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COMMENT

Old Wine in New Bottles:* The "Marital"** Rape Allowance***

I. INTRODUCTION

The marital rape exemption1 is the common law doctrine that precluded the prosecution of a husband for raping his wife.2 This unqualified immunity was based on the notion that, by the very act of marriage, a woman irrevocably consented to intercourse with her husband.3 The exemption bestowed upon husbands an absolute privilege to rape their wives, using whatever degree of force or coercion they pleased.4

For more than a decade, the marital rape exemption has faced mounting opposition.5 Some commentators have criticized the immunity as vio-

* "Neither do men put new wine into old bottles: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved." Matthew 9:17 (King James).

** The quotation marks signify that the so-called "marital rape exemption" no longer applies exclusively to married men in many jurisdictions, but now includes cohabitants and social companions as well. See infra notes 136-44 and accompanying text.

*** The term "allowance" signifies the movement away from granting husbands the absolute right to rape their wives (traditionally classified as the marital rape exemption) toward permitting such behavior only in particular circumstances. See infra notes 116-35 and accompanying text.

 Appropriately, the dictionary definitions of "allowance" include the following: (1) "to supply in a fixed or regular quantity," (2) "an imposed handicap," and (3) "an allowed dimensional difference between mating parts of a machine." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 72 (1983).

1. Except when referring to the "marital rape exemption" as a legal doctrine, rule, or philosophy, the term "wife rape" is more accurate and descriptive. Using "marital rape" ignores the reality that a majority of rapes are committed by men (and husbands) against women (and wives) and implicitly diminishes the importance of this point.

2. See infra note 22 and accompanying text.

3. See infra notes 23-25 and accompanying text.


Criticism of the exemption, however, is not new. Though often cited, John Stuart Mill's eloquent words are worth repeating:

[A] female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse to her master the last familiarity. Not so the wife: however brutal a tyrant she may unfortunately be chained to—though she may know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him—he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.
iating the Equal Protection Clause of the United States Constitution. Others have argued that laws condoning wife rape are inconsistent with the contemporary social status of women and that they contradict the prevailing trend of the law to accord women greater reproductive freedom and bodily integrity.

Responding to these arguments, several courts have abolished the exemption or refused to recognize it in any form, granting single and married women ostensibly equal rights to state protection from sexual assault. Many courts, however, have not directly addressed this issue, and a few have been unwilling to overturn the exemption when presented with the opportunity. Given the small number of wife rape cases that come before appellate courts, advocacy groups have turned to state legislatures to abrogate the exemption by statute.

John S. Mill, *The Subjection of Women*, in *ESSAYS ON SEX EQUALITY* 123, 160 (Alice S. Rossi ed., 1970). As a caveat, it should be noted that female slaves in “Christian countries” were not always able to exercise the right Mill described. See infra note 71.


10. See People v. Brown, 632 P.2d 1025, 1027 (Colo. 1981) (holding that the state’s interest in preserving familial relationships provided a rational basis for the marital exception in Colorado’s first degree sexual assault statute); People v. Hawkins, 407 N.W.2d 366, 367 (Mich.) (refusing to declare unconstitutional Michigan’s marital rape exemption as it then existed), modified, 413 N.W.2d 677 (Mich. 1987).

11. Rape is among the most underreported and unprosecuted of all crimes. ESTRICH, *supra* note 4, at 10; see also Augustine, *supra* note 8, at 577 & nn.99-101 (citing crime statistics from the Federal Bureau of Investigation). As the Supreme Court noted in *Planned Parenthood v. Casey*, “[i]f anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government.” Casey, 112 S. Ct. at 2829.

That few marital rape cases are brought to trial should not be considered an indication that the actual number of marital rapes is equally small. See infra note 47.
These efforts at reform have met with considerable success, and most states have abolished the traditional exemption. Throughout this process, however, significant resistance to abolishing all laws distinguishing between marital and nonmarital rape has persisted, leading a number of jurisdictions to replace the traditional exemption with what might instead be termed a "marital rape allowance." In general, the allowance creates a lesser crime for wife rape than for other rapes. Under the new allowance laws, husbands no longer enjoy an unqualified privilege to force their wives to engage in nonconsensual sex; nonetheless, states adopting such laws maintain the legal right of a husband to rape his wife under certain circumstances. Because married women in these jurisdictions remain unprotected from some forms of sexual assault, the reform effort must continue.

This Comment first discusses the traditional rationales on which the marital rape exemption is based and explores the justifications offered by its contemporary proponents. Second, the Comment examines the major arguments against penal laws differentiating between marital and nonmarital rape. Next, the Comment reviews recent modifications to the marital rape exemption and offers possible explanations for the development of the marital rape allowance. The exemption's history in North Carolina is then

12. According to the National Clearinghouse on Marital and Date Rape, every state now has laws criminalizing marital rape. See Marylou Tousignant & Carlos Sanchez, Woman Who Mutilated Husband Had Told Neighbor of Rapes, WASH. POST, June 26, 1993, at D5; Foon Rhee, Marital Rape Law Approved in N.C., CHARLOTTE OBSERVER, July 2, 1993, at 6A. However, at least 31 states have maintained distinctions between marital and nonmarital rape by placing additional legal burdens on victims of wife rape. Tousignant & Sanchez, supra, at D5.

For a state-by-state survey of marital rape law, see Russell, supra note 5, app. II, and Augustine, supra note 8, at 578-85. The inherent difficulty in making definitive classifications should be noted, however. The status of the law in many jurisdictions is ambiguous because states with no statutory exemption for husbands may still recognize one under common law. See, e.g., infra notes 154-66 and accompanying text (discussing North Carolina's common law treatment of wife rape). The relatively small number of cases testing these statutes and the subtle but often critical distinctions among them contribute to the complexity of making an accurate categorization.

13. One of the more extreme statements defending the exemption is a quotation attributed to California State Senator Bob Wilson: "But if you can't rape your wife, who[m] can you rape?" Michael D. Freeman, "But If You Can't Rape Your Wife, Who[m] Can You Rape?": The Marital Rape Exemption Re-examined, FAM. L.Q., Spring 1981, at 1, 1.

14. See supra note ***.

15. Often, a greater degree of force is required before nonconsensual intercourse with one's spouse is considered rape. Some states simply make the punishment for raping one's wife less severe than that imposed for raping another woman. See infra notes 120-29.

16. See infra notes 116-35 and accompanying text.
17. See infra notes 22-47 and accompanying text.
18. See infra notes 48-108 and accompanying text.
examined as an illustrative case study.\textsuperscript{20} Finally, the Comment argues that complete abolition of all laws distinguishing among rape and sexual assault victims based on their relationship to their assailant is required in order for women to achieve equal protection under the law.\textsuperscript{21}

II. A TRADITION OF WIFE RAPE: THE MARITAL RAPE EXEMPTION IN LEGAL HISTORY

According to its common law definition, rape occurred when a man “engage[d] in intercourse . . . with a woman \textit{not his wife}; by force or threat of force; against her will and without her consent.”\textsuperscript{22} The origins of this definition are usually traced to Matthew Hale’s assertion that “[t]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in this kind unto her husband, which she cannot retract.”\textsuperscript{23} In modern terms, this doctrine is most often referred to as the “implied consent theory.”\textsuperscript{24} Its basic premise is that raping one’s wife is an impossibility, as she has consented to sex with her husband through the act of marriage.\textsuperscript{25}

