

January 1981

The Marital Rape Exemption: A Violation of a Woman's Right of Privacy

Maria Pracher

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Law and Gender Commons](#)

Recommended Citation

Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 Golden Gate U. L. Rev. (1981).
<http://digitalcommons.law.ggu.edu/ggulrev/vol11/iss3/1>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

THE MARITAL RAPE EXEMPTION: A VIOLATION OF A WOMAN'S RIGHT OF PRIVACY

Maria Pracher*

For 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.¹

With this cryptic pronouncement, the seventeenth century jurist, Matthew Hale, laid the foundation for the common law marital rape exemption.² The marital rape exemption gives legal immunity to a man who forcibly sexually assaults his wife, an act which would be rape if committed against a woman not his wife.³ While the marital rape exemption protects the husband from criminal charges of rape, it imposes harsh physical,⁴ emo-

* Third Year Student, Golden Gate University School of Law.

1. M. HALE, PLEAS OF THE CROWN 629 (1847).

2. Hale appears to have been the first to articulate what later would become an accepted legal principle, that a husband cannot be charged with raping his wife. Comment, *The Marital Exception to Rape: Past, Present and Future*, 1978 DET. C.L. REV. 261, 262. Hale's determination of the law in this area was without other explicit supporting authority. *Regina v. Clarence* [1886-1890] All E.R. 133, 152, 22 Q.B.D. 23, 57 (1889) (reversing a conviction for assault and infliction of grievous bodily harm by a husband on his wife for having sexual intercourse with her when he had venereal disease). After citing Hale's statement that a husband cannot be guilty of raping his wife, the author of the opinion commented: "[t]he authority of Lord Hale C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition and I should hesitate before I adopted it." *Id.* (Field, J., dissenting).

3. Notwithstanding the presence of the other elements of rape—sexual penetration, lack of consent, and force—the husband cannot be prosecuted for rape. See generally 3 WHARTON'S CRIMINAL LAW §§ 283-290 at 1-43 (14th ed. C. Torcia 1978) [hereinafter cited as WHARTON]. For a typical example of a state statute embodying the marital rape exemption, see LA. REV. STAT. ANN. § 14.41 (West Supp. 1980).

4. Physical violence accompanying rape in addition to the act of rape may include beating, choking, successive attacks and the use of weapons. One study of rape found that of the 646 rapes studied, 85% involved some form of physical violence. Amir, *Forc-*

tional,⁵ and legal consequences⁶ on the woman who is the victim of her husband's forcible sexual assaults. The marital rape exemption not only robs a married woman of the right to control her body vis-a-vis her husband,⁷ but also disregards the serious harm suffered by the victim of rape⁸ and denies a married woman the right, which a single woman has, to legal recourse against her attacker.⁹

This Comment reviews the statutory status of the marital rape exemption, examines its historical origins, and critically analyzes the legal justifications supporting the exemption. The final section discusses the relation between the marital rape exemption and a woman's constitutional right of privacy.

I. STATUTORY STATUS

Current statutory rape laws reflect the ubiquitous tenacity of the marital rape exemption. Most states statutorily provide, in varying degrees, for spousal immunity from rape charges.¹⁰ Some states limit the exemption under certain conditions,¹¹ whereas others extend the exemption to unmarried couples.¹²

ible Rape, in *RAPE VICTIMOLOGY* 51 (L. Schultz ed. 1975). See notes 176-77 *infra* and accompanying text for a discussion of the effect of this violence on the victim.

5. For a discussion of the complex emotional and psychological harm resulting from rape, see, e.g., Burgess & Holmstrom, *Rape Trauma Syndrome*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER*. (D. Chappell, R. Geis, G. Geis eds. 1977). See also notes 180-182 *infra* and accompanying text.

6. The legal consequences include denial of the right to have her attacker charged with rape and violation of her constitutional right of privacy. See part IV *infra* for a discussion of a married woman's constitutional right to privacy and the marital rape exemption.

7. See notes 159-173 *infra* and accompanying text for a discussion of this issue.

8. See notes 4, 5 *supra* and notes 174-182 *infra* and accompanying text.

9. Rape is a statutory crime in every state. WHARTON, *supra* note 3, § 283, at 2.

10. See notes 15-25 *infra* and accompanying text, for citation and discussion of the various state statutes. Inasmuch as this Comment is concerned with statutory marital rape exemptions, those states which do not statutorily provide for the exemption but which may rely on the common law to the same effect are not discussed. See Note, *The Marital Rape Exemption: Legal Sanction of Spousal Abuse*, 18 J. FAM. L. 565, 580 (1980) [hereinafter cited as *Legal Sanction of Spousal Abuse*], for mention of these states.

11. These conditions include separation under a court order, see note 17 *infra* and accompanying text; separation and initiation of legal proceedings for divorce or separation, see note 18 *infra* and accompanying text; or infliction of physical injury, see note 22 *infra* and accompanying text.

12. Some states include unmarried cohabitants in the exemption. See note 23 *infra*. Other states extend immunity from first degree rape charges to voluntary social compan-

Women's Law Forum

Despite variations in application, thirty-eight states statutorily provide for application of the exemption if the couple is cohabitating.¹³

The most restrictive statutes unconditionally bar a woman from bringing rape charges against her husband.¹⁴ These states expressly exclude marital rape from their rape statutes.¹⁵ Under these statutes, a husband may not be charged with raping his wife while the couple is legally married. Thus, until a woman obtains a final divorce decree, she is not legally protected from her husband's forcible sexual assaults.¹⁶ Other states statutorily provide that the exemption does not apply where the rape occurs after the parties are living apart *and* have *obtained* a court-ordered separation.¹⁷ Seven states require both that the parties

ions. See notes 36-37 *infra* and accompanying text.

13. See notes 14, 15, 17-19, & 23 *infra* and accompanying text for citation and discussion of these statutes. The following states provide for application of the exemption if the couple is cohabitating: Alabama, Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

14. The exemption sometimes is expressed in a section defining language used in the rape provision. For example, one code defines "female" for the purposes of its rape statute as "[a]ny female who is not married to the actor." ALA. CODE § 13A-6-60(4) (1977). Other codes incorporate the exemption in the definition of rape. "Rape is an act of sexual intercourse committed by a man with a woman not his wife . . ." KAN. STAT. § 21-3502(1) (Supp. 1980).

15. ALA. CODE § 13A-6-60(4) (1977); ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd 1979), KAN. STAT. § 21-3502(1) (Supp. 1980); OKLA. STAT. ANN. tit. 21, § 1111 (West 1958); S.D. COMP. LAWS ANN. § 22-22-1 (Supp. 1980); TEX. PENAL CODE ANN. tit. 2, § 21.02(a) (Vernon 1974); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1980); WASH. REV. CODE § 9A-44-040 (Supp. 1980); W. VA. CODE § 61-8B-1 (1977).

16. If, after she obtains a final divorce decree, her (ex-) husband rapes her, a woman may charge him with rape. *State v. Baugh*, 402 S.W.2d 768 (Tex. Crim. 1966).

17. KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1975): "[S]pouses living apart under a judicial decree are not married"; LA. REV. STAT. ANN. § 14:41 (West Supp. 1980); MD. ANN. CODE art. 27, § 464D (Supp. 1980); MO. ANN. STAT. § 566.030.2 (Vernon Supp. 1980); N.Y. PENAL LAW § 130.00(4) (McKinney Supp. 1980) (alternately a written separation agreement specifically providing that the husband may be subject to the rape statute will render the exemption inoperative); N.D. CENT. CODE § 12.1-20-01.2 (1976); R.I. GEN. LAWS § 11-37-1 (Supp. 1980) requires the couple to be living apart and a divorce granted, although no final decree is required. The limitation on prosecution of a spouse for sexual assault only applies to first degree forcible sexual assault. *Id.* There is no limiting language in the statute for second degree sexual assault. *Id.* at 11-37-4; S.C. CODE § 16-3-658 (Supp. 1980) ("a person cannot be guilty of criminal sexual conduct . . . if the victim is his legal spouse, unless the couple are living apart, by reason of a court order"); UTAH CODE ANN. § 76-5-407(1) (Supp. 1979); WYO. STAT. § 6-4-307 (1977) (pro-

720 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 11:717

be living apart *and* that one spouse has *filed* for separation, separate maintenance, annulment, or divorce before the exemption is inapplicable.¹⁸ Some states only require that the couple be living apart to nullify the exemption.¹⁹ Of these states, three provide alternatively, that the exemption is inoperative if the husband or wife has filed for separation, separate maintenance, or divorce.²⁰ One state which disallows the exemption if the couple is living apart, alternatively disallows the exemption if the couple is living together under a written separation agreement or a court-ordered separation.²¹ Another state permits prosecution of the husband for rape if the couple is cohabitating and the accused caused physical injury to the victim.²² A number of states extend the exemption to unmarried cohabitants.²³

vides, alternatively, that issuance of a restraining order will void the marital exemption).

18. IND. CODE ANN. § 35-42-4-1(b) (Burns 1979) states: "This section [defining the criminal offense of rape] does not apply to [forced] sexual intercourse between spouses unless a petition for dissolution of the marriage is pending and the spouses are living apart"; MICH. COMP. LAWS ANN. § 750.520(1) (West Supp. 1979-1980) states: "A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce." MINN. STAT. ANN. § 609.349 (West Supp. 1980); NEV. REV. STAT. § 200.373(3) (1979); OHIO REV. CODE ANN. § 2907.01(L) (Supp. 1980) (no mention that the parties must be living apart and provides, alternatively, that a written separation agreement nullifies the exemption); TENN. CODE ANN. § 39.3709 (Supp. 1980); WIS. STAT. ANN. § 940-225(6) (West Supp. 1980).

19. ALASKA STAT. § 11.41.445(a)(1) (1978); ARIZ. REV. STAT. § 13-1401(4) (West 1978); COLO. REV. STAT. § 18-3-409 (1978) (also requires the "intent to live apart"); IDAHO § 18-6107 (1979); IOWA CODE ANN. § 709.4 (West 1979) (allows for prosecution of sexual assault in the third degree if spouses are living apart); ME. REV. STAT. ANN. tit. 17A, § 251(1)(A) (West Pamph. 1979) (for purposes of the rape statute, "[s]pouse" means a person legally married to the actor, and does not include a legally married person living apart from the actor under a *de facto* separation"); MONT. REV. CODES ANN. § 45-5-506(2) (1979) (marital exemption under the rape statute is "inoperative as respects spouses living apart whether under a decree of judicial separation or otherwise"); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1979); N.M. STAT. ANN. § 30-9-10(E) (Supp. 1980); PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1980-1981).

20. IDAHO CODE § 18-6107 (1979) (spousal exception to rape doesn't apply if one spouse has begun legal proceedings for divorce or separation *or* the spouses have been living apart for at least 180 days); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1979) ("A person does not commit a crime under this chapter [defining the criminal charge of rape] if the victim is his legal spouse, unless the spouses are living apart or one of them has filed for separate maintenance or divorce."); N.M. STAT. ANN. § 30-9-10(E) (Supp. 1980) (spouse means a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce).

21. PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1980-1981).

22. ALASKA STAT. § 11-41-445(a)(2) (1978).

23. *See, e.g.*, ALA. CODE § 13A-6-60(4) (1977) which states: "Persons living together in cohabitation are married for the purpose of this article, regardless of the legal status

Women's Law Forum

Most of the statutes contain no legislative commentary elucidating the policy behind the adoption of the exemption. One legislature briefly notes its reason for granting spousal immunity to rape charges: "At common law, a man could not legally rape his wife. Although that issue appears not to have been raised in any reported case it is expected that the common law rule would be applied in Maine."²⁴ Another legislature mentions its apprehension over the possibility of false charges and the presumed consensual nature of marital sexual relations to explain its marital rape exemption.²⁵ The little legislative commentary that exists suggests that the steadfast adherence of legislatures to the notion that a husband cannot be guilty of raping his wife finds explanation in the common law history of the exemption and in its legal rationales.

At common law, a woman, including her sexuality, was considered the property of her husband, and the law did not recognize any crime in a husband violating the woman who legally belonged to him.²⁶ Somewhat less draconian legal explanations imply, in the marriage contract, a wife's irrevocable consent to sexual relations with her husband.²⁷ The possibility of fabricated charges expresses a perennial concern in the legal treatment of rape.²⁸ A state's interest in protecting the marital relationship from the destructive effect of a rape charge is another possible explanation for the exemption.²⁹ The perceived difficulty of proving a marital rape charge might also influence a legislative

of their relationship otherwise." CONN. GEN. STAT. § 53a-67(b) (West Supp. 1980); KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1976); MINN. STAT. ANN. § 609.349 (West Supp. 1980); MONT. REV. CODES ANN. § 45-5-506(2) (1979); PA. CONS. STAT. ANN. § 3103 (Purdon Supp. 1980-1981); W. VA. CODE § 61-8B-1(2) (1977).

24. ME. REV. STAT. ANN. tit. 17-A, § 251-1(A), Comment (West Pamph. 1980).

25. MONT. REV. CODES ANN. § 94-5-506, Comment (West Pamph. 1977). This edition of the code provided that the exemption did not apply only if the couple is living apart under a decree of judicial separation. In a later edition, the legislature dropped the requirement of a judicial decree and merely living apart now voids the exemption. MONT. REV. CODES ANN. § 45-5-506(2) (1979).

26. For the historical origins of the marital rape exemption, see notes 45-65 *infra* and accompanying text.

27. For a discussion of the contract theory, see notes 66-83 *infra* and accompanying text.

28. The myth of false accusation is discussed further at notes 89-113 *infra* and accompanying text.

29. For a discussion of the state's interests, see notes 203-213 *infra* and accompanying text.

decision to adopt the exemption.³⁰

The policies reflected in the diversity of points at which the exemption no longer shields a husband from a rape charge are difficult to extrapolate. All the provisions require some outward manifestation that the marriage has broken down. Designating the actual or symbolic end of a marriage as the point at which the exemption no longer obtains, perhaps implies a legislative determination that whatever the reasons for the exemption, they are sufficiently attenuated when the marriage breaks down that the countervailing interest in protecting a woman from rape takes precedence. Why some states set this point at the time of final divorce and others when the couple chooses to live apart is unclear.

Those statutes comprehending unmarried couples within the exemption complicate the policy considerations even further. Such a provision does not further any state interest in protecting a marital relationship or come within the state's power to regulate marriage. Moreover, there is no marriage contract on which to base a theory of contractual consent to sexual relations.

A few states have revised their rape statutes to provide for prosecution of marital rape charges. Delaware³¹ and Hawaii³² have adopted rape statutes which provide that anyone who "by forcible compulsion"³³ or "without . . . consent"³⁴ engages in sexual intercourse with another is guilty of second degree rape. Neither statute includes, in these or any related sections, the typical limiting language that the victim not be the wife of the offender. Both states, however, limit prosecutions for first degree rape.³⁵ Delaware does not provide for a first degree rape charge

30. Proof problems are discussed at notes 84-88 *infra* and accompanying text.

31. DEL. CODE ANN. tit. 11, § 763 (1979) states: "A man is guilty of rape in the second degree when he intentionally engages in sexual intercourse with a female without her consent."

32. HAW. REV. STAT. § 707-731 (Supp. 1980) provides: "A person commits the offense of rape in the second degree if: (a) He intentionally engages in sexual intercourse by forcible compulsion with any person"

33. *Id.*

34. DEL. CODE ANN. tit. 11, § 763 (1979).

35. The difference in classification as first degree or second degree relates to the difference in the length of sentence which may be imposed. For example, under the Hawaii code, the maximum sentence for first degree rape is 20 years and the maximum

if the victim was the defendant's voluntary social companion on the occasion of the crime and had previously permitted him sexual contact unless the accused inflicted serious physical, mental or emotional injury upon the victim.³⁶ The Hawaii statute also proscribes a first degree rape charge if the victim was the voluntary social companion of the accused and had engaged in consensual sexual intercourse with the accused in the past year.³⁷ Under the Hawaii statute, even if a woman was the voluntary social companion of her attacker, first degree rape may be charged if the attacker inflicts "serious bodily injury"³⁸ upon her.

Three states allow a woman to charge her husband with first degree rape. Nebraska³⁹ and Oregon⁴⁰ provide for first degree rape charges without any statutory limitations based on the relationship of the victim and the accused. New Jersey has a provision stating that marriage is not a defense to a rape charge.⁴¹

California has enacted a penal code section addressed specifically to spousal rape.⁴² The statute provides that spousal rape

sentence for second degree rape is 10 years. HAW. REV. STAT. § 706-660 (1976).

36. DEL. CODE ANN. tit. 11, § 764 (1979).

37. A person commits the offense of rape in the first degree if: (a) He intentionally engaged in sexual intercourse, by forcible compulsion, with another person and: (i) The other person is not, upon the occasion, his voluntary social companion who had within the previous twelve months permitted him sexual intercourse; or (ii) He recklessly inflicts serious bodily injury upon the other person

HAW. REV. STAT. § 707-730 (Supp. 1980).

38. *Id.*

39. The Nebraska statute provides: "Actor shall mean a person accused of sexual assault Victim shall mean the person alleging to have been sexually assaulted." NEB. REV. STAT. § 28-318 (1979). That section provides for first degree sexual assault when any person subjects another to sexual penetration.

40. Oregon's statute provides: "(1) A person who has sexual intercourse with a female commits the crime of rape in the first degree if: (a) The female is subjected to forcible compulsion by the male" OR. REV. STAT. § 163.375 (1979-1980).

41. After providing for the definitions of rape in the various degrees, New Jersey provides: "No actor shall be presumed to be incapable of committing a crime under this chapter because of . . . marriage to the victim." N.J. STAT. ANN. § 2c:14-5(b) (West Pamph. 1980).

42. (a) Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury (b) [T]here shall be no arrest or prosecution under this section unless the violation of this section is

is a crime if: (1) one spouse forces sexual intercourse against the other spouse's will, or (2) the attacker spouse places the victim in "fear of immediate and unlawful bodily injury."⁴³ The victim spouse must report the rape within thirty days, a limitation which does not apply to other rape victims in California.⁴⁴

This overview of the statutory provisions has shown that the great majority of states retain the marital rape exemption, and raises two basic questions: (1) What led to the notion that a husband cannot be guilty of raping his wife, and (2) Why has the law allowed the concern for protecting a woman from rape to be outweighed by other considerations in marital rape? These questions compel an inquiry into the origins of the exemption and the legal justifications for its continued application.

II. HISTORICAL ORIGINS OF THE MARITAL RAPE EXEMPTION

The history of rape and marriage laws provides some insight into the genesis of the marital rape exemption. The matrix of much of the legal and social system in medieval England was the law of private property.⁴⁵ The protection of property interests influenced both rape and marriage laws. History also reveals an intrinsic connection between the acts of rape and marriage. The marital rape exemption can be linked to the interplay of these forces, which made a woman the property of her husband.⁴⁶

Some of the earliest rape laws developed in response to the practice of "marriage by capture," whereby a man abducted and

reported to a peace officer having the power to arrest for a violation of this section or to the district attorney of the county in which the violation occurred within 30 days after the day of violation.

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

43. *Id.*

44. *Id.*

45. See generally 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* (2d ed., reissued 1968).

46. In an opinion repudiating the rationales and policies in favor of the marital rape exemption, one court noted that: "A close examination of the historical origins of this principle reveal that it is rooted in the ancient concepts of a wife as a chattel and the inviolability of the husband's supreme role in a marriage relationship." *State v. Smith*, 148 N.J. Super. 219, 229, 372 A.2d 386, 391 (1977). The court ultimately upheld the exemption, reasoning that it was a legislative not a judicial function to determine the elements of a crime.

Women's Law Forum

raped a woman, then married her.⁴⁷ English law only proscribed abduction if the woman had goods or lands, or was an heiress.⁴⁸ The attempt to secure property through a forcible marriage, not the abduction and rape of a woman, was the punishable offense.⁴⁹ The woman's guardian could bring an action for the trespass against his property interest in her marriage.⁵⁰ Under

47. This practice can be traced to ancient germanic marriage laws. "It is said with some show of truth that in the earliest Teutonic laws we may see many traces of 'marriage by capture.' The 'rape-marriage' . . . is a punishable offense; but it is still a marriage, as we find it also in the Hindu law-books." 2 F. POLLACK & F. MAITLAND, *supra* note 45, at 364.

48. The first English statute proscribing this practice was enacted in 1487. It provided:

Where Women, as well as Maidens, as Widows and Wives, having Substances, some in Goods moveable and some in Lands and Tenements, and some being Heirs apparent unto their ancestors, for the Lucre of such Substances, been often times taken by Misdoers, contrary to their Will, and after married to such Misdoers, or to other by their Assent, or defoiled.

Quoted in 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 5504 (1966).

The statute made such an abduction a felony. 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 436 (1948). When interpreting the statute, the courts determined that "[t]he crucial circumstance on which the application of the statute depended was that the woman carried away against her will had to have substance of goods or land, or be an heiress apparent." *Id.* at 440.

49. This is clear from one leading case in which a court held that the forcible abduction and marriage of a twelve year old girl who did not have goods or land and was not an heiress, was not punishable under the statute. 1 L. RADZINOWICZ, *supra* note 48, at 440-41. "'Of forcible marriage, etc. it is observable . . . that by confining the offense to women of estate only, moral principles are made to yield to political considerations; and the security of property is deemed more essential than the preservation of female chastity . . .'" *Id.* at 441.

50. The father or the woman's guardian had an interest in her marriage because a bridegroom was required to pay a father or the guardian for the marriage. "The usual and lawful marriage, however, is a 'sale-marriage'; in consideration of money paid down, the bride is handed over to the bridegroom." 2 F. POLLACK & F. MAITLAND, *supra* note 45, at 364. These same authors note the penalty for forcible marriage: "If a man forcibly abducts a maiden, let him pay 50 shillings to him to whom she belongs. There was no talk of giving her back . . ." *Id.* at 365 n.5. If a woman was betrothed to a man and then abducted by another, the abductor was required to pay the man to whom she had been betrothed. "Where there had been a solemn betrothal it is likely that the bridegroom thereby acquired some rights over the bride which were good against third persons, and that any who carried her off would have to pay a *bôt* to him." *Id.* at 365-66. Another author describes the action for abduction thusly: "In the case of a daughter . . ., there was a medieval action of trespass for abduction; but it lay only if she were an heir presumptive, to protect the proprietary interest in her marriage." J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 382 (2d ed. 1979).

Another commentator's description of the trespass action emphasizes that the criminal act was not against the woman, but her guardian.

[I]f a layman is convicted of abducting and marrying off a

one statute, the woman was compelled to forfeit her property to her family during the marriage, to keep the property from passing to the abductor.⁵¹ Despite these sanctions, the marriage was valid.⁵²

Although in the case of forcible marriage only the underlying property offense was criminally recognized, rape was a statutory felony.⁵³ Under medieval rape statutes, however, a rapist could avoid punishment if the woman "by consent of the judge and her parents" married him.⁵⁴ Thus, if a woman did not, or was not forced to, marry her attacker after the rape, he was subject to severe criminal penalties.⁵⁵ Marriage in either instance, however, exempted a man from criminal liability for rape.

Marriage at common law, predicated on the premise that a woman was her husband's chattel, justified the notion that a husband could not be guilty of raping his wife. The civil law of marriage evolved in the middle ages to define what constituted a marriage in order to determine property rights of the couple and their children.⁵⁶ What developed were laws that divested married women of their legal rights, justified by the notion of the

child without leave of the chief lord let him restore to the guardian the value of the marriage, and because of his delict [sic], let his body be delivered to prison by the bailiffs until he has made amends to the guardian for his wrongful act and satisfied the King for his wrongful trespass.

2 H. BRACON, ON THE LAWS & CUSTOMS OF ENGLAND 264 (1968).

51. An abduction statute passed in 1558 provided that if a man abducts a girl under sixteen and marries her "he shall be imprisoned five years, or fined at the discretion of the justices, and she shall forfeit all her lands to her next of kin during the life of her said husband." 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 2415 (W. Jones ed. 1915).

52. In noting that a woman could testify against her husband in a prosecution under an abduction statute, Blackstone stated: "It is held that a woman thus taken away and married may be sworn and give evidence against the offender, though he is her husband *de facto*." *Id.*

53. For a discussion of the various medieval English rape statutes see 2 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 624-26 (7th ed. 1882).

54. In discussing the history of rape laws, Blackstone notes that under the earliest laws, "the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband, if he also was willing to agree to the exchange, but not otherwise." 2 W. BLACKSTONE, *supra* note 51, at 2418.

55. The punishment for rape included death, castration, and loss of eyes. *Id.* at 2417.

56. See generally 2 F. POLLACK & F. MAITLAND, *supra* note 45, at 240-399.

Women's Law Forum

unity of the parties.⁵⁷

According to the eminent Justice Blackstone, "by marriage, the husband and wife are one person in law The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband" ⁵⁸ Under this doctrine, marriage not only eradicated the woman's legal identity, but continued and enlarged the husband's, thus resulting in the domination of a husband over his wife.⁵⁹

When she married, a woman surrendered her personal and real property to her husband.⁶⁰ All her earnings belonged to her husband;⁶¹ she had no right to contract, except as the agent of

57. Long before married women had any legal rights, a single woman had rights under the law:

A woman of twenty-one becomes an independent human creature, capable of holding and administering property to any amount; or if she can earn money, she may appropriate her earnings freely to any purpose she thinks good. Her father has no power over her or her property. But if she unites herself to a man, the law immediately steps in, and she finds herself legislated for and her condition of life suddenly and entirely changed. Whatever age she may be of, she is again considered an infant,—she is again under "reasonable restraint"—she loses her separate existence, and is merged in that of her husband.

Chapman, *A Brief Summary in Plain Language, of the Most Important Laws Concerning Women; Together With A Few Observations Thereon*, in *ON THE PROPERTY OF MARRIED WOMEN AND THE LAW OF DIVORCE* 13 (M. Milnes ed. 1975).

58. 1 W. BLACKSTONE, *supra* note 51, at 625-26.

59. One commentator describes the woman's status under the unity of the parties doctrine by analogy, saying:

The next thing that I will show you is this particularitie of law; in this consolidation which we call wedlock is a locking together; it is true that man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus, Humber, or the Thames, the poore rivulet loseth her name; it is carried and recarried with the new associate; it bareth no sway, it possesseth nothing during coverture. A woman as soone as she is married is called covert, in Latine nupta, that is veiled, as it were clouded and overshadowed she hath lost her streame. I may more truly farre away say to a married woman, her new selfe is her superior, her companion, her master.

Chapman, *supra* note 57, at 14.

60. 2 F. POLLACK & F. MATTLAND, *supra* note 45, at 403-04.

61. Chapman, *supra* note 57, at 7.

her husband;⁶² nor could she initiate a legal action in her own name.⁶³ Not only did her property and legal rights belong to her husband, but her body was his as well.⁶⁴ Thus, as one commentator noted, "a husband forcing sex on his wife was merely making use of his own property."⁶⁵

III. LEGAL JUSTIFICATIONS FOR THE MARITAL RAPE EXEMPTION

A. THE CONTRACT THEORY

Hale's statement that the marriage contract includes the wife's irrevocable consent to sexual relations with her husband is the fulcrum upon which the modern legal justifications for the marital rape exemption turns.⁶⁶ Because sexual intercourse is an integral part of marriage, the wife's consent inheres in the marriage contract.⁶⁷ Her consent need not be obtained for each act of intercourse because she is deemed to have consented to all acts of marital sexual intercourse at the time of marriage.⁶⁸ Thus, if a husband forces sexual intercourse on his wife, he is merely exercising his marital right.⁶⁹ The consent given is irrevocable; as part of the contract it lasts throughout the marriage.⁷⁰

But although the rights and duties which come with mar-

62. 2 F. POLLACK & F. MAITLAND, *supra* note 45, at 405.

63. Chapman, *supra* note 57, at 8.

64. "A woman's body belongs to her husband; she is in his custody, and he can enforce his right by a writ of habeas corpus." *Id.* at 6.

65. Note, *The Marital Rape Exemption*, 52 N.Y.U.L. REV. 306, 309 (1977) [hereinafter cited as *Marital Rape Exemption*].

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

67. In discussing the marital rape exemption, one court noted: "Sexual intercourse between husband and wife is recognized as one of the chief aims and controlling objects of marriage . . . It is asserted that a husband may enforce sexual connection, and that in the exercise of his marital right he cannot be guilty of the offense of rape." Anonymous, 206 Ala. 295, 297, 89 So. 462, 463 (1921) (quoting 13 R.C.L. 987, 988 § 6). Since sexual intercourse is one of the main objects of marriage, and the husband acquires a "marital right" to sexual intercourse, the woman's consent must be part of the marriage contract.

68. Note, *Criminal Law—Rape—Husband Cannot Be Guilty of Raping His Wife*, State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (1977), 82 DICK. L. REV. 608, 610 (1978).

69. See note 67 *supra* and accompanying text.

70. At the time Hale formulated his theory, a marriage could only be dissolved by death. The woman was not released from the marriage contract until her husband died, and thus, in effect this consent was irrevocable. State v. Smith, 148 N.J. Super. 219, 225, 372 A.2d 386, 388 (1977).

riage are generally described as contractual in nature, marriage resembles no other type of contract. Marriage is, in fact, more like a status.⁷¹ The parties enter into the "contract" without the benefit of traditional contract attributes and protections.⁷² The contract theory of marriage diverges from contract law not only in formation, but also in the way it is enforced. Generally, private parties are not permitted under contract law to resort to self help to remedy a contract breach; and normally, contracts are enforceable only through the courts.⁷³ Thus, applying a contract theory, if a woman breaches the marital contract by withholding her consent to sexual relations, a husband should not be able to enforce the contract by rape. Furthermore, the remedy for breach of contract for personal services is not specific performance.⁷⁴ Contract law recognizes that personal services are unique and does not require a person to perform against his or her will.⁷⁵ Therefore, to justify the marital rape exemption because of the marriage "contract" misconceives the nature of contract law, the marital status, and the act of rape.⁷⁶

71. Marriage is a status because the law imposes the legal rights and duties on the parties; the parties do not bargain over and set the terms of their "contract." One commentator makes this point by noting that:

[c]ourts and commentators define and discuss marriage as a contract. Thus, one might expect that the terms of the relationship would be the subject of bargaining and agreement between the parties, and enforcement through the courts. But, in fact, parties to a marriage are not allowed to define their legal relationships, and if they attempt to do so, their agreements will not be enforced. A marriage "contract" thus exists only in the narrow sense that the parties decide whether to marry. Once they are married, the law dictates their roles; in marrying, they enter a predetermined civil status.

B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 561 (1975).

72. For example, the parties do not bargain over the terms of the contract, rather the law imposes the terms on the parties; such terms often escape the attention of the parties; no options are available, and the penalties are not apparent. Wertman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1170 (1974). Furthermore, this "contract" has traditionally been one-sided: The woman was compelled to forfeit her property rights and her body to her husband. See notes 46-64 *supra* and accompanying text.

73. See Comment, *The Common Law Does Not Support a Marital Exemption For Forcible Rape*, 5 WOMEN'S RIGHTS L. REP. 181, 184 (1979).

74. *Id.*

75. *Id.* at 184 n.33.

76. In *State v. Smith*, the court specifically rejected the application of contract law to marital rape because:

[s]uch a mechanical application of principles of contract law are illogically applied in the area of forcible sexual invasions

B. THE CONSENT THEORY .

The idea that, upon marrying, a woman gives irrevocable consent to the actions of her husband cannot withstand analysis, whether examined within the contract theory or analyzed on its own. The theory of marital consent⁷⁷ in rape law is inconsistent with the notion of consent as interpreted and applied in other areas of law. Usually, the law does not permit a person to consent to serious bodily injury inflicted by another.⁷⁸ Although the law will imply consent to injuries arising out of a situation involving a potential for harm, if that situation is voluntarily entered, the law does not imply consent to the malicious infliction of serious injury.⁷⁹ A woman may consent to sexual intercourse with her husband when it is a mutually desired act, but rape is the violent "desecration of the victim's person,"⁸⁰ and to impute consent on the part of the victim exceeds the bounds of the law of consent.

In domestic relations, the law recognizes many instances when a woman may withhold consent to sexual relations with her husband.⁸¹ Thus, outside of the context of rape, the law does

. . . [because] [s]uch reasoning overlooks the basic nature of rape interdiction created by a civilized society. Rape is essentially a crime of moral effrontery. The affront is to society in the larger sense as with all crimes, but to a rape victim its personal impact is unique. Given monogomy as a recognized societal goal, such reasoning can result in a kind of bondage of a wife, who alone becomes vulnerable as a result thereof.

148 N.J. Super. at 227, 372 A.2d at 390.

77. See notes 66-70 *supra* and accompanying text.

78. The state's interest in protecting persons from harm and protecting the general "social well-being overrides respect for individual free will in crimes where grievous bodily harm is inflicted by one person on another." Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 635 (1976) [hereinafter cited as *Towards a Consent Standard*].

79. This is the case for activities such as sports where one generally is presumed to have consented to any injuries suffered, except where there was an intentional infliction of harm. *Id.* at 640.

80. "[F]orcible rape ranks among the most serious crimes . . . because it amounts to a desecration of the victim's person which is a vital part of her sanctity and dignity as a human being." *Newsom v. State*, 533 P.2d 904, 911 (Alaska S. Ct. 1975).

81. A woman may withhold consent when her husband is diseased and intercourse would impair her health or when she does not wish to condone adultery. For a discussion of these cases, see *Legal Sanction of Spousal Abuse*, *supra* note 10, at 568. Excessive sex is recognized as grounds for a divorce based on cruelty; and divorces have been denied on the ground that a wife withheld consent to sex. For a discussion of these cases see *Marital Rape Exemption*, *supra* note 65, at 312. Two recent cases recognized that a woman

Women's Law Forum

not employ the mythical "wife's consent" to unconditionally entitle a husband to sexual relations with his wife. Moreover, under certain circumstances a husband may be charged with raping his wife. Some statutes provide that after separation, a husband who forcibly sexually assaults his wife may be charged with rape.⁸² Additionally, the marital rape exemption does not immunize a husband from a rape charge when he aids and abets another in raping his wife.⁸³ In recognizing that a woman may withhold her consent from her husband's sexual demands, the courts have undercut the basic premise of the marital rape exemption.

C. PROOF PROBLEMS IN SHOWING LACK OF CONSENT

The issue of consent generates other obstacles. One commentator has suggested that the difficulties of proving that a rape has occurred "reach their zenith when a wife accuses her husband of rape."⁸⁴ The main problem is the difficulty of proving the wife's lack of consent to sexual relations on a particular occasion.⁸⁵ But while the task of proving lack of consent between spouses might present a dilemma, perhaps the most arduous challenge lies in overcoming the jury's predisposition to doubt a

has the right to refuse sexual contact with her husband. In one case, the husband was convicted for forcing his wife to perform fellatio on him. In the other case, a woman charged with murdering her husband pleaded self-defense from a sexual attack and the judge instructed the jury that a "woman is not compelled by law to submit against her will to sexual contact which she finds offensive." See *id.* at 321.

82. See notes 17-21 *supra* and accompanying text.

83. See, e.g., *Elliot v. State*, 190 Ga. 803, 10 S.E.2d 843 (1940) (husband convicted of aiding and abetting in rape of his wife when he forced her to have sex with two men he hired to work for him); *State v. Martin*, 17 N.C. App. 317, 194 S.E.2d 60 (1973) (although a husband is legally incapable of raping his wife, he may be convicted of rape when he aids and abets another who rapes his wife); *State v. Blackwell*, 241 Or. 528, 407 P.2d 617 (1965) (conviction of rape upheld for man charged with forcing his wife to submit to sex with another man).

84. Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 724 (1954) [hereinafter cited as *Rape and Battery Between Husband and Wife*].

85. One commentator notes that:

Since marriage is by definition a relationship in which both parties have presumably consented to sexual intercourse on a number of occasions, it becomes extremely difficult for a wife to prove that on certain occasions sex was different; she must have evidence that she did not consent, that she was forced against her will.

Griffin, *In Forty-Four States, It's Legal To Rape Your Wife*, STUDENT LAW, Sept., 1980, at 57.

marital rape charge, and not in the unavailability of evidence.⁸⁶ Lack of consent could be shown by corroborating evidence, such as signs of physical force, and medical and witness testimony.⁸⁷ Prosecutions of alleged rapes where the victim previously consented to sexual relations present similar proof problems, yet they are not barred.⁸⁸ The difficulty of proof argument lacks force when balanced against the severity of the crime. The public policy of protecting the victims of violent crimes should outweigh the argument that marital rape is too difficult to prove.

D. FEAR OF FALSE ACCUSATIONS

The Myth

The fear that a vindictive wife will falsely accuse her husband of rape is a fourth major justification for the marital rape exemption.⁸⁹ Matthew Hale's early observation that rape is "an accusation easy to be made and hard to be proved and harder to be defended"⁹⁰ shaped the legal definition of rape and the type of proof required.⁹¹ The conviction that women are extremely likely to fabricate charges of rape has been characterized by male commentators,⁹² judges,⁹³ and psychiatrists⁹⁴ as the fore-

86. One commentator suggests that the predisposition of juries to doubt a woman charging her husband with rape is a more difficult obstacle than proving nonconsent. *Id.* at 57. See notes 114-140 *infra* and accompanying text for a discussion of the difficulty of obtaining a rape conviction.

87. Evidence in rape cases does not rest solely on the woman's testimony and prosecutors are unlikely to bring a rape charge without sufficient substantiating evidence. See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1382 (1972) [hereinafter cited as *The Corroboration Requirement*].

88. *Marital Rape Exemption*, *supra* note 65, at 314.

89. This fear was the major concern of opponents of the recent California legislation establishing marital rape as a criminal offense. Griffin, *supra* note 85, at 57.

90. 1 M. HALE, PLEAS OF THE CROWN 635 (1860). This statement has traditionally been a mandatory jury instruction in rape cases. *Towards a Consent Standard*, *supra* note 78, at 617. In *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975), the California Supreme Court expressly disapproved use of this instruction in rape cases.

91. The fear of false accusations has resulted in: the corroboration requirement, see generally *The Corroboration Requirement*, *supra* note 87, at 1373; the resistance requirement, Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 681, 684-85 (1966) [hereinafter cited as *The Resistance Standard*]; requiring evidence of the victim's chastity, 3A WIGMORE, EVIDENCE § 924a at 736 (rev. ed. Chadbourn 1970); *Packineau v. United States*, 202 F.2d 681, 685-86 (1953); and cautionary jury instructions; *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975).

92. Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word

Women's Law Forum

most concern in rape law.

The sexual nature of rape generates attitudes which distinguish this crime from all others. Two issues lie behind the fear of false accusations: the difficulty of determining consent, and a perception of women as sexually psychopathic. At one end of the consent continuum is the "classic" rape: "a sudden sexual demand on a dark and isolated street by one or more unknown

of the prosecutrix is that the word is very often false. False accusations of sex crimes in general, and rape in particular, are generally believed to be much more frequent than untrue charges of other crimes.

Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) [hereinafter cited as *Corroborating Charges of Rape*]. "In its very nature rape is a crime which is peculiarly open to false accusations . . ." Puttkammer, *Consent in Rape*, 19 ILL. L. REV. 410, 421 (1925).

93. "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance." *People v. Benson*, 6 Cal. 221, 223 (1856).

94. The most dangerous witnesses in prosecutions for morality offenses are the youthful ones (often mere children) in whom the sex-instinct holds the foremost place in their thoughts and feelings But on the other hand one must not be deceived by a madonna-like countenance that such a girl can readily assume; nor by the convincing upturn of the eyes, with which she seeks to strengthen her credibility With profuse falsities they shamelessly speak of the coarsest sex matters . . . : It is just such witnesses that often bring into their picture individuals who have never even been near them and that throw suspicion recklessly on the most worthy persons In male youths, this peculiar sex-disposition plays a far smaller part.

Mönkemöller, *Psychology and Psychopathology of Testimony*, in 4 BIBLIOTHEK DER KRIMINALISTIK, pt. 2, § a6, at 333 (1930), quoted in 3A WIGMORE, *supra* note 91, at 743-44.

Every girl who enters a plausible but unproved story of rape should be required to have a psychiatric examination The reason I think that rape in particular belongs in this category [requiring psychiatric examination] is one well known to psychologists, namely that fantasies of being raped are exceedingly common in women, indeed one may almost say that they are universal.

Letter of Dr. Karl Menninger (Sept. 5, 1933), quoted in *id.*

Accusations of rape, unless there is perfectly clear evidence of an assault, are open to suspicion One has, therefore, to weigh all the possibilities of a case with great care to realize that such accusations frequently have no foundation whatever in fact and originate entirely in the mind of the accuser.

Letter of Dr. William White (Sept. 7, 1933), quoted in *id.*

men, perhaps intoxicated and armed."⁹⁵ In this situation, the woman's lack of consent is presumed. In the middle of the continuum is the situation in which the complainant and the accused are acquainted and the "encounter occurred in an apartment to which they both went willingly."⁹⁶ Here, lack of consent is not so readily presumed and the woman's version may often be doubted. At the far end of the continuum lies marital rape, in which the entire relationship with the accused is presumed consensual. In traditional rape law theory, deviation from this construct may be analyzed as an expression of psychological conflict or abnormality.⁹⁷

Various theories of female sexuality have been advanced to justify regarding with suspicion a woman's claim that she did not consent to intercourse. Women are seen, for example, as needing to attain sexual gratification through struggle and resistance,⁹⁸ thereby creating evidence with which to convict an innocent man.⁹⁹ Not only the masochistic woman, but the ambivalent one as well, renders the issue of consent unreliable through

95. Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 66 (1952) [hereinafter cited as *Operation of the Consent Standard*]. This classic image of rape does not conform to reality. Many rapists know their victims and plan their rapes. M. AMIR, PATTERNS IN FORCIBLE RAPE 143, 234-35 (1971).

96. *Operation of the Consent Standard*, *supra* note 95, at 66.

97. Dean Wigmore relies extensively on psychiatric case studies and comments regarding women's psychosis, ostensibly resulting in uncontrollable propensity to falsify charges of sexual abuse, to justify the admission into evidence of a rape complainant's chastity. "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3A WIGMORE, *supra* note 91, at 737. Another commentator draws heavily on Freudian theories of female sexuality to support his view that the consent standard in rape based on a woman's idea of when she did or did not consent is "an uncertain standard for branding sexual intercourse a crime as serious as forcible rape." *Operation of the Consent Standard*, *supra* note 95, at 56. One commentator arguing for the resistance standard in rape to remove conjecture, uncertainty, and the woman's often distorted opinion from the law of forcible rape relies on "current psychological evidence indicat[ing] the unreliability of a woman's report of the incident, [so that] nothing should be left to the conceivably unreasonable opinion of the alleged victim." *The Resistance Standard*, *supra* note 91, at 683.

98. "'Although a woman may desire sexual intercourse, it is customary for her to say 'no, no, no' (although meaning 'yes, yes, yes') and to expect the male to be the aggressor It is always difficult in rape cases to determine whether the female really meant 'no''" *The Resistance Standard*, *supra* note 91, at 682 (quoting Slovenko, *A Panoramic Overview: Sexual Behavior and the Law*, in *SEXUAL BEHAVIOR AND THE LAW* 5, 51 (Slovenko ed. 1965)).

99. *Operation of the Consent Standard*, *supra* note 95, at 66.

Women's Law Forum

her alternating resistance and acceptance of the man's sexual demands.¹⁰⁰ In both situations, the act of forcible sexual intercourse is perceived as not necessarily contrary to the true wishes of the woman.¹⁰¹ Furthermore, in these circumstances the woman is often seen as lacking the ability to accurately distinguish the dominant attitude of consent or nonconsent.¹⁰² It is hypothesized that a woman recalls rape to alleviate feelings of guilt that would arise from a sense of willing participation.¹⁰³

Once the fear of false accusations is accepted as well supported by this kind of perception of women's sexual nature, other more tenuous justifications for the fear may be accepted as well. Thus, for example, psychological disorders actually suffered by some women may be generalized to every woman who charges a man with rape. The fact that psychiatrists have confirmed that some women imagine that they have been victims of sexual attack, though none has occurred, has led some commentators to conclude that false accusations arise from a woman's unchastity or from rape fantasies.¹⁰⁴ A married woman accusing her husband of rape, on the other hand, may be seen as motivated by a desire to blackmail him into a profitable property settlement,¹⁰⁵ a desire for revenge,¹⁰⁶ or hatred.¹⁰⁷

100. *Id.* at 67.

101. *Id.* at 66-68.

102. *Id.* at 65-70.

103. "Most women probably have a strong need to adopt the socially acceptable motive and thus some may honestly believe that they were forced to submit over their mental opposition." *Id.* at 68. "A woman may accuse an innocent man of raping her because . . . having consented to intercourse, she is ashamed of herself and bitter at her partner . . ." *Corroborating Charges of Rape, supra* note 92, at 1138.

104. "The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which she is the heroine or victim. 3A WIGMORE, *supra* note 91, at 736. "The feminine wish to be subjected to a sexual attack may become the subject of an hallucination." *Operation of the Consent Standard, supra* note 95, at 69 n.102.

[F]antasies of being raped are exceedingly common in women, indeed one may almost say that they are universal . . . Of course, the normal woman who has such a fantasy does not confuse it with reality, but it is so easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications . . .

Statement of Dr. Karl Menninger, *quoted in* 3A WIGMORE, *supra* note 91, at 744.

105. *Rape and Battery Between Husband and Wife, supra* note 84, at 725.

106. *Marital Rape Exemption, supra* note 65, at 314.

107. The mysteries of sexual relationships have impressed many experienced judges as well as psychologists. Where there has

Men fear rape charges not only because they believe women are inclined to fabricate complaints, but also because they believe that the emotion raised by a rape charge causes juries to be sympathetic to the woman at the expense of the man.¹⁰⁸ Women who contrive false charges are believed to be quite convincing when spinning their tales so that others are easily persuaded of the truth of the accusation.¹⁰⁹ Rape usually occurs when no one other than the victim and the attacker are present.¹¹⁰ Evidence of physical force is often unavailable in rape cases.¹¹¹ A combination of a convincing liar and an awareness that rape is often accomplished with little corroborating evidence is thought to increase the ease with which women will undertake to falsify a

once been love, there is reason to suspect that it will be replaced by hatred rather than indifference. A wife who is willing to prod the state into beginning a felony prosecution against her husband is unlikely to recollect objectively.

Rape and Battery Between Husband and Wife, *supra* note 84, at 724-25.

108. "The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to . . . a plausible tale." 3A WIGMORE, *supra* note 91, at 736. "[S]uch charges (rape) are extremely likely to succeed because of the intense feelings that the charge is very likely to awaken." Puttkammer, *supra* note 92, at 422. "The ordinary reaction to an accusation of a sex offense usually committed in secret is that the offense has been committed . . ." *People v. Putnam*, 20 Cal. 2d 885, 892, 129 P.2d 367, 370 (1942). Rape "must be conceded [to be] . . . the kind of act [which] . . . is so thoroughly repugnant to the average person that it can breed that righteous outrage which is the enemy of objective fact finding." *People v. Merriam*, 66 Cal. 2d 390, 395, 426 P.2d 161, 164, 58 Cal. Rptr. 1, 4 (1967).

109. In describing the case of a girl who allegedly falsely accused members of her family of sexual abuse, one psychiatrist reported:

She was possessed of a very dramatic manner As she made [the accusations] . . . she looked the interviewer right in the eyes; there was not a hint of evasiveness Her story was told in such detail, was so well remembered from time to time, and she presented such an outward form of sincerity that experienced people were led to believe there must be much in what she said.

Healy & Healy, *Pathological Lying, Accusation, and Swindling*, in 4 CASES OF PATHOLOGICAL ACCUSATION 172 (1915) *quoted in* 3A WIGMORE, *supra* note 94, at 741.

110. "Rape seldom if ever takes place in broad daylight, in public places, or in plain view of numerous spectators and potential witnesses. Instead, the assailant usually manages to lure or force his victim into some obscure place so that he will not be seen or interrupted." Note, *Repeal of the Corroboration Requirement: Will It Tip the Scales of Justice?*, 24 DRAKE L. REV. 669, 670 (1975) [hereinafter cited as *Repeal of the Corroboration Requirement*]. For statistics on the time and place of rape see M. McDERMOTT, RAPE VICTIMIZATION IN TWENTY-SIX AMERICAN CITIES 17-18 (1979).

111. *Id.* A woman might fear for her life and thus avoid resistance. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 11 (1977).

Women's Law Forum

rape charge for either sick, confused, or malevolent motives.¹¹² A rape charge, once made, is thought to evoke in judges and juries such animosity for the accused and such compassion for the victim that unsound convictions will abound,¹¹³ thus substantiating men's fears and the need for extreme caution in taking a woman's charge of rape at face value.

Rebutting The Myth

1. *Rape is an underreported crime.*

Recent studies have shown that many traditional notions regarding rape are less universally true than previously believed. The assumed frequency of false charges is one notion which has been seriously questioned by a number of studies and commentators. Rape is an immensely underreported crime.¹¹⁴ Many reasons for this phenomenon have come to light as victims of rape and their treatment by the criminal justice system have received attention.¹¹⁵ Because rape is often a personally humiliating experience for the woman, and because of the social stigma often imputed to rape victims,¹¹⁶ reporting the incident may exact too high a price from the woman. Rape charges often expose women to insensitive treatment by police during the investigation,¹¹⁷

112. *Repeal of the Corroboration Requirement*, *supra* note 110, at 671.

113. "Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed." 3A WIGMORE, *supra* note 91, at 736. "When a charge of [rape] . . . is made, the people, and the jurors likewise are apt to let their indignation get the better of their judgment, and convict upon evidence which does not authorize it." *Davis v. State*, 102 Ga. 433, 437, 48 S.E. 180, 182 (1904).

114. One report estimates that unreported rapes exceed reported rapes by more than three and a half times. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 21 (1967). Another report estimates that between 1973 and 1977 the percent of unreported rapes ranged between 51 and 42 percent. U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1979, at 329 (1979).

115. See Berger, *supra* note 111, at 2-7, for a discussion of the various forces behind and ways in which, recent public attention has begun to focus on rape.

116. *The Corroboration Requirement*, *supra* note 87, at 1374.

117. See *Id.* at 1374 n.62, in which women describe police reaction as: "Disbelief. Ridicule. Questioning along voyeuristic lines. Or just plain lack of interest." See also Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 347-49 (1973), and S. BROWN MILLER, *AGAINST OUR WILL*, 408-12 (1975) in which she recounts her experience of speaking to a group of police about rape "and was met with a chortle of hoots and laughter from the . . . men. 'Honey, you don't believe there is such a thing as rape, do you?' [she replied] 'Don't you?' 'Noooo' came the nearly unanimous response." *Id.* at 409.

and by the defense attorney at trial.¹¹⁸ In addition, a lack of corroborating evidence appears to deter more founded complaints than it does to encourage false ones.¹¹⁹ Similarly, the low conviction rate in all rape cases, and especially in nonaggravated cases,¹²⁰ likewise discourages rape complaints. Given the fact that many rapists are acquainted with their victims,¹²¹ the fear of retaliation by the attacker also arises.¹²²

A woman raped by her husband would be dissuaded from filing charges by these same personal, societal, and legal impediments. One author suggests that these restraints are magnified in the case of marital rape.¹²³ Marital rape is often part of the syndrome of domestic violence,¹²⁴ another largely unreported crime.¹²⁵ Justifying the marital rape exemption on the basis of false charges by vindictive wives simply fails to consider these significant and effective deterrents to filing a complaint.

2. *Police disbelief*

Charges of rape are not readily believed. Initially, the police categorize many complaints as unfounded.¹²⁶ Once investigation begins, the number of complaints so categorized increases. The police are very likely to term complaints unfounded where the victim and attacker were acquainted.¹²⁷ "Victim-precipitated"

118. See Berger, *supra* note 111, at 13, for an example of cross-examination at trial.

119. *The Corroboration Requirement*, *supra* note 87, at 1382. One study revealed that "[t]he second most frequently given reason for not reporting completed rape was that the victim felt nothing could be done, there was a lack of proof." M. McDERMOTT, *supra* note 110, at 46.

120. *The Corroboration Requirement*, *supra* note 87, at 1379. In nonaggravated rapes, that is, those cases where there is no evidence of extrinsic violence, it is less likely that proof will be available, resulting in a greater likelihood that the victim will not report the crime. See generally M. McDERMOTT, *supra* note 111, at 46.

121. M. AMIR, *supra* note 95, at 234-35.

122. *The Corroboration Requirement*, *supra* note 87, at 1374.

123. Griffin, *supra* note 85, at 57.

124. *Id.* at 58; see generally L. WALKER, *THE BATTERED WOMAN*, 105-26 (1979).

125. L. WALKER, *supra* note 124, at 19.

126. FBI statistics have pegged this figure of initial "unfounded" complaints at about 18%. FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS 14* (1971). "Unfounded" means "only that police, for various reasons, have decided not to advise prosecution. It does not imply that the woman's report of the rape is inaccurate." Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 928 (1973) [hereinafter cited as *Sexism in Society*]. See also the discussion, *supra* note 117, illuminating some of the police prejudice, which results in the unfounding of rape complaints.

127. According to one study, where the victim and accused are acquainted or dating,

rapes, those "where the victim either retracts from an initial agreement to have sexual relations or enters into a 'vulnerable' situation,"¹²⁸ are also largely dismissed as unfounded.¹²⁹ Because a marital rape involves a married couple, with the implied agreement to engage in sexual relations based on the consent-contract theory,¹³⁰ the factors which the police use to dismiss a complaint as unfounded are emphasized.¹³¹ Regardless of the truth of the charge, most marital rape complaints will not survive police investigation. The fear of false accusations is unwarranted given the police disbelief that accompanies the filing of a charge of rape.

3. *Jury verdicts*

Even those charges of rape which survive these obstacles and come to trial contradict the myth of great victim sympathy and defendant opprobrium.¹³² Nationally, more than half of those apprehended and prosecuted for rape are acquitted.¹³³ In individual cities, the percentage of convictions drops even lower.¹³⁴ One famous study of forty-three jury verdicts documented that, in cases lacking evidence of physical violence, the defendant was acquitted in thirty-nine cases.¹³⁵ In cases involving violence, where the victim and defendant previously engaged in consensual sexual relations, the jury would also acquit the defendant.¹³⁶ Indeed, verdicts in rape cases were found to be greatly influenced by the moral judgment the jury attached to the *victims'* behavior and character.¹³⁷ Juries, "often harshly,

43% of all complaints are rejected as unfounded; in cases in which the victim and accused are strangers, only 18% are unfounded. Note, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape In Philadelphia*, 117 U. PA. L. REV. 277, 291 (1968).

128. *Sexism in Society*, *supra* note 126, at 929.

129. *Id.*

130. For a discussion of the consent-contract theory, see notes 66-83 *supra* and accompanying text.

131. Other factors which also contribute to a finding of an unfounded complaint are victim intoxication, delay in reporting, good physical condition of the victim, and the absence of a medical examination or evidence of a battery. *Sexism in Society*, *supra* note 126, at 928-29.

132. See notes 108-113 *supra* and accompanying text discussing this problem.

133. For a discussion of these statistics see *People v. Rincon-Pineda*, 14 Cal. 3d 864, 879, 538 P.2d 247, 257-58, 123 Cal. Rptr. 119, 129-30 (1975).

134. *Id.*

135. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 252-54 (1966).

136. *Id.* at 251.

137. The authors note a case of brutal rape in which the jury voted for acquittal.

scrutinize the female complainant” and show lenience for the defendant.¹³⁸ The study found acquittal particularly likely when the jury felt the woman in some way contributed to the attack.¹³⁹ Thus, the fear that juries will convict innocent men out of sympathy for the victim is not supported by the evidence.

4. *Corroborating evidence*

Corroborating evidence is necessary to bring a rape charge to trial. Without such evidence, police treat the complaint as unfounded, and juries are unlikely to convict. Prosecutors rarely, if ever, rely solely on the testimony of the victim.¹⁴⁰ The difficulty of proving a rape case seems to outweigh the difficulty of defending one. Thus a marital rape complaint without corroborating evidence is unlikely to survive the criminal justice system because the system is designed to eliminate unwarranted complaints.

IV. CONSTITUTIONAL ASPECTS OF MARITAL RAPE

The preceding discussion of the marital rape exemption, its origins, the legal justifications and their limitations, and its continued existence in the laws of most states, underscores the need to develop legal challenges to the exemption. Many of the laws governing marriage no longer restrict a married woman's legal rights by placing her under the control of her husband.¹⁴¹ Current policy behind rape laws reflects a concern for the harm done to “the person and feelings of the victim of rape.”¹⁴² In short, legal and social mores no longer tolerate the notion of a woman as the property of her husband. One challenge to the marital rape exemption is through the existence of a violation of

The victim had several illegitimate children and had been previously accused of prostitution. *Id.*

138. *Id.* at 249.

139. *Id.* The jury viewed any voluntary interaction with the defendant as contributing to the attack. *Id.* at 249-51.

140. In none of the cases studied did the prosecution rely solely on the victim's testimony. *Id.* at 141-42.

141. For a discussion of a wife's status as chattel, see notes 56-65 *supra* and accompanying text. See generally *Marital Rape Exemption*, *supra* note 65, at 310-11, which reviews the changes in the legal status of married women.

142. “The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape.” CAL. PENAL CODE § 263 (West Supp. 1981).

Women's Law Forum

the woman's constitutional right of privacy.¹⁴³ The remainder of this Comment will address the right of privacy and its application to the marital rape exemption.

A. THE RIGHT OF PRIVACY

In *Griswold v. Connecticut*,¹⁴⁴ the Supreme Court held that a Connecticut statute proscribing the use of contraceptives violated a married couple's right of privacy.¹⁴⁵ In an opinion by Justice Douglas, the Court found the constitutional right of privacy implicit in the penumbras of the guarantees in the first, third, fourth, fifth, and ninth amendments.¹⁴⁶ *Griswold* determined that the right of privacy encompasses the marital relationship and that the Connecticut statute impermissibly transgressed on the intimacies of that relationship.¹⁴⁷ Since *Griswold*, the Court has struggled to define the substance and perimeters of the constitutional right of privacy.

Shifting from Justice Douglas' opinion in *Griswold*, the Court in *Roe v. Wade*¹⁴⁸ explicitly grounded the right of privacy in "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action. . . ."¹⁴⁹ In defining those interests protected by the right of privacy, the Court stated that they must be "rights which can be deemed 'fundamental' or 'implicit in the concept of ordered liberty. . . .'"¹⁵⁰ In an effort to illuminate the meaning of these notions, the Court listed marriage, procreation, contraception, family relations, and child

143. An equal protection argument can also be made on grounds that the exemption denies married women rights accorded to single women. This argument is beyond the scope of this Comment. See generally Comment, *Rape Laws, Equal Protection, and Privacy Rights*, 54 TUL. L. REV. 456, 475-76 (1980).

144. 381 U.S. 479 (1965).

145. The statute subjected those who used contraceptives to fine and imprisonment. The defendants at the criminal trial were the Executive Director of Planned Parenthood League of Connecticut and physicians who prescribed contraceptives for married women and were prosecuted as accessories. 381 U.S. at 480.

146. *Id.* at 484. The concurring opinions of Justices Goldberg and Harlan drew on the concept of liberty which protects fundamental rights to create the right of privacy rather than relying on the Bill of Rights for justification. *Id.* at 486-87.

147. *Id.* at 485-86.

148. 410 U.S. 113 (1973).

149. *Id.* at 153. In adopting this position, the Court agreed with Justice Goldberg's concurrence in *Griswold*: "I do agree that the concept of liberty protects those personal rights that are fundamental and is not confined to the specific terms of the Bill of Rights." 381 U.S. at 486.

150. *Roe v. Wade*, 410 U.S. at 152.

rearing and education as examples of realms within which one may maintain some expectation of privacy free from undue governmental interference.¹⁵¹ Although *Griswold* spoke of the right of privacy within a marital relationship, the Court has subsequently made clear that the right of privacy is an individual's right, independent of any marital relationship.¹⁵² Re-examining *Griswold* in *Carey v. Population Services International*,¹⁵³ the Court stated that the interest protected by the right of privacy was not "the sacred precincts of marital bedrooms,"^{153.1} but rather the individual's interest in making certain important decisions.¹⁵⁴ Thus, although the right of privacy remains somewhat of an enigma, it is clear from the Court's decisions that the right protects an individual's interest in making autonomous decisions on fundamental issues, unfettered by undue governmental interference.

B. THE RELATIONSHIP BETWEEN MARITAL RAPE AND RIGHT OF PRIVACY MATTERS FUNDAMENTAL TO PERSONAL LIFE

The problem of discerning what issues fundamentally affect a person's life, and thus implicate the right of privacy, to some extent can be resolved by identifying the underlying concerns inherent in the family, procreation, and marriage areas which the Court has included within the protective reach of that right. The concerns that emerge will be examined in relation to how the marital rape exemption interferes with these aspects of a

151. *Id.* at 152-53.

152. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Relying mainly on an equal protection analysis, the Court held unconstitutional a law prohibiting unmarried couples from obtaining contraceptives. In considering the right to privacy the Court stated: "If the right to 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." *Id.* at 453.

153. 431 U.S. 678 (1977) (prohibition of sale and distribution of contraceptives to minors held unconstitutional).

153.1. *Id.* at 687 (quoting *Griswold v. Connecticut*, 381 U.S. at 485-86).

154. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), expressly stated that the right of privacy protected the decision whether to have a child. Similarly, *Roe v. Wade*, 410 U.S. 113 (1973), held that the right of privacy protected a woman's decision to terminate her pregnancy. In *Walen v. Roe*, 429 U.S. 589 (1977), the Court stated: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600. When referring to the right of privacy, this Comment focuses on the second interest.

woman's life and, consequently, her right of privacy.

Although the Court does not speak in philosophical terms when invoking the right of privacy,¹⁵⁵ it has implicitly incorporated some basic philosophical components of the concept of privacy through the types of interests considered fundamental. One formulation of privacy incorporates three basic elements: control, identity, and intimacy.¹⁵⁶ These components, understood in relation to one another, provide that a definition of privacy involves "control over the intimacies of [one's] personal identity."¹⁵⁷ In this way, privacy protects the essential aspects of our selfhood.¹⁵⁸

Control

Control is an important aspect of the notion of privacy. The ability to decide for one's self to refrain from or to participate in certain life experiences inheres in the concept of ourselves as persons. This notion of control encompasses those decisions which affect one's self as well as those decisions which have an impact on others.¹⁵⁹ Developing and asserting one's personal identity necessarily involves the capacity to affect others. Through interactions with others our personal identities unfold and manifest themselves. The Supreme Court has vindicated this dual impact of autonomous decision-making in the types of interests deemed protected by privacy.¹⁶⁰ Thus, governmental action or intentional neglect which undermines autonomy over one's identity and decision-making impinges on privacy interests.¹⁶¹

155. See text accompanying notes 151-154 *supra*, for language the Court uses to define what matters are protected by the right of privacy.

156. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 233, 236 (1977).

157. *Id.*

158. One commentator sees the central concern the courts seek to protect under the right of privacy as "the preservation of 'those attributes of an individual which are irreducible in his selfhood.'" L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 889 (1978) (quoting FREUND, 52 ALI ANNUAL MEETING, 42-43 (1975)).

159. Professor Tribe develops this idea by describing both inward and outward forms of privacy. L. TRIBE, *supra* note 158, at 888.

160. Professor Tribe identifies child-rearing as one example. *Id.* Abortion and contraception also require decisions which affect not only the decision-maker, but also that person's partner, family, and society in general.

161. The issue revolves around governmental interference with one's personality. According to Professor Tribe:

The very idea of a fundamental right of personhood rests on

The marital rape exemption interferes with a woman's control over her life. By deliberately denying access to the criminal justice system to a woman who has been sexually assaulted by her husband, the state dictates her irrevocable consent to sexual relations with her husband. When the state decrees that a married woman cannot bring rape charges against her husband, it denies her the autonomy to decide whether to undergo a particular experience. Important to this conclusion is the state's active prevention, through the marital rape exemption, of a woman's ability to exercise control over this part of her life. The marital rape exemption expressly rejects the notion that a woman should be able to determine for herself when she will consent to sexual intercourse with her husband. It does so by rendering her refusal ineffective and by allowing her husband to forcibly sexually assault her with impunity. Nullifying a woman's decision in this matter effectively usurps her control over this area of her life. Allowing a married woman to retain control over this decision would allow her to develop her personal identity and to assert it in her immediate world, an essential aspect of control over one's life protected by the right of privacy.¹⁶²

Intimacy and Personal Identity

Not all control over one's life is protected by the right of privacy. Reference to the intimate aspects of one's personal identity limits the notion of privacy and thus the right to unimpaired control over one's life.¹⁶³ As previously noted, *Griswold* was concerned with a decision regarding the intimacies

the conviction that, even though one's identity is constantly and profoundly shaped by the rewards and penalties, the exhortation and scarcities and constraints of one's social environment, the 'personhood' resulting from this process is sufficiently 'one's own' to be deemed fundamental in confrontation with the one entity that retains a monopoly over legitimate violence—the government. Thus active coercion by government to alter a person's being or deliberate neglect by government which permits a being to suffer, are conceived as qualitatively different from the passive, incremental coercion that shapes all of life and for which no one bears precise responsibility.

Id. at 890.

162. See generally L. TRIBE, *supra* note 158, at 888-90.

163. One commentator stresses that, "[i]ntimacy is the chief restricting concept in the definition of privacy . . .—intimacy both in its relation to identity and, what is more subtle and complex, to autonomy." Gerety, *supra* note 156, at 263.

Women's Law Forum

of a marital relationship.¹⁶⁴ Fundamental life decisions which the Court has since protected under the rubric of privacy also implicate profoundly intimate concerns of life.¹⁶⁵

Intimacy is closely connected to one's physical being. One's body and what one chooses to do with it necessarily reflect and comprehend one's personality.¹⁶⁶ Control over one's body is one of the basic autonomies we experience as humans.¹⁶⁷ Our physical integrity, then, embraces the notions of control, intimacy, and personal identity. Thus, the interest one maintains in one's bodily integrity is intrinsically a privacy interest.¹⁶⁸ Some of the most important privacy cases have struck down laws which infringed on a person's decisions regarding his or her body.¹⁶⁹ The laws invalidated in these cases also had a severe impact on the intimate aspects of personality.¹⁷⁰

164. For a discussion of the right of privacy see text accompanying note 144 *supra*.

165. For examples of some interests which have been accorded protection see text accompanying note 151 *supra*.

166. Our bodies are "the most basic vehicle of [our] selfhood." Gerety, *supra* note 156, at 266.

167. Gerety notes that most of us take this form of control as a basic assumption in life and a "necessary condition" for all other forms of control by posing the question: "If we don't control our bodies, what do we control?" *Id.*

168. "[P]hysical intrusion . . . , brings us to the core of our expectations and intuitions about privacy and hence of our rights to it." What is injured by physical intrusion is a "peculiar aspect of dignity and freedom invested in reasonable expectations of privacy." *Id.* at 265.

169. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (decision whether to use contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (decision whether to obtain an abortion); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1975) (husband and parental consent not required to obtain abortion); *Carey v. Population Services*, 431 U.S. 678 (1976) (decision to obtain an abortion does not require parental consent).

170. All of the cases cited in note 169 *supra* concerned governmental interference with a woman's decision regarding whether to conceive or carry a child to term. The impact of such a decision on one's life is surely inestimable and deeply personal. Professor Tribe comments that: "[o]f all decisions a person makes about his or her body, the most profound and intimate relate to . . . whether, where, and how one's body is to become the vehicle for another human being's creation." L. TRIBE, *supra* note 158, at 921. To be subject to the state's regulation regarding this decision is to have one's personal life and identity irreversibly violated. Pointing out how central such a decision is to self-definition, Professor Tribe observes:

[i]f a man is the involuntary source of a child—if he is forbidden, for example, to practice contraception—the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child—not simply to provide an ovum, but to carry the child to term—the invasion is incalculably greater. Quite apart from the physical experience

Similarly, the marital rape exemption violates a woman's interest in her bodily integrity. The physical invasion of a forcible sexual assault takes from a person control over who one will allow to share in one's body—a decision which manifests one of the most intimate aspects of personal identity.¹⁷¹ One commentator suggests that the real importance of privacy to individuals is that only in a context of privacy, that is control over one's self, can essential relationships of love, trust, and respect flourish.¹⁷² For one's sexuality to be a part of such relationships, one

of pregnancy itself, an experience which of course has no analogue for the male, there is the attachment the experience creates, partly physiological and partly psychological, between mother and child. Thus it is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary.

Id. at 924. Pregnancy as a result of rape only heightens the intrusion.

171. Gerety discusses two tort cases to emphasize that the "core expectation of privacy" is an expectation "of control over who, if anyone, will share in the intimacies of our bodies." One case involved the presence of a nonmedical observer during childbirth; the other case arose out of an incident in which the police took nude photographs of a victim of a crime, which they circulated among themselves. Gerety, *supra* note 156, at 265-66. A forcible sexual assault presents an invasion of the intimacies of one's physical being which is strikingly stronger than these examples. If this sort of control is a central expectation of privacy, as discussed at notes 185-88, *infra* and accompanying text, then rape must violate the constitutionally protected areas of privacy.

172. [P]rivacy is not just one possible means among others to insure some other value, but . . . it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion."

Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968). Fried notes that love, trust, and respect depend on recognizing that individuals are entitled to basic rights as persons, including the right to privacy, that cannot be unwillingly infringed upon by others. Respect is the manifestation of such recognition. Respect together with "a spontaneous relinquishment of certain entitlements of one's own" are the basic components of love. *Id.* at 480. In order to relinquish one's self one must be in control over access to one's self. *Id.* Trust is the expectation that others will respect you and your entitlement to yourself, and your privacy. *Id.* at 481-82. The marital rape exemption allows a woman's right to her body to be forcibly taken from her. Rape is a denial of a woman's right to herself and is a manifestation of disrespect. If a woman has no right to refuse sexual relations she does not

Women's Law Forum

must have the freedom to decide for one's self when to share one's body and have the partner respect that decision.¹⁷³ Without such control, those relationships in which one shares the intimacies of one's body with another diminish in love, trust, and respect because the ability to choose is limited. These sorts of relationships provide one with a significant and meaningful part of one's identity as a person. By denying a married woman the right to control an essential aspect of herself—her sexuality—in a relationship in which love, respect, and trust are intended to flourish, the state interferes with her control over the most intimate aspects of her personality.

Personal Effect of the Marital Rape Exemption

The magnitude of the impact that the challenged law and the accompanying denial of choice have on an individual's life is one factor the Court has considered in privacy cases.¹⁷⁴ In discussing why a woman's decision whether to terminate her pregnancy is protected by the right of privacy, the Court in *Roe* observed:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed

have control over this aspect of her life; sexual relations lose meaning as an integral part of a love relationship. In a relationship where one person does not respect the other's right to privacy and to control one's body, trust is destroyed.

173. Forced sexual activity is hardly an expression of our sexuality nor is it an expression of love, trust, and respect.

174. One author discusses this impact as one of the "tests" for finding a privacy interest, noting that the Court has phrased the right of privacy in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), as "the right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1175 (1974) (quoting *Eisenstadt v. Baird*, 405 U.S. at 453) (emphasis in original).

motherhood may be involved.¹⁷⁵

Like pregnancy, abortion, and contraception, rape has a direct and immediate, as well as a future, impact on a woman and her life.¹⁷⁶ Rape subjects a woman to physical and psychological harm. Contrary to some common notions,¹⁷⁷ being married to one's attacker may exacerbate, not reduce, the harm suffered by a rape victim. Not only is rape itself an act of physical violence, but spousal rape often occurs as part of a pattern of spousal abuse¹⁷⁸ and, consequently, the rape may be accompanied by other acts of physical violence. One study of rape revealed that

175. *Roe v. Wade*, 410 U.S. at 153.

176. The impact of spousal rape affects many women's lives.

It is estimated that more women are raped by their husbands each year than by strangers, acquaintances, or other friends and relatives. Of the estimated 2 million battered wives in the United States, at least one fifth are forced to have sex with their husbands as part of the beating. If rape by intimidation—the threat of violence—is included, the number of women raped by their husbands may actually be as high as 2 million, according to . . . domestic violence experts.

Griffin, *supra* note 85, at 57.

177. One commentator has assumed that "the possibilities of serious social, physical or mental harm from a familiar, if unwanted, conjugal embrace [sic] are rather small." *Rape and Battery Between Husband and Wife*, *supra* note 84, at 724. Another author reprinted a letter to the editor of the New York Times stating:

'In the usual rape case, where it is a stranger who accosts a woman, not only is there physical abuse but the psychological effect constitutes a tremendous traumatic experience. In a situation where a husband compels his wife to have sexual intercourse against her will, there cannot be the same traumatic experience. There may be resentment or injured feelings, but the overall effect cannot be compared to rape by a stranger.'

Griffin, *supra* note 85, at 59. At least one legislature has expressed this same notion by considering:

The degree and nature of the victim's acquaintance with the actor as a *mitigating* circumstance . . . based on the theory that a person who resorts to sexual aggression against a female who has permitted previous sexual intercourse and who has thereby furnished to some extent an incentive to further amorous advances, presents less of a social danger than the person who commits sexual aggression against a female who is not his voluntary social companion or with whom he has not been previously familiar. Moreover, a man who forces sexual intercourse in such situations does not deserve the same degree of moral condemnation, as the male who forces sexual intercourse upon a female with whom he has little or no acquaintance.

HAWAII REV. STAT. § 707-732 Legislative Comment (Supp. 1980).

178. See generally Griffin, *supra* note 85.

the likelihood and the amount of violence used in rape increased when the victim and offender had a close relationship.¹⁷⁹ The psychological and emotional trauma of rape may carry additional ramifications when the victim lives with her attacker. The woman may be subject to repeated attacks,¹⁸⁰ her feelings of humiliation may be heightened by continued interaction with her attacker,¹⁸¹ and she may experience psychological confusion since her attacker is also supposedly her loving and beloved companion in life.¹⁸² The injury imposed by denying a woman control over this matter has a malignant impact on her and on her life.

Privacy Implicates Rights of the Individual

Although the Court first enunciated the right of privacy in a case involving a marital relationship,¹⁸³ in *Eisenstadt v. Baird* the Court disavowed the idea that the right is premised on a marital relationship. Commenting on *Griswold*, the *Eisenstadt* Court noted:

179. M. AMIR, *supra* note 121, at 245.

180. Griffin, *supra* note 85, at 59. Where a pattern of chronic sexual abuse exists, the woman may suffer many of the psychological and emotional difficulties associated with battered wives. For a discussion of the psychological patterns experienced by battered wives, see L. WALKER, *supra* note 124.

181. 'When it's business as usual in the morning, one's sense of violation is belittled. The victim of a rape by a stranger can have a sense of herself as a survivor of a violent crime. She has survived danger, is entitled to sympathy, and can try to avoid danger in the future. She can see the rapist as an enemy and direct her anger outward.'

Griffin, *supra* note 85, at 59 (quoting from Address by clinical psychologist Barbara Cohn Schlachet, New York County Lawyers' Association, Forum on Marital Rape (Feb. 1979)).

182. The situation is confused by the fact that the rapist husband also may, on occasion, be a loving husband with whom sexual intercourse may be pleasurable and affectionate. Furthermore, a wife may be so financially and emotionally dependent upon a rapist husband that she finds it difficult to perceive him as 'the enemy' . . .

While the rape may be experienced as a real violation, many women believe they have a 'duty' to be sexually accessible to their husbands at all times. They aren't convinced that they have a right to their anger [T]hese women often turn feelings of anger in on themselves, damaging their self-esteem. They may believe they 'deserved' it because they rebelled against their 'wifely duty.'

Id. at 59-60.

183. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the 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 to privacy means anything, it is the right of the *individual*¹⁸⁴

The Court vindicated this notion, to some extent, in *Planned Parenthood v. Danforth*,¹⁸⁵ which held that provisions in a state statute requiring, during the first trimester, a husband's consent to his wife's abortion and parental consent to a minor's abortion, unconstitutionally violated a woman's right of privacy. While recognizing that the woman's decisions would affect her family, the Court concluded that the interests of the woman are significantly more affected than those of her husband or her parent because she is the one who bears the child. Thus, a blanket veto by a third party would unconstitutionally violate her right of privacy. Justice Stevens's concurrence in *Bellotti v. Baird*¹⁸⁶ emphasized that inherent in the right of privacy is the right to make decisions "without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties" ¹⁸⁷ For anyone to interfere with one's decision "is fundamentally at odds with privacy interests underlying the constitutional protection afforded to [one's] decision."¹⁸⁸

These cases suggest that what is protected by the right of privacy is the *individual's* decision regarding fundamental matters, separate from any marital or family relationship, even though such decisions may arise within the context of these relationships.¹⁸⁹ This interpretation corresponds with the notion

184. 405 U.S. 438, 453 (1972) (emphasis in original).

185. 428 U.S. 52 (1976).

186. 443 U.S. 622, 652 (1979). In *Bellotti*, the Court held that, because the state cannot allow a parent to veto a minor's abortion in the first trimester, if a state requires parental consent it must also provide an alternative.

187. 443 U.S. at 655.

188. *Id.* at 655-56.

189. There is some controversy on this point. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1978), the Court stated that "the constitutionally protected privacy of the family, marriage, motherhood, procreation, and child-rearing is . . . concerned . . . with a protected intimate relationship." For a discussion of competing views on this point, see Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy*:

that privacy protects one's autonomy over the essentials of one's selfhood. If privacy means that a person as such has a distinctive value and cannot be used to further another's or society's ends,¹⁹⁰ then the ability to independently control the intimate aspects of one's life inheres in the concepts of privacy and personhood. A formulation of privacy which would protect a marital unit rather than an individual's rights within that relationship disregards basic premises of privacy by failing to recognize an individual's autonomy over selfhood.

The interest threatened by marital rape is the woman's interest in autonomous control over the intimacies of her body and her life. To suggest that the marital rape exemption protects the privacy of the marital relationship obscures the notion of privacy in several respects. Such a position rests on the fallacious premise that the family or marital unit provides protection for the privacy interests of the individual. But this is not true where, within an intimate relationship, one person's privacy rights are being violated by the other person, as is the case in forcible sexual assaults.¹⁹¹ Moreover, elevating the societal goal of protecting the family unit over that of the woman's right to autonomy not only sacrifices the woman's physical and mental well-being, but actually furthers the personal and individual goals of the husband. Thus, what is protected is not so much the marital relationship, but the dominant role of the man in that

Beyond the Ideology of Familial Privacy, 14 HARV. C.R.-C.L.L. REV. 361 (1979).

190. "The right to privacy expresses 'the moral fact that a person belongs to himself and not to others nor to society as a whole.'" Eichbaum, *supra* note 189, at 364 (quoting Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288 (1977)).

191. Eichbaum makes this point when she notes, "the implicit foundation of a familial privacy right is the dominant cultural myth of the family as 'haven in a heartless world': the family as a structure defining a private realm for the individual, as a source of privacy for the individual." *Id.* at 368. This is no longer true because the family often embodies the forces it tried to protect against. Consequently, a family-based right to privacy "rests the right of privacy on a structure which may no longer be able to support it." *Id.* at 369. A family-based right of privacy would effectively deny a woman autonomy over her body and her sexuality.

[A] family-based right would discriminate against individual members of the family unit itself by reducing their human significance vis-à-vis the abstraction of which they are a part. A family-based right is premised upon the vision of a person as an instrumentality toward the higher goal of the abstract family unit. It, therefore, violates basic principles of individual equality and autonomy which . . . reside at the core of a civil right.

Id. at 372.

relationship.

A woman does not forfeit her right of privacy upon marriage.¹⁹² But when this right is implicated within the context of marriage, as it is by the marital rape exemption, the Court might weigh the effect of a woman's decision on her husband as it did in *Danforth*. In *Danforth*, the court recognized that a husband does have a strong interest in his wife's pregnancy, not only because of his interest in the fetus, but also because of his interest in the marriage, both of which would be profoundly affected by the wife's decision whether to have an abortion.¹⁹³ Nevertheless, the court decided that "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."¹⁹⁴ In the case of marital rape, however, a similar weighing process would be inappropriate. Whereas a man does have a legitimate interest in the decision whether or not to create a child, no one has an interest in raping another.

C. MARITAL RAPE EXEMPTION AS AN UNDUE BURDEN

Upon determining that the right of privacy protects a particular decision, constitutional analysis next requires examining the statute in question to ascertain whether it places an undue burden on the exercise of the right.¹⁹⁵ To be unduly burden-

192. The *Eisenstadt* decision recognizes that persons maintain their separate identities in marriage, and that the right of privacy inheres in the individual. See discussion at note 152 *supra*, and accompanying text.

193. We are not unaware of the deep and proper concern and interest that a . . . husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying Moreover, we recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious.

428 U.S. at 69-70.

194. 428 U.S. at 71.

195. The right of privacy is not impermissibly infringed by narrowly tailored, carefully drafted regulations that meet permissible state interests.

That the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding contraception does not, however, automatically invalidate every state regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not

some, a regulation must infringe in some significant way on an individual's decision. Regulations absolutely prohibiting a decision or "substantially limiting access to the means of effectuating that decision"¹⁹⁶ have been held unduly burdensome.¹⁹⁷

Rape laws provide the means through which a woman protects her right to control sexual access to her body.¹⁹⁸ Because a woman has such a right, society, through the criminal justice system, does not permit others to violate it. The marital rape exemption burdens a married woman's decision regarding control of her body and sexuality by denying her access to the criminal justice system. Without such access, her decision not to engage in sexual intercourse with her husband is ineffectual.

In *Danforth*, the Court held that a statutory provision granting a husband veto power over his wife's decision to have an abortion unduly burdened a woman's constitutionally protected decision.¹⁹⁹ The Court interpreted such a provision as giving greater weight to a husband's interest than to the woman's, and thus "interposed an absolute obstacle to a woman's decision."²⁰⁰ Under the marital rape exemption, a husband may override his wife's decision regarding sexual access to her body without suffering any of the legal consequences which usually ensue to enforce a woman's decision. By permitting a husband to control his wife's body in this regard, the marital rape exemption places his interests above hers. Because she is denied the means to effectuate her decision, her husband's decision governs. This sort of interference presents a woman with an absolute ob-

infringe protected individual choices.

Carey v. Population Serv. Int'l, 431 U.S. 678, 685-86 (1977) (emphasis added). "[T]he right [in *Roe*] protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977).

196. *Carey v. Population Serv. Int'l*, 431 U.S. at 688.

197. The statute in *Griswold*, banning the use of contraceptives, is an example of a statute which absolutely prohibits a decision. The statute in *Carey*, which restricted the distribution of contraceptives to minors, and distribution by anyone other than a licensed physician is an example of a statute which substantially restricts access to the means of implementing a decision.

198. Rape leaves a woman "with little retaliatory capability save that provided by law—to charge her attacker so that a civilized society may lawfully exact a just penalty or punishment for the trespass committed." *State v. Smith*, 148 N.J. Super. 219, 222, 372 A.2d 386, 390 (1977).

199. 428 U.S. 52 (1975).

200. *Id.* at 70-71 n.11.

stacle to her decision and is therefore unduly burdensome.

D. STATE INTERESTS

A regulation imposing an undue burden on a decision protected by the right of privacy may be validated only if the regulation voices a "compelling state interest" and is "narrowly drawn to express only the legitimate state interests at stake."²⁰¹ The state must show that the means chosen in the statute actually promote a compelling state interest.²⁰² If the relationship between the means and the purpose is speculative, underinclusive, or overinclusive, the statute is unlikely to withstand the required scrutiny.

It might be argued that the state has a compelling interest in protecting the institution of marriage by fostering the intimacies of the marital relationship²⁰³ and encouraging reconciliation. The sexual intimacies of a marriage are an integral part of the institution of marriage and subjecting them to possible criminal sanctions would have a debilitating effect on the marital relationship. Fear of rape charges might destroy the sexual relationship of the couple. Additionally, a rape charge poses a substantial threat to a marriage; divorce, not reconciliation, is likely to ensue.

But these assertions misconceive the basic nature of a forci-

201. *Roe v. Wade*, 410 U.S. at 155.

202. In discussing the state interests in *Roe*, the Court emphasized the importance of a proveable factual relationship between the asserted state goals of protecting human life and the health of the mother and the legislative means, prohibiting abortions. The Court noted that the question of when life begins is debatable and would not permit the legislature to pick one of the speculative theories to infringe on the right of the woman to decide to terminate her pregnancy. Further, the Court held that the state interest in the health of the mother was not compelling until after the first trimester because in the first trimester mortality rates from abortions are less than mortality rates in childbirth. 410 U.S. at 149-62.

203. [T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

Women's Law Forum

ble sexual assault. In *State v. Smith* the court correctly observed: "Rape is necessarily and essentially an act of male self-aggrandizement, while sexual communion mutually entered into connotes and communicates love, respect and a gift of physical pleasure. Rape subjugates and humiliates the woman"204 Recent studies disclose rape to be an act of violence not sexuality.²⁰⁵ The rapist uses sexual acts to express hostility, aggression, and dominance.²⁰⁶ Marital rape is a manifestation of these same motivations.²⁰⁷ Thus rape is not one of the intimacies of the marital relationship.

In *Danforth*, the Court recognized that allowing a husband to veto his wife's decision whether or not to terminate her pregnancy did not further the state's interest in protecting a marital relationship.²⁰⁸ Acknowledging that a marriage in which the couple is divided on such an immensely important issue is not harmonious or successful, the Court concluded that to permit a husband to override his wife's decision would do little to enhance or salvage the marriage. Although a woman's decision to have an abortion when her husband disagrees would have a deleterious effect on the marriage, granting a husband an absolute

204. 148 N.J. Super. at 226, 372 A.2d at 389-90.

205. Inaccurate notions surrounding rape "assume that the offender's behavior is primarily motivated by sexual desire and that rape is directed toward gratifying only this sexual need. Quite to the contrary, careful clinical study of offenders reveals that rape is in fact serving primarily nonsexual needs. It is the sexual expression of power and anger. Forcible sexual assault is motivated more by retaliatory and compensatory motives than by sexual ones." A GROTH, *MEN WHO RAPE* 2 (1979).

206. *Id.* at 12-13.

207. The marital rapist uses sex to assert powers over his wife by forcing her to submit to him. Through submission he also degrades and humiliates her, which expresses his anger and contempt for her. *Id.* at 177-79.

208. It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the 'interest of the state in protecting the mutuality of decisions vital to the marriage relationship.'

428 U.S. at 71.

veto over her decision would be equally deleterious to the marriage.

Similarly, a woman's decision to withhold her consent to sexual relations could arguably have an adverse effect on the marriage. The husband's rape of his wife, however, is likely to have an even more pernicious effect on the marriage. In fact, marital rape, which negates any notion of mutual, consenting, and loving behavior, might symbolize the ultimate breakdown of a marriage.²⁰⁹ Thus the Court's observation in *Danforth* regarding the effect of a husband's absolute veto over his wife's decision to terminate her pregnancy, that "it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution will be achieved,"²¹⁰ similarly applies to giving a husband immunity to rape his wife.

Moreover, the state does not have a legitimate interest in sheltering the perpetrators of violent crimes under the guise of protecting the marital relationship. Justice Harlan's famous dissent in *Poe v. Ullman*,²¹¹ after setting forth a married couple's right of privacy surrounding their sexual relationship, went on to note that: "[T]he family . . . is not beyond regulation" . . . , and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime."²¹² The marital rape exemption commits just this absurdity. Other crimes committed between husband and wife are not exempted from criminal prosecution based on the marital relationship.²¹³ The consideration which has distinguished marital rape, that rape involves the sexual relationship of the couple, ignores the true nature of the

209. "[R]econciliation hardly seems an expected or likely consequence of a relationship that has deteriorated to the point of forcible sexual advances by a husband." *State v. Smith*, 148 N.J. Super. at 226, 372 A.2d at 389.

210. 428 U.S. at 71.

211. 367 U.S. 497, 522 (1961). This case preceded *Griswold* and upheld a Connecticut statute prohibiting the use of contraceptives by married couples. Justice Harlan's dissent anticipated and became the basis for the *Griswold* decision. Justice Goldberg's concurrence in *Griswold* cited with approval Justice Harlan's dissent in *Poe*. 381 U.S. at 495.

212. 367 U.S. at 552 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943)).

213. See e.g., *Goodwin v. State*, 114 Wis. 318, 90 N.W. 170 (1902) (husband prosecuted for assault with intent to kill his wife).

crime and the harm inflicted.

V. CONCLUSION

The marital rape exemption is predicated on the ancient notions that a woman is the property of a man, and in particular, that a husband has the right to own and control his wife. These concepts have long been repudiated. A wife is no longer the legal chattel of her husband. The normative view of marriage today, in both the law and society, is that of a partnership between two equals. The protection of women from violent, unwanted assaults is the purpose of rape laws. The marital rape exemption contradicts this purpose and continues to incorporate the notion of a woman as the property of her husband in modern rape statutes. The legal justifications for the exemption are based on factually and legally suspect assumptions.

The apparent unwillingness of most legislatures to eliminate the exemption indicates a need to challenge the exemption in the courts. The right of privacy is one argument available for securing the right of a married woman to control her body.