local jail, only 13.1% of the older respondents would favor these sanctions. Both groups were more likely to favor the more punitive act of a long prison sentence. Both were more likely to want to deal with a marital rapist through mandatory counseling and/or community service work than any other response (46.6% of the younger group and 50.5% of the older group). Younger people were more likely to want to treat a man who rapes his wife as a criminal. Sixteen percent thought he should not be treated as a criminal but that the act was grounds for divorce. Conversely, 26.6% of the older respondents would not want to treat husband-rapists as criminals. There was a very small difference between the groups with regard to the "nothing" re-

168. Table 3: Response by Age

Sanction for Marital Rape	18-35 year olds		36-92 year olds	
	Number	Percent*	Number	Percent*
1. Long prison term	22	16.8	18	10.7
2. Short jail sentence	17	13.0	4	2.4
3. Mandatory counseling and/or community service work	61	46.6	85	50.3
4. Not treated as a criminal but grounds for divorce	21	16.0	45	26.6
5. Nothing	6	4.6	6	3.6
6. Don't know/Not applicable	4	3.1	11	6.5
TOTALS	131	100.1	169	100.1

*Percentages may be slightly more or less than 100% due to rounding.

sponse. Of the younger group, 4.6% thought nothing should happen to men who force their wives to have sex with them and 3.6% of the older group reported the same.

Finally, Table 4[169] reports the different responses by marital status. The data revealed that persons who have never been married were more likely to favor treating marital rape as a crime. Whereas 28.6% would favor either a long prison term or a short jail sentence, only 19.7% of the married respondents and 13.2% of the single respondents were in favor of these sanctions for dealing with marital rape. Again, all groups were most likely to think marital rapists should be required to seek counseling and/or perform community service work. Single people (all those widowed, divorced, or separated) were most likely to think marital rape should be grounds for divorce but did not believe the husband should be treated as a criminal. Never married respondents were more willing than married respondents to treat husbands who rape their wives as criminals. Approximately thirty percent of the single respondents, 22.5% of those married, and 15.78% of the never marrieds thought marital rape should definitely be grounds for divorce but that the man should not be treated as a criminal. Interestingly, the married respondents were more likely than the other two groups to think nothing should happen to men who force their wives to have sex with them.

To summarize the results, women were more likely to favor treating men who rape their wives as criminals. Men were more likely to think nothing should happen to men who force their wives to have sex with them. Younger people and people who

169. Table 4: Response by Marital Status

Sanction for Marital Rape	Married		Single		Never Married	
	Number	Percent*	Number	Percent*	Number	Percent*
1. Long prison term	23	13.3	4	7.5	13	18.6
2. Short jail sentence	11	6.4	3	5.7	7	10.0
3. Mandatory counseling and/ or community service	84	48.6	25	47.2	36	51.4
4. Not treated as a criminal but grounds for divorce	39	22.5	16	30.2	11	15.7
5. Nothing	8	4.6	2	3.8	2	2.9
6. Don't know/Not apply	8	4.6	3	5.7	1	1.4
TOTALS	173	100.0	53	100.1	70	100.0

*Percentages may be slightly more or less than 100% due to rounding.

have never been married were more likely to favor imposing criminal sanctions. Older people and male respondents were more likely to respond that marital rape should be grounds for divorce but the man should not be treated as a criminal.

C. *Analysis*

There are several points which deserve further analysis. First, the fact that nearly all respondents were in favor of some form of state intervention when dealing with husband-rapists suggests progress with regard to criminalization of marital rape. In addition, the fact that most favor mandatory counseling may say something about the origin of the problem. This may suggest that people believe that marital rape is a family issue which demands state intervention in the form of mandatory counseling in order to get to the root of the problem.

The fact that people who were in favor of imposing criminal sanctions were more in favor of a long prison term may reflect the nationwide "get tough" movement. An alternative explanation is that the people who believe that marital rape is a criminal act want to treat it like any other rape.

It should be pointed out that fifteen of the 300 respondents failed to offer their opinion on marital rape. This could reflect the limitations of the study in the sense that the respondents were forced to choose from one of five responses without the opportunity to establish circumstances. For instance, several interviewees thought their answer would depend on the circumstances around the act, *i.e.*, whether violence was involved, history of previous abuse, or if the parties were living together. They wanted to establish a scenario and thought each case should receive individual attention. As such, five percent of the respondents could not choose from any of the sanctions our study supplied. This suggests that there are characteristics surrounding marital rape which would cause some people to respond more or less punitively.

The fact that several respondents wanted to establish a typical scenario when responding to the issue of marital rape is related to the literature addressing rape victims. In the area of rape in general, it has been suggested that there are characteristics which determine whether or not a rape is "legitimate."[170] "Legit-

170. S. Randall & V. Rose, *Barriers to Becoming a "Successful" Rape Victim*, in WOMEN AND CRIME IN AMERICA (L. Bowker ed. 1981) at 341.

imacy has to do with whether a victim can successfully persuade the police that she is 'deserving' of the status of rape victim."[171] Such factors as the physical condition of the victim, the amount of resistance offered by the victim, presence of a weapon, proof of penetration, the relationship between the victim and offender, and alcohol involvement are all taken into account when a woman has been raped.[172] Similarly, criminal justice responses to marital rape may depend on whether or not the victim can prove she is a legitimate victim. Perhaps the closer we can get to describing a typical marital rape, the more likely people will be to favoring criminalization.

Another limitation of the study is the fact that marital rape was defined simply as "men who force their wives to have sex with them," allowing individual respondents to interpret as desired. It would be a mistake to assume all respondents interpreted the survey question the same. For example, some people may have responded that nothing should happen to men who force their wives to have sex with them because in their minds, mere force does not constitute rape of the spouse or anyone else. If the question had been worded to include physically forcing their wives, perhaps the results would have been different. Thus, left to interpret what should be done with a man who forces his wife to have sex with him, the majority of the respondents chose the middle of the road approach—mandatory counseling and/or community service work. A more thorough investigation of public perceptions would require asking for a number of responses under different circumstances. For example, how would people treat a man who rapes his wife if he is a recidivist, or if the act occurs outside of the home? What about if weapons were involved and the victim sustains injuries? These are questions which would provide valuable information with regard to how the public wants to treat a marital rapist and thus perhaps aid the legislatures in appropriate action. Responses, not only of the public, but also of the criminal justice system, are bound to vary with the characteristics of the act. The limited case law that is available also suggests that the courts are more likely to respond when specific factors are present, *i.e.*, when the parties are separated.[173]

171. *Id.* at 342.
172. *Id.*
173. *See* Section III.B. and text accompanying notes 9596, *supra.*

The fact that male respondents were less likely to treat marital rape as a criminal act than were females, may suggest that men have more traditional views of the role of sex in marriage. In addition, the fact that younger people favored imposing criminal sanctions may be a good indication of the future for legislative action on marital rape. Since younger people generally represent future policies, there is hope that marital rape will be criminalized nationwide.

In conclusion, while recognizing the limitations of this study, it nonetheless seems critical to know what the public thinks about marital rape. Where state action has occurred, it has been the result of public pressure.[174] Rape laws are being changed as a result of a "quiet but emotionally intensive campaign by women's groups against what they call 'legal rape.'"[175] Groups which are active in this campaign include the Coalition to Reform the Sex Offense Laws and the National Organization for Women. Leaders of these and various other groups lobby for marital rape bills that would abolish spousal exemption, declaring that such a bill is necessary, not only as protection of women's rights, but also as a social statement that any forced sexual relationships are intolerable.[176] The importance of this study is the fact that it has revealed that there is public support for state action in the area of marital rape.

VI. Conclusion

Marital rape is a very real and serious problem. Until every state recognizes that it is a criminal act, it must be given political priority. States which continue to maintain even a partial exemption, such as Kentucky,[177] are encouraged to follow the trend established by the eleven states which have abolished the marital rape exemption in its entirety.[178]

Kentucky's legislature was recently confronted with the opportunity to follow the trend set forth in the other states by deleting from Kentucky law any reference to marriage as a

174. J. C. Barden, *Rape in Marriage Defined*, N.Y. Times, April 19, 1981, § 23, at 1, col. 1.
175. *Id.*
176. *Id.*
177. *See* notes 73-80, *supra.*
178. *See* note 72, *supra.*

defense to a charge of rape.[179] The supporters of House Bill 309, which was sponsored by Rep. Marshall Long, argued that the bill would provide Kentucky women with another way to combat domestic violence.[180] The bill's opponents argued that marital rape should not be treated the same as rape by a stranger.[181]

House Bill 309 was defeated by the legislature on February 23, 1988 by a vote of 49-42. The legislators who opposed the bill stated that they feared that it would lead to fabricated charges of rape. Rep. Bobby Richardson said that the bill would allow women to file false charges as a ploy to obtaining a more favorable divorce settlement.[182] Rep. Herbie Deskins feared that the bill would put law enforcement officials into the bedroom of every home in Kentucky.[183] As the bill's sponsor, Long dismissed such concerns and defended HB 309 by stating: "Rape is rape. Violence is violence. And a victim is a victim. It makes really no difference whether it's inside or outside of the marriage."[184]

Apparently, the forty-nine legislators who voted against HB 309 were either unaware of, or chose to disregard, the studies documenting the widespread extent of marital rape.[185] In addition, it would appear that these same legislators would rather adhere to the stereotypical image of women "lying in wait for such a change [in rape statutes], ready to blackmail their husbands into favorable divorce settlements or get even for some real or imagined wrong."[186] This image of women is both detrimental and unfair because it fails to recognize that women are people—not a "horde of spiteful wenches."[187] The fear that women will fabricate false charges is an inadequate justification for maintaining a spousal exemption. For one, the criminal justice system is presumed capable of handling false complaints. In addition, and as Rep. Long reminded House members, filing false charges is a class D felony.[188]

179. *Controversial Marital-rape Bill Defeated by the House,* The Courier Journal, Feb. 24, 1988, at A8, col. 2.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. D. RUSSELL AND D. FINKELHOR & K. YLLO, *supra* note 5.
186. Schwartz, *The Spousal Exemption* at 51, *supra* note 32.
187. *Id.*
188. The Courier Journal, *supra* note 179.

In addition to the argument that women will fabricate false charges, the other arguments which have been advanced by those who support spousal exemption from rape statutes are similary without merit. If ours is a society which truly believes that women are individuals with separate identities and rights, then it cannot be said that when a woman marries she gives herself up to her husband who then has unrestricted access to her body. The marital rape exemption should not be used to "promote reconciliation" of a marriage that has deteriorated to the point that one spouse is demanding sex without the other spouse's consent. Marital rape is frequently quite violent and leaves the same emotional scars on its victim as nonmarital rape. Men need to be aware that they do not have the right to control their wive's bodily integrity.

Finally, if our goal is to promote a society where women are free to control access to their own bodies, then the repeal of any spousal exemption is essential to every woman's guarantee of liberty and justice.

Sallee Fry Waterman