Another traditional legal justification offered in support of the exemption is the so-called “unities theory.” This doctrine contends that “the husband and wife are one person in law,” with the “legal existence of the woman . . . suspended during the marriage.”\textsuperscript{26} The following Georgia statute, not repealed until 1983, is a typical codification of this purported unity: “The husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except insofar as the law recognizes her separately, for her own protection, for her benefit, or for the

\textsuperscript{20} See infra notes 154-88 and accompanying text.
\textsuperscript{21} See discussion infra part VII.
\textsuperscript{22} ESTRICH, supra note 4, at 8 (emphasis added). This definition is still the cornerstone of contemporary rape law. \textit{Id.}
\textsuperscript{23} 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 629 (Dublin, O. Lynch 1778). It is noteworthy that this far-reaching pronouncement was simply a “bare assertion” by Hale, in contrast to his typical practice of citing to supporting authorities. Freeman, supra note 13, at 13. Michael Freeman postulates that, “[g]iven [Hale’s] views about women[,] it cannot . . . be ruled out that he did, indeed, create the marital rape exemption rule.” \textit{Id.} (emphasis added).
\textsuperscript{24} The Model Penal Code notes that marriage, or an equivalent relationship, implies a “generalized consent” that is “valid until revoked.” \textsc{Model Penal Code} § 213.1 cmt. 8(c) (1985).
\textsuperscript{25} In fact, some matrimonial law is inconsistent with Hale’s notion. Freeman, supra note 13, at 15. For example, a wife’s refusal to have sexual intercourse with her husband is not generally considered grounds for divorce, and courts have held that a husband has the “duty of forbearance . . . at the reasonable request of the wife.” \textit{Id.} at 14-15 (purporting to quote Hines v. Hines, 179 N.W. 299 (Mich. 1920), but actually using language from Martilla v. Quincy Mining Co., 191 N.W. 193, 194 (Mich. 1923)).
\textsuperscript{26} 1 WILLIAM BLACKSTONE, COMMENTARIES #442.
If one accepts the premise that a wife’s civil identity is subsumed into that of her husband, it follows that “a man could no more be charged with raping his wife than . . . with raping himself.”

The legal status of married women as the property of their husbands was also used to justify the common law marital rape exemption. As one court noted, “the purpose behind the proscriptions [against rape] was to protect the chastity of women and thus their property value to their fathers or husbands.” Given this justification, there is no reason to punish those rapes not diminishing a woman’s value as property, because no injury to the proprietary interest of the relevant male “property owner” has occurred.

The historical view of marriage as a contract has likewise been viewed as supporting the marital rape exemption. Traditionally, a marriage contract was virtually irrevocable, especially for women, and sex with one’s husband was an inescapable obligation under it. At least one state maintains a statutory requirement that a husband and wife have sexual intercourse before their marriage is deemed legally valid. Accepting the premise that sex is an established right pursuant to any marital relationship, the contract rationale, which approaches Hale’s irrevocable consent doctrine, interprets the rape of one’s wife as the mere exercise of a contractual right.

In addition to the traditional legal theories discussed above, more contemporary justifications have been offered in support of the marital rape exemption.
exemption. One such position is that wife rape is less serious than other rapes. In one wife rape case, the defense lawyers argued that "the emotional trauma suffered by a person victimized by an individual with whom sexual intimacy is shared as a normal part of an ongoing marital relationship is not nearly as severe as that suffered by a person who is victimized by one with whom that intimacy is not shared." This assertion is questionable; it is at least as plausible to argue that victims "feel as or more traumatized from being raped by someone known or trusted... than by some stranger."

Another argument that exemption proponents have used successfully builds on the widespread fear of false rape claims. Exemption supporters worry that false accusations would damage the reputation of those men unjustly accused and that fabricated claims could become a potent weapon for a vindictive wife during a divorce or custody proceeding. This fear,

34. Brief for Plaintiff-Appellee at 10, People v. Brown, 632 P.2d 1025 (Colo. 1981) (No. 81SA102), quoted in MacKinnon, supra note 32, at 177. The Model Penal Code espouses the view that "[t]he character of the voluntary association of husband and wife, in other words, may be thought to affect the nature of the harm involved in unwanted intercourse." Model Penal Code § 213.1 cmt. 8(c) (1985).

35. MacKinnon, supra note 32, at 177.

36. As with so much of rape law, the classic articulation of this fear is attributed to Hale: "Rape is... an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 Hale, supra note 23, at 635. Wigmore is responsible for a similar statement: "The real victim... too often in such cases is the innocent man..." 3A John H. Wigmore, Evidence in Trials at Common Law § 924a, at 736 (Chadbourn rev. ed. 1970).

The use of the term "prosecutrix" to describe the victim in a rape case is indicative of this attitude, because it implies that a vindictive woman is out to punish the defendant. See, e.g., Kenneth S. Brown et al., McCormick on Evidence § 43, at 158 n.10 (John W. Strong ed., 4th ed. 1992); Joseph Neff, House Votes to Revoke Centuries-Old Law Allowing Marital Rape, News & Observer (Raleigh, N.C.), Apr. 7, 1993, at 1A ("Is the unsupported testimony of a prosecutrix all that is required to send [a rape case] to jury trial?" (emphasis added)). Likewise, the term "alleged victim" is consistently used by the media to describe women claiming to have been raped. In contrast, individuals claiming to have been the object of some other crime frequently are accorded a degree of credibility denied to rape victims by being labelled simply "victims." Few consider that a supposed robbery "victim" may be running an insurance scam or (to use an extreme example) that a supposed murder "victim" may have committed suicide. Cf. Susan Estrich, Rape, 95 Yale L.J. 1087, 1126 (1986) ("[T]he law puts a special burden on the rape victim to prove through her actions her nonconsent... while imposing no similar burden on the victim of trespass, battery or robbery.").

37. For example, North Carolina Representative Hugh Lee stated: "I don't care if he's as innocent as the baby Jesus, that stigma will follow him the rest of his life... This bill [abolishing the exception] is promoting great mischief." Neff, supra note 36, at 1A; see also Joseph Neff, Marital Rape Bill Vexes Senators, News & Observer (Raleigh, N.C.), June 23, 1993, at 3A (quoting members of the North Carolina State Senate).

38. Brief in Support of Answer in Opposition to Prosecutor's Application for Leave to Appeal at 17, People v. Hawkins, 407 N.W.2d 366 (Mich.) (No. 80436) ("[T]he charge by a spouse in the context of marital discord provides a much stronger basis to suspect hostile motives to make exaggerated or false claims.") modified, 413 N.W.2d 677 (Mich. 1987).
however, is unfounded: there is no evidence indicating that married women are more likely to fabricate false claims than unmarried ones.\textsuperscript{39} Indeed, the social pressures against accusing one's husband of rape may in fact make claims of wife rape, legitimate or otherwise, less likely. In any case, reliance on this argument as the basis for a marital rape exemption (or allowance) clearly places the protection of the husband's reputation above the protection of his wife's right not to be raped. Such concerns are absent in other areas of criminal law. "[I]f the possibility of fabricated complaints were a basis for not criminalizing behavior, virtually all crimes other than homicides would go unpunished."\textsuperscript{40}

Some commentators and legislators have also worried about the impact on "marital stability" if the exemption were to be abrogated.\textsuperscript{41} The concern underlying this argument is that permitting wives to charge their husbands with rape would unsettle marital relationships, foreclose the possibility of reconciliation between spouses, and cause increased strife within families.\textsuperscript{42} Marital harmony is undoubtedly a worthwhile social goal, but as the Supreme Court of Virginia noted:

It is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.\textsuperscript{43}

\textsuperscript{39} See People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984) ("[T]he possibility that married women will fabricate complaints would seem to be no greater than the possibility of unmarried women doing so."). cert. denied, 471 U.S. 1020 (1985).

With what might be characterized as half-hearted support, another court responded to this fear with the observation that there was "no basis for believing that a vindictive spouse is more likely to fabricate a sexual assault charge than a vindictive former lover." People v. M.D., 595 N.E.2d 702, 712 (Ill. App. Ct.), appeal denied, 602 N.E.2d 467 (Ill. 1992).

Overall, the number of false rape charges has been estimated at two percent, the same rate as for other violent crimes. Brown Miller, supra note 30, at 387.

\textsuperscript{40} Liberta, 474 N.E.2d at 574.


\textsuperscript{42} During legislative debate over the exemption, North Carolina State Senator Sandy Sands observed: "The institution of marriage is taking a whipping here .... What we're doing is taking one more step to eroding what I consider the building block of this country, that is, the family relationship, the husband and wife." Neff, supra note 37.

\textsuperscript{43} Weishaupt v. Commonwealth, 315 S.E.2d 847, 855 (Va. 1984). In even stronger language, the court also concluded that "[t]his argument is absurd." \textit{Id.}

The \textit{Weishaupt} decision is unusual in that it upheld the conviction of a husband for raping his wife without rejecting the marital rape exemption outright. The court held that a wife could "unilaterally revoke her implied consent to marital sex" by "manifest[ing] her intent to terminate the marital relationship by living separate and apart from her husband; refraining from voluntary sexual intercourse with her husband; and . . . conducting herself in a manner that establishes a \textit{de facto} end to the marriage." \textit{Id.} A concurring opinion cautioned that "the flood gates
Implicit in the use of marital harmony as a justification for the marital exemption is the idea that reconciliation between the rapist and his victim is more important than the victim's right not to be raped in the first place. This set of priorities is hardly appropriate for a system that endorses the full and equal dignity of women.

At a deeper level, arguments in favor of the marital rape exemption reveal that the exemption is consistent with the traditional status of women in our society. Throughout our legal and cultural traditions, woman is either virgin or whore, alternatively someone to be placed on a pedestal or in the bedroom. Catharine MacKinnon observes:

The law of rape divides women into spheres of consent according to indices of relationship to men. . . . These categories tell men whom they can legally fuck, who is open season and who is off limits . . . .

. . . Virtuous women, like young girls, are unconsenting, virginal, rapable. Unvirtuous women, like wives and prostitutes, are consenting, whores, unrapable.\(^4\)

The husband's traditional role was that of protector. As such, he received unqualified entitlement to sexual relations with his wife. Through the marital rape exemption, the law embraced this traditional relationship, recognizing that such an arrangement contravenes the very notion of wife rape. In so doing, it left married women vulnerable, apparently presuming that an appropriately protective husband would not abuse his commensurate sexual privileges. Unfortunately, extensive evidence of wife rape indicates that this presumption is dangerously mistaken.\(^4\)

\(^{44}\) See MacKinnon, supra note 32, at 42 ("Unequal marriage laws . . . began by 'recognizing the relations they find already existing between individuals.'" (quoting Mill, supra note 5, at 130)).

The marital rape exemption is also consistent with some elements of the Christian tradition, particularly the letters of the apostle Paul. From 1 Corinthians 7:4: "For the wife does not rule over her own body, but the husband does; likewise the husband does not rule over his own body, but the wife does. Do not refuse one another . . . ." From Ephesians 5:22: "Wives, be subject to your husbands, as to the Lord."

\(^{45}\) MacKinnon, supra note 32, at 175 (emphasis added).

\(^{46}\) Compare Blackstone's comments articulating the legal unity of husband and wife: "[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband under whose wing, protection, and cover, she performs everything . . . ." 1 Blackstone, supra note 26, at *442 (emphasis added).

\(^{47}\) In one study of 930 women by Diana Russell, 12% of those who had ever been married were raped by their husband or ex-husband. Russell, supra note 5, at 64-65; see also David Finkelhor & Kersti Yllo, License to Rape: Sexual Abuse of Wives 6-7 (1985) (noting that one out of ten wives has been sexually assaulted by her husband at least once). A 1992 report indicated that 9% of all rapes were committed by husbands or ex-husbands. National Victim
PARTICULARLY SINCE THE EARLY 1980S, THE MARITAL RAPE EXEMPTION HAS COME UNDER INCREASING ATTACK. \(^{48}\) IN ADDITION TO THE OBJECTIONS MENTIONED ABOVE, COMMENTATORS AND COURTS HAVE RECOGNIZED THAT THESE LAWS ARE AN "ANTIQUE TATED HOLODOVER FROM AN EARLIER AND DISCARDED VIEW OF WOMEN." \(^{49}\) WHILE ITSELF A fairly recent development, the movement to abolish the marital rape exemption is the latest in a progression of reforms to improve the legal status of women. IN GENERAL, A WIFE IS NO LONGER THE LEGAL CHATTLE OF HER HUSBAND, "TO BE USED AS HE WILLS." \(^{50}\) (OF COURSE, THE OBVIOUS EXCEPTION TO THIS IS WIFE RAPE IN THOSE STATES ADOPTING A MARITAL RAPE ALLOWANCE.) PASSED IN SOME FORM BY ALL STATES, MOSTLY DURING THE SECOND HALF OF THE NINETEENTH CENTURY, MARRIED WOMEN'S PROPERTY ACTS HELPED REFORM THE COMMON LAW STATUS OF WOMEN BY GRANTING THEM AN INDEPENDENT LEGAL IDENTITY. \(^{51}\) AMONG OTHER CHANGES UNDER THESE LAWS, WOMEN GAINED THE RIGHTS TO CONTRACT, TO SUE, AND TO OWN PROPERTY. \(^{52}\) TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, \(^{53}\) WHICH PROHIBITS DISCRIMINATION ON THE BASIS OF SEX BY CERTAIN EMPLOYERS, WAS ANOTHER STEP IN THE PROGRESSION TOWARD GENDER EQUALITY. THE CONTINUING WILLINGNESS OF THE UNITED STATES SUPREME COURT TO UPHOLD A WOMAN'S RIGHT TO CHOOSE ABORTION, IN THE MIDST OF CONSIDERABLE CONTROVERSY, IS ALSO AN INDICATION OF THE ENHANCED LEGAL STATUS WOMEN RECENTLY HAVE ACHIEVED. \(^{54}\)

Another criticism of the marital rape exemption is that it violates the constitutional right to privacy recognized by the United States Supreme Court in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992) (reaffirming the "right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State"); cf. id. at 2826-31 (striking down Pennsylvania's spousal notification requirement as an undue burden on a woman's right to choose abortion).
Court—both the privacy rights of married women in particular, and of all women in general. A state cannot limit this right, which protects bodily integrity, reproductive freedom, and individual autonomy, unless a legitimate state interest necessitates governmental interference. Since no such interest is furthered by laws exempting wife rape, the state arguably violates the privacy rights of married women by "extinguish[ing] [their] autonomy in one of the most personal and intimate of all human interactions." The fact that rape sometimes results in an unwanted pregnancy adds even more credence to this argument. In *Eisenstadt v. Baird*, the Court noted: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." By legalizing an activity that may cause conception, the state unjustifiably infringes on that decision and violates the privacy rights of married women.

The argument that the privacy rights of all women are violated by the marital rape exemption implicates the right to marry, which the Supreme Court has recognized as fundamental. The requirement that a wife-to-be relinquish state protection from sexual assault could be considered a "significant interference" with this right, thereby meeting the established standard for invalidating such a classification in the absence of an important state interest. In effect, the marital rape exemption requires women either to forfeit their rights to bodily integrity, individual autonomy, and procreative freedom, or to forfeit their right to participate in a social institution that

55. See, e.g., *id.* at 2805 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.").


The *Casey* plurality criticized the post-*Roe* opinions holding that regulations limiting abortion rights "must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Case*, 112 S. Ct. at 2817 (plurality opinion) (emphasis added) (citing *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 427 (1983)). Nonetheless, in establishing its new "undue burden" test, the plurality emphasized the necessity of at least a legitimate state interest. *See id.* at 2820 (plurality opinion).

58. *See infra* notes 88-108 and accompanying text. In the context of equal protection, the New York Court of Appeals has held that laws distinguishing between marital and nonmarital rape were "unable to withstand even the slightest scrutiny." *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985).


60. 405 U.S. 438 (1972).

61. *Id.* at 453.


the Court has described as "noble" and "sacred." In jurisdictions protecting wife rape, these rights are mutually exclusive—presenting women who wish to marry, but who desire state protection against sexual assault, with an impossible, and arguably unconstitutional, dilemma.

In addition to violating privacy rights, exemptions for wife rape may implicate the Thirteenth Amendment as well. Although no court has relied on the Thirteenth Amendment in declaring the marital rape exemption unconstitutional, one can make a plausible argument that laws exempting wife rape violate this amendment, which provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States." Though some commentators have equated the subordinate status of (white) women to that of African-American slaves, whose plight the amendment was primarily intended to address, the analogy is unwarranted. The cir-

64. In Griswold v. Connecticut, 381 U.S. 479, 486 (1965), the Court noted:
Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

65. Exemption supporters have argued that the right to marital privacy is actually furthered by the exemption, and that the state should not regulate what they consider to be intimate matters. See Augustine, supra note 8, at 570; cf. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."). Taken to its extreme, this argument could be used to justify the legalization of spouse abuse, child abuse and neglect, incest, and other common forms of domestic violence.

In one recent wife rape case, an Illinois court explicitly recognized that the right to marital privacy does not apply outside the context of consensual marital relations. People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984), cert. denied, 471 U.S. 1020 (1985).

66. See Andrew Koppelman, Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480, 504 n.102 (1990); McConnell, supra note 7, at 247-51. Laura X, who founded the National Clearinghouse Against Marital Rape in 1980, regrets that courts have not been more responsive to Thirteenth Amendment arguments against the exemption. Ms. X adopted her last name "to protest the legal ownership of wives by their husbands." Telephone Interview with Laura X, Director of the National Clearinghouse Against Marital and Date Rape (Jan. 4, 1993).


68. U.S. Const. amend. XIII, § 1.

69. John Stuart Mill, not known for his sensitivity to racism, wrote: "Marriage is the only bondage known to our law. There remain no legal slaves, except the mistress of every house." Mill, supra note 5, at 217.

cumstances facing African Americans under slavery were materially worse.\textsuperscript{71} While married women—even those living under a marital rape exemption—are not \textit{slaves}, the Thirteenth Amendment’s prohibition against \textit{involuntary servitude} may be applicable to the situation of battered women,\textsuperscript{72} many of whom are also victims of wife rape.\textsuperscript{73}

In a 1992 article, Joyce McConnell argues that some abusive intimate relationships constitute “involuntary servitude,” potentially subjecting such behavior to criminal sanctions under the Thirteenth Amendment’s enforcement provisions.\textsuperscript{74} Citing statements by framers of the amendment that it could alter the traditional marital relationship between husband and wife,\textsuperscript{75} McConnell concludes that the amendment was intended “not only [to forbid] the legal ownership of human chattel (slavery), but [to prohibit] anyone from treating another as if such ownership existed (involuntary servitude).”\textsuperscript{76} If one accepts this argument, there are many examples of sexual abuse and brutality by husbands against their wives that might qualify as involuntary servitude.\textsuperscript{77}

\textsuperscript{71} At least during the time of slavery, white women were in many ways the “chattel” of their husbands. Their status as second-class citizens, however, provided rights and privileges denied to African Americans. The primary advantage enjoyed by white women over those truly enslaved were the benefits attending their unique proximity to the dominant social group—white males. As a caveat, it should be noted that African-American men probably received more protection from sexual violence than white women, see Mill, supra note 5, if only because of the pervasive social ethic against homosexual behavior. Black women, however, were almost entirely unprotected from rape by white men, which occurred on an epic scale. For an account of rape in slavery, see Brownmiller, supra note 30, at 153-70.

\textsuperscript{72} Lenore Walker defines a battered woman as someone in “an intimate relationship with a man who repeatedly subjects . . . her to forceful physical and/or psychological abuse.” Lenore E. Walker, The Battered Woman Syndrome app. B at 203 (1984).

\textsuperscript{73} See Russell, supra note 5, at 61 (citing two studies finding that over one-third of battered women are raped by their husbands); see also Lenore E. Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 124-35 (1989) (describing incidents of sexual abuse that resulted in the wife killing her husband and the legal system’s response to this situation).

\textsuperscript{74} McConnell, supra note 7, at 251. The federal criminal involuntary servitude statute is codified at 18 U.S.C. § 1584 (1988).

\textsuperscript{75} McConnell, supra note 7, at 215-16 & n.38.

\textsuperscript{76} Id. at 220.

\textsuperscript{77} For a graphic judicial account of the horrors to which one abusive husband subjected his wife, see State v. Everhardt, 392 S.E.2d 391, 391-92 (N.C. 1990). This case is an excellent example of the legal extremes to which a marital rape exemption can force sympathetic courts. Since North Carolina at the time did not criminalize the rape of a cohabitant spouse, see N.C. Gen. Stat. § 14-27.8 (Supp. 1992), amended by Act of July 5, 1993, ch. 274, 1993 N.C. Sess. Laws, the State instead prosecuted Frank Everhardt for assault with a deadly weapon inflicting serious injury. The North Carolina Supreme Court upheld Everhardt’s conviction by concluding that the “serious injury” element of the charge (which could not include the rape itself) could be satisfied by mental injuries, despite the court’s prior limitation of the term to “physical or bodily injury.” Everhardt, 392 S.E.2d at 392-93.
Successful criminal prosecutions under enforcing statutes reveal that "involuntary servitude" is a concept based on the existence of physical or legal coercion. It typically includes violence or threats of violence and may involve forced prostitution or domestic service. In equating these cases to the situation confronted by battered women, McConnell notes that batterers use violent and coercive techniques "to effect total domination" over their wives.

In support of her thesis that some abusive spouses may be punished under the constitutional prohibition against involuntary servitude, McConnell cites reform in the law of marital rape. Although her beliefs regarding the extent of reform may be exaggerated, the basic premise of her argument is still worthwhile. Since "[t]he law has evolved away from treating private sphere crimes, such as battery and rape, differently from those committed in the public sphere," it would be "unreasonable to continue to limit the Thirteenth Amendment exclusively to public sphere conduct" (i.e., the type of economically exploitive relationships that have historically generated Thirteenth Amendment claims). It follows that, at least in the context of an abusive relationship rising to the level of involuntary servitude, wife rape could give rise to a constitutional claim based on the Thirteenth Amendment. Since this amendment, unlike the Fourteenth, is not limited to governmental action, the Thirteenth Amendment has the potential to become an especially useful vehicle in victims' efforts to enforce their constitutional rights.

78. See Pierce v. United States, 146 F.2d 84, 86 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945); Bernal v. United States, 241 F. 339, 341 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918); United States v. Ingalls, 73 F. Supp. 76, 77 (S.D. Cal. 1947).

Joyce McConnell notes that in each of these cases the relationship was initially voluntary, and that failure to make use of escape opportunities did not preclude the court from finding that a relationship of "involuntarily servitude" existed. McConnell, supra note 7, at 225-26.

79. McConnell, supra note 7, at 233. Cf. Russell, supra note 5, at xii (comparing abusive marriages to "a bondage similar to that of a prisoner of war").

80. McConnell, supra note 7, at 247-51.

81. McConnell speaks in terms of a "national trend," id. at 247, and "the end of the marital rape exemption," id. at 251. She recognizes, however, that "[s]tates that have abrogated the exemption have taken differing approaches" and cites several of the partial exemptions that this Comment classifies as allowance laws. Id. at 248 n.237.

82. Id. at 247.

83. The Equal Protection and Due Process Clauses of the Fourteenth Amendment are introduced with the words "No state shall." U.S. CONST. amend. XIV, § 1.

84. Laurence Tribe has written, albeit not in the context of involuntary servitude: "Congress possesses a power to protect individual rights under the Thirteenth Amendment which is as open-ended as its power to regulate interstate commerce." Laurence H. Tribe, American Constitutional Law § 5-13, at 332 (2d ed. 1988).
The most successful legal argument against the marital rape exemption, and the most persuasive, is also the most straightforward: the exemption violates the equal protection rights of married persons under the Fourteenth Amendment. The Constitution does not prohibit laws making a distinction based on marital status, but it does require a rational basis for the distinction. Although this test is generally not a demanding one, there is precedent establishing that laws exempting spousal rape from prosecution fail to withstand even this level of review. In People v. Liberta, which involved the prosecution of a husband for raping his estranged wife, the New York Court of Appeals struck down the state’s exemption after determining that laws distinguishing between marital and nonmarital rape are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny. Observing that “a married woman has the same right to control


86. For two good examples of equal protection arguments against the exemption, see West, supra note 6 passim, and Dailey, supra note 6, at 1267-72.

87. In its pertinent part, the Fourteenth Amendment provides that “[n]o state shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

88. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972). “A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” Id. (quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971)).

89. E.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (requiring only that statutory classifications be “rationally related to a legitimate state interest”). However, because marriage has been recognized as a fundamental interest, Zablocki v. Redhail, 434 U.S. 374, 383 (1978), statutes affecting this right may be subject to a stricter standard of review.

90. E.g., People v. M.D., 595 N.E.2d 702, 712-13 (Ill. App. Ct.) (holding there was no rational basis for spousal exemption under Illinois’ criminal sexual abuse statute), appeal denied, 602 N.E.2d 467 (Ill. 1992).


92. Id. at 573. It should be noted that New York’s rape law was challenged on equal protection grounds by Mario, rather than Denise, Liberta. In one of the many ironies of this case, Mario Liberta argued that the law denied him the right enjoyed by married men to commit rape without fear of punishment by the State. Id. at 570-71. The court treated Mr. Liberta as “not married” under the penal statute at issue, since, as it required, he and his estranged wife were living apart pursuant to an order of protection at the time of the assault. Id. Thus, the most important case involving the marital rape exemption was initiated by a statutorily “unmarried” man guilty of raping his legal wife. Yet another irony is the name of the protagonists in this decision, which means “liberty” in Latin. Finally, the Liberta opinion, which has achieved almost canonical status among feminist scholars and activists, was written by former judge Sol Wachtler. After resigning his position as Chief Judge of the New York Court of Appeals, Wachtler recently plead guilty to threatening to kidnap his former lover’s 14 year-old daughter. Diana J. Schemo, Sol Wachtler Is
her own body as does an unmarried woman," the court held that New York's marital exemption violated the equal protection clauses of both the federal and state constitutions. 

_Eisenstadt v. Baird,_ a case not directly involving sexual assault laws, offers additional support for the position that laws distinguishing between marital and nonmarital rape are unconstitutional. In _Eisenstadt_, the United States Supreme Court held that state statutes criminalizing the distribution of contraceptives to single, but not married, individuals violated the Equal Protection Clause. The Court determined that there was no "difference that rationally explain[ed] the different treatment accorded married and unmarried persons."

The Court's decision in _Planned Parenthood v. Casey_ is also indicative of the Court's changing attitude toward the institution of marriage. While significantly expanding the ability of states to regulate abortion, the Court nevertheless struck down the spousal notification provision in Pennsylvania's statute as an "undue burden" on a woman's right to terminate her pregnancy. To justify its holding, the Court relied on extensive sociological evidence documenting the widespread physical and sexual abuse of wives by their husbands. Describing the notification requirement as "repuant to our present understanding of marriage," the Court acknowledged its "rejection of the common-law understanding of a woman's role within the family."

The Court also observed that "[w]omen do not lose their constitutionally protected liberty when they marry." Overall, the _Casey_ Court's relatively progressive attitude toward the marital relationship supports the position that laws exempting spousal rape from prosecution cannot withstand even a rational basis test, and thus violate constitutional norms.


93. _Liberta_, 474 N.E.2d at 573.
94. _Id._ at 575. The provisions are located in § 1 of the Fourteenth Amendment of the U.S. Constitution and in Article 1, § 11 of the New York Constitution.
95. 405 U.S. 438 (1972).
96. _Id._ at 454-55.
97. _Id._ at 447. In requiring that married and unmarried persons have equal rights to contraceptives, the Court noted: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." _Id._ at 453.
99. _Id._ at 2826-31. The spousal notification requirement was the only one of five restrictions imposed by the State that the Court found constitutionally impermissible. _Id._
100. _Id._ at 2826-29.
101. _Id._ at 2831.
102. _Id._
In an apparent effort to be nondiscriminatory, marital rape laws and exemptions are now commonly framed in gender-neutral terms, forbidding nonconsensual sex with any person not one's spouse. More traditional statutes maintain the common law's gender specificity, prohibiting nonconsensual sex with any female not one's wife. Since both types of exemption involve a distinction based on marital status, the rational basis requirement discussed above is applicable to each, and exemptions of both types consequently fail to withstand constitutional scrutiny.

In the case of the gender-specific exemptions, however, an even stronger equal protection argument can be made. The Supreme Court has held that legislation treating women and men differently is subject to a heightened level of scrutiny far stricter than the rational basis test usually applied to gender-neutral statutes. The Court has mandated that such laws must "serve important governmental objectives and must be substantially related to achievement of those objectives." As discussed above, courts have held repeatedly that the governmental interest in exempting marital rape cannot withstand even a rational basis test. When a heightened level of scrutiny is triggered by a gender-specific classification, the exemption's failure to meet the Fourteenth Amendment's equal protection guarantees is even more apparent. Because gender-specific laws differentiating between marital and nonmarital rape appear to serve no important governmental objectives, and because there is no basis for such a distinction, a state with a gender-specific exemption for marital rape unconstitutionally denies its citizens the right to "equal protection of the laws."

103. See, e.g., CAL. PENAL CODE § 261(a) (1988). In general, this Comment discusses the marital rape exemption and allowance in gender-specific terms because, despite the pretense inherent in the statutory modifications, the impact of spousal rape falls almost entirely on women.

104. E.g., MODEL PENAL CODE § 213.1 (1985). Although most contemporary exemptions use the term "spouse," the offenses to which marriage is a defense may still be defined in gender-specific terms. For example, § 18-6107 of the Idaho Code provides, subject to certain exceptions, that "[n]o person shall be convicted of rape for any act or acts with that person's spouse." IDAHO CODE § 18-6107 (Supp. 1993) (emphasis added). Section 18-6101, however, defines rape as "an act of sexual intercourse accomplished with a female." Id. § 18-6101 (emphasis added). Thus, even a facially neutral exemption may in fact apply only to husbands.

105. See Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 75-76 (1971). The level of scrutiny applied to such laws is lower than that applied to laws differentiating on the basis of race, however. Compare Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions are inherently suspect . . . .") with Craig, 429 U.S. at 197 ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

106. Craig, 429 U.S. at 197.

107. See cases cited supra note 85; see also supra notes 90-94 and accompanying text.

108. As one critic noted:
What possibly could be less rational than a statute that criminalizes sexual assault, and punishes it severely, unless the victim and assailant are married? What could be more obvious than the plain fact, repeatedly documented, that these state laws are derived
IV. FROM EXEMPTION TO ALLOWANCE: "REFORM" IN THE LAW OF MARITAL RAPE

The marital rape exemption went largely unchallenged from the time of Matthew Hale until the late 1970s.109 At that point, substantial opposition to the exemption surfaced, largely in conjunction with, and in response to, the efforts of feminists to reform rape laws generally.110 These efforts led to significant developments in the law of marital rape during the 1980s. In several noteworthy cases, courts completely abrogated the exemption.111 The most prominent of these was People v. Liberta,112 in which the New York Court of Appeals held that laws distinguishing between marital and nonmarital rape violated the Equal Protection Clause.113 Although a few courts adhered to legal tradition by upholding sexual assault laws containing spousal exemptions,114 most appellate courts addressing the issue were willing to abrogate, by judicial fiat, laws differentiating between marital and nonmarital rape.115 In contrast, state legislatures adopted a more favorable stance toward laws distinguishing wife rape from other sexual assaults. Though most legislatures did away with the exemption in its traditional form, many adopted some form of limited exemption or allowance instead.

The most common method by which states altered the traditional exemption was to declare that husbands and wives living apart were not considered "married" for purposes of their rape statutes.116 Several states initially required a judicial decree or some type of official separation order,117 but most states using this approach now require only that the hus-

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West, supra note 6, at 45-46.

109. See Augustine, supra note 8, at 564 (citing People v. De Stefano, 467 N.Y.S.2d 506, 511 (N.Y. Civ. Ct. 1983)).

110. See Estrich, supra note 4, at 80.

111. See cases cited supra note 9.


113. Id. at 573; see supra notes 91-94 and accompanying text for a discussion of the Liberta court's analysis.

114. See cases cited supra note 10.

115. See cases cited supra note 9.

116. Virtually every state maintaining a statutory immunity now makes some distinction between cohabiting and separated spouses. Pennsylvania's law is one example: "[T]he exclusion shall be inoperative as respects spouses living in separate residences, or in the same residence but under terms of a written separation agreement or an order of a court of record." 18 PA. CONS. STAT. ANN. § 3103 (Supp. 1993).

band and wife live in separate residences before the exemption is inapplicable. Other states, even those criminalizing wife rape under particular circumstances, continue to use the traditional dividing line of a legal marriage in determining whether or not a particular sexual assault will be subject to prosecution. Such statutes mean that even women who have initiated legal proceedings to terminate their marriages are legally unprotected against sexual assaults by their soon-to-be ex-husbands.

Another common approach taken by legislatures modifying the traditional exemption has been to create a distinct crime of spousal rape. Under these statutes, the punishment for assaulting one’s wife is often less than that for an equivalent assault against another woman. For example, Arizona treats spousal sexual assault as a class six felony, while other sexual assaults are class two. The presumptive sentence for the latter is one year, while the former invokes a five year sentence. Furthermore, in cases of a first offense for spousal sexual assault, “the judge has discretion to enter judgment for conviction of a class [one] misdemeanor with mandatory counseling.”

Another typical practice is to alter the traditional exemption by criminalizing wife rape, but only when a spousal rapist uses a degree of force greater than that required for nonmarital sexual assaults to be classified as rape. In some states, this stricter standard has been incorporated

118. E.g., VA. CODE ANN. § 18.2-61(B) (Michie 1988). This statute also provides for the rape prosecution of a cohabitant spouse who “caused serious physical injury to the spouse by the use of force or violence.” Id.


120. E.g., id. § 262.

121. For example, under § 264(a) of the California Penal Code, the minimum punishment for “rape” is three years; “rape of spouse” carries no minimum punishment. Id. § 264(a).

122. The Arizona statute states:

(A) A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another.

(B) A first offense sexual assault of a spouse is a class 6 felony.


125. ARIZ. REV. STAT. ANN. § 13-1406.01(B) (1989) (amended 1993). Any subsequent sexual assault of a spouse is considered a class two felony, id., so essentially every husband is allowed to rape his wife at least once without it being punished as such.

126. See infra notes 127-28.
into the terms of a newly established spousal rape offense.\textsuperscript{127} Other states have accomplished an equivalent result by abolishing the exemption for the most serious rapes and maintaining a spousal exemption for lesser degrees of sexual assault.\textsuperscript{128} In a number of states, the heightened scrutiny applied to charges of wife rape manifests itself in a requirement that a wife report any sexual assault by her husband within a certain number of days after the offense.\textsuperscript{129}

The specific charges from which states protect husbands are often those based on the victim’s incapacity to consent.\textsuperscript{130} For example, Alaska punishes sexual assaults against a person “who[m] the offender knows is (A) mentally incapable; (B) incapacitated; or (C) unaware that a sexual act is being committed.”\textsuperscript{131} In 1988, the State, which then recognized no spousal exemption, established marriage as a defense in these situations.\textsuperscript{132} Similarly, Rhode Island’s sole marital exemption applies in those cases of first degree sexual assault where the victim is “mentally incapacitated, mentally disabled, or physically helpless.”\textsuperscript{133} The logic of this approach is difficult to follow, since it denies state protection to those women least capable of defending themselves.

\textsuperscript{127} For example, under Arizona law, spousal sexual assault is committed upon intercourse without consent “by the immediate or threatened use of force.” \textit{Ariz. Rev. Stat. Ann.} § 13-1406.01(A) (1989). The general sexual assault provision requires only that the intercourse be nonconsensual. \textit{Id.} § 13-1406(A).


\textsuperscript{129} \textit{E.g., Cal. Penal Code} § 262(b) (West Supp. 1993) (requiring that spousal rape be reported to law enforcement within 90 days in order for the offending spouse to be prosecuted); \textit{18 Pa. Cons. Stat. Ann.} § 3128(c) (Supp. 1993) (same); \textit{S.C. Code Ann.} § 16-3-615(B) (Law. Co-op. Supp. 1992) (30-day limitation); \textit{Va. Code Ann.} §§ 18.2-61(B), 18.2-67.2:1(B) (Michie 1988) (10-day limitation). The unusual reporting requirement for charges of spousal rape is presumably an effort to prevent wives from falsely accusing their husbands. \textit{See supra} notes 36-40 and accompanying text.

\textsuperscript{130} \textit{E.g., Ark. Code Ann.} § 5-14-105(a) (Michie 1987) (“A person commits carnal abuse in the second degree if he engages in sexual intercourse or deviate sexual activity with another person not his spouse who is incapable of consent because [that person] is mentally defective or mentally incapacitated.”).

\textsuperscript{131} \textit{Alaska Stat.} § 11.41.420(3) (Supp. 1992). If a “mentally incapable” victim has been entrusted to her assailant’s care by law, rape is considered first degree sexual assault. \textit{See id.} § 11.41.410(3). Otherwise, intercourse with an incapacitated or mentally incapable person is treated as second degree sexual assault. \textit{See id.} § 11.41.420.

\textsuperscript{132} \textit{Id.} § 11.41.432(a)(2) (1989).

\textsuperscript{133} \textit{R.I. Gen. Laws} § 11-37-2(A) (Supp. 1992). Strangely, second degree sexual assault, which is defined using identical terms except that it involves sexual contact instead of penetration, contains no spousal exemption. \textit{Id.} § 11-37-4(A).
Statutory rape is another offense from which allowance states frequently exempt spouses. Assuming that the purpose of nonforcible rape statutes is to protect children, this exclusion makes sense if one accepts the premise that individuals who marry are capable of making adult decisions about sexual relationships and do not require any special protection. However, one must question the wisdom of a statutory scheme permitting individuals to marry at an age when they are not considered competent to consent to sexual intercourse.

One of the most disturbing legal developments concerning marital rape has been the extension of the traditional exemption to some unmarried individuals. Several states have exempted cohabitants from prosecution for sexual assault, usually to the same extent that legal spouses enjoy immunity. Surprisingly, the Pennsylvania statute affords cohabitants even less protection than that given married individuals. Although neither spouses nor cohabitants can be prosecuted under the state’s rape statute, spouses are protected under the state’s spousal sexual assault provision, which apparently does not apply to cohabitants.


137. “Except as provided in section 3128 (relating to spousal sexual assault), whenever in this chapter the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship . . . .” 18 Pa. Cons. Stat. Ann. § 3103 (Supp. 1993).

138. The general rape provision in Pennsylvania establishes:

A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: (1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious; or (4) who is so mentally deranged or deficient that such person is incapable of consent.

Id. § 3121. Since § 3103, see supra note 137, provides that cohabitants are treated as married whenever “the definition of an offense excludes conduct with a spouse,” they cannot be prosecuted under § 3121.

139. Compare id. § 3103 (equating cohabitants and spouses “[e]xcept as provided in section 3128”) with id. § 3128 (criminalizing spousal sexual assault).

Section 3128(a) provides:

A person commits a felony of the second degree when that person engages in sexual intercourse with that person’s spouse: (1) by forcible compulsion; (2) by threat of forci-
In Delaware, exemption from prosecution for some forms of sexual assault does not even require cohabitation. The State makes no distinctions based on marital status in its sexual assault laws, imposing instead a limited exemption for "voluntary social companions" of the victim. Intercourse "without the victim's consent" is punished as unlawful sexual intercourse in the second degree, unless the victim was a voluntary social companion of her assailant at the time, in which case it can be prosecuted only as a third degree offense. Similarly, if a rape victim engaged in voluntary sexual intercourse with her assailant at some point during the twelve month period preceding the assault, the defendant cannot be prosecuted under the first degree statute unless she suffers "serious injury." Delaware, then, treats a rape by someone with whom the victim may have had a limited relationship as significantly less serious than the rape of a stranger—thereby carrying the notion of "implied consent" to a ridiculous extreme.

V. Why the Allowance?

Hostility toward abolishing the marital exemption by statute may in part be due to the personal biases of many of the legislators, mostly men, who have confronted the issue. The question of false rape claims is apparently more important to many of them than the protection of married women from sexual assault. Sexist remarks by certain legislators during the
debates over marital rape laws support this explanation.\textsuperscript{146} However, since the judiciary—also male-dominated and presumably subject to the same personal prejudices—has been more likely to abolish the exemption completely, this explanation of the reluctance by legislatures to eliminate marital distinctions from sexual assault laws is not adequate. There may be other, more fundamental reasons for the present course of development in marital rape legislation.

First, judges may approach their duty to interpret the law according to constitutional principles more seriously than legislators regard their obligation to make laws consistent with the Constitution.\textsuperscript{147} This explanation is credible in light of the fairly common perception that constitutional interpretation is exclusively the domain of the judiciary, particularly the United States Supreme Court.\textsuperscript{148} Of course, the Court is well established as the ultimate interpreter of the Constitution.\textsuperscript{149} Legislators should not ignore Section 5 of the Fourteenth Amendment, however, which establishes that "Congress shall have power to enforce, by appropriate legislation, the pro-

\begin{itemize}
\item accusation disturbs them far more than all the pain endured by countless numbers of women who, for whatever reason, cannot seek justice.
\end{itemize}

\textit{Russell, supra} note 5, at xxi.

\textsuperscript{146} For example, "Damn it, when you get married you kind of expect you're going to get a little sex." \textit{When a Wife Says No . . .,} Ms., Apr. 1982, at 23 (quoting Senator Jeremiah Denton of Alabama). A few female legislators have made similar statements. Colorado legislator Anne Toledo opined: "I think if a woman is having problems, she might abuse it. All of a sudden she gets tired of him and she yells 'Rape.'" \textit{Russell, supra} note 5, at xx.

\textsuperscript{147} \textit{See} Paul Brest, \textit{The Conscientious Legislator's Guide to Constitutional Interpretation}, 27 \textit{Stan. L. Rev.} 585, 587 (1968) (arguing that legislators are obligated to assess the constitutionality of legislation); \textit{James B. Thayer, John Marshall} 104 (De Capo Press 1974) (1901) (noting the inclination of legislatures to "shed the consideration of constitutional restraints, . . . turning that subject over to the courts").

Robin West argues for a "pluralistic approach" to enforcement of constitutional rights, with each branch of government obligated to pursue the Federal Constitution's fundamental principles within its appropriate sphere of influence. \textit{West, supra} note 6, at 75-76. Specifically regarding the marital rape exemption, she argues:

\begin{itemize}
\item Whether or not the United States Supreme Court or state supreme courts ever rule on the unconstitutionality of marital rape exemptions, Congress has the power, the authority, and arguably the duty, to do so, under section five of the fourteenth amendment. Congress could enact a federal law guaranteeing protection to all women against violent sexual assault. Consistent with rationality requirements, this law would prohibit irrational discrimination against married women in the making and enforcement of rape laws.
\end{itemize}

\textit{Id.} at 76 (footnote omitted). The same mandate also could be applied to state legislatures under the state constitutional provisions embracing equal protection principles.

\textsuperscript{148} Consider the prototypical secondary school civics lesson that the legislature makes the law, the judiciary interprets the law, and the executive enforces the law. Though adequate as a generalization, this axiom cannot mean that legislators should ignore constitutional guidelines when deciding on legislation.

\textsuperscript{149} \textit{See} Cooper v. Aaron, 358 U.S. 1, 18-20 (1958).
visions of this article." Since laws protecting wife rape violate the amendment’s promise of equal protection, this enforcement provision alone should be sufficient to prompt legislative action.

Political considerations may be another reason that legislatures have been more likely than courts to establish a marital rape allowance. After the real and perceived successes of the women’s rights movement in the 1970s, the 1980s were a time of reaction against women in general and feminism in particular. Less constrained by the necessity of adhering to a coherent set of legal principles than the judiciary, legislatures appear to have passed rape laws based on compromises between widely divergent political views. Reformers worked to abolish all laws distinguishing marital from nonmarital rape, while their opponents hoped to maintain the traditional unqualified exemption. Given these conflicting views, it is not surprising that the legislative process often resulted in statutes that punish wife rape, but with less severity than other rapes.

VI. THE MARITAL RAPE EXEMPTION IN NORTH CAROLINA

The history of the marital rape exemption in North Carolina provides an illustrative case study. The state first recognized an exemption for wife rape as part of the common law. In State v. Dowell, the North Carolina Supreme Court observed that “[a husband] may enforce sexual connection [with his wife], and, in the exercise of this marital right, it is held that he

150. U.S. CONST. amend. XIV, § 5. Section 2 of the Thirteenth Amendment contains virtually identical language authorizing legislative enforcement of its prohibitions against slavery and involuntary servitude.

151. See supra text accompanying notes 85-108.

152. See generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991) (exploring the political and cultural reaction against women and feminism in the 1980s).

153. One example of such a statute, South Carolina’s 1991 spousal battery law, punishes aggravated sexual battery against one’s spouse entirely “at the discretion of the court.” S.C. CODE ANN. § 16-3-615(A) (Law. Co-Op. Supp. 1992). The equivalent offense of first degree criminal sexual conduct, defined in virtually identical language but applying only to rapists not married to their victims, is a “felony punishable by imprisonment for not more than thirty years.” Id. § 16-3-652(2) (Law. Co-Op. 1985). Newspapers reporting on the adoption of this statutory scheme noted that it was the result of a legislative “compromise.” Enthusiasm Low in House for Spousal Rape Bill, CHARLOTTE OBSERVER, Apr. 15, 1988, at 2C.

Legislation is the result of collective action rather than individual decisionmaking. Such a process can give rise to apparently irrational outcomes, which may not be congruent with the preferences of any individual within the legislative body. The marital rape allowance, then, may be an example of Condorcet’s Paradox, wherein the rational consistency of the positions held by individual legislators does not prevent irrational inconsistency in the outcome of their deliberations. See Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 901-02 & n.171 (1987).

154. 106 N.C. 722, 11 S.E. 525 (1890).
cannot be guilty of the offense of rape." Because Dowell involved the prosecution of a husband for aiding and abetting the rape of his wife by another man, however, the language stating that a husband could force himself on his wife was dicta. Concerning the behavior at issue, the court concluded that the privilege to enforce "connection" with one's wife "[was] a personal one only" and upheld Dowell's conviction.

The assertion in Dowell that a man could not rape his wife except by aiding and abetting another was repeated by North Carolina courts on several other occasions. In State v. Martin, the court of appeals upheld the conviction of the victim's husband for assault with intent to commit rape. The court concluded: "[A] husband is legally incapable of raping his wife, but may be convicted of the rape of his wife. A husband who counsels, aids, or abets, assists or forces another to have sexual intercourse with his wife, is guilty of rape." Despite the dicta in Dowell, there is some precedent indicating that the Martin court need not have concluded that "a husband is legally incapable of raping his wife" under North Carolina law. At the time, state statutes did not establish a spousal defense. Courts in other states subsequently declined to recognize the common law exemption under statutes similar to the one in effect at the time of the Martin decision. In addition, the North Carolina Supreme Court, in the 1920 case of Crowell v. Crowell, had held that a wife could maintain an action against her husband for assault. The Crowell court based its holding on North Carolina's Married Women's

155. Id. at 723, 11 S.E. at 525.
156. Id. The court was especially sensitive to the rape victim in this case because of what it described as the "abhorrently simple" facts: the man forced at gunpoint to attempt intercourse with her was African-American. Id. at 722-23, 11 S.E. at 525. Although he escaped before the rape was completed, the court was "not prepared to say that, under the circumstances, [he] would have been excusable had he completed the offense." Id. at 725, 11 S.E. at 526.
158. 17 N.C. App. at 317, 194 S.E.2d at 60 (1973).
159. Id. at 319, 194 S.E. 2d at 61. The court quoted a statement by Hale initially cited in the Dowell case: "For, though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another." Id. (quoting State v. Dowell, 106 N.C. 722, 723, 11 S.E. 525, 525 (1890) (quoting Hale, supra note 23, at 629)).
162. 180 N.C. 516, 105 S.E. 206 (1920).
Property Act, passed in 1913.\textsuperscript{163} The court concluded this statute "gave the wife a right to recover damages for injuries to her person, or for other torts sustained by her, \textit{against her husband as fully as against any one else.}\"\textsuperscript{164} The following language from the \textit{Crowell} opinion, which made no reference to the \textit{Dowell} case, also supports the contention that North Carolina no longer afforded husbands legal immunity for wife rape:\textsuperscript{165}

So much of the common law as exempted the husband from liability civilly or criminally for assaults, slanders, or other torts or injuries committed by him on his wife is invalid now, both because it has become obsolete and at variance with the customs and sense of right, and with our form of government, which confers "equality before the law" upon all, and because it has been expressly abrogated and repealed by the statutes above quoted . . . .\textsuperscript{166}

The state legislature answered unambiguously any questions about whether North Carolina recognized an exemption for wife rape in 1979, when it adopted section 14-27.8 of the North Carolina General Statutes as part of a broad revision of the state's sexual assault laws.\textsuperscript{167} Limiting the common law immunity slightly, this statute permitted the prosecution of a husband for raping his wife only if the parties "were living separate and

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\textsuperscript{163} The statute provided:

That the earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried.


\textsuperscript{164} \textit{Crowell}, 180 N.C. at 521, 105 S.E. at 209 (emphasis added).

\textsuperscript{165} For other cases with language arguably supporting this position, see State v. Way, 297 N.C. 293, 296, 254 S.E.2d 760, 761 (1979) ("If the particular act of intercourse was without her consent, the offense is rape without regard to the consent given for prior acts to third persons or the defendant.") and State v. Long, 93 N.C. 542, 544 (1885) ("[A]lthough the person . . . was \textit{taken first with her own consent, if she was afterwards forced against her will, the offense would be committed.}""). \textit{Long} involved the rape of a "lewd woman," which "only counted to her credit, for the fact that a woman is a common strumpet or the mistress of the defendant is no bar." \textit{Id.} Way specifically dealt with whether the concept of "withdrawn consent" applied when there was only one act of intercourse between the complainant and the defendant. 297 N.C. at 296-97, 254 S.E.2d at 761-62.

\textsuperscript{166} \textit{Crowell}, 180 N.C. at 522, 105 S.E. at 210. A dissenting opinion expressed concern about the "radical and far-reaching changes" wrought by the court's decision. \textit{Id.} at 528, 105 S.E. at 213 (Walker, J., dissenting).

\textsuperscript{167} As originally adopted, the exemption stated: "A person may not be prosecuted under this Article if the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart pursuant to a written agreement or a judicial decree." Act of May 29, 1979, ch. 682, sec. 1, § 14-27.8, 1979 N.C. Sess. Laws 725, 726-27 (codified as amended at N.C. Gen. Stat. § 14-27.8 (Supp. 1992)), \textit{amended by} Act of July 5, 1993, ch. 274, 1993 N.C. Sess. Laws.
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apart pursuant to a written agreement or a judicial decree." In 1987, the statute was amended to dispense with the requirement of a formal separation, permitting the prosecution of any non-cohabitant spouse. As originally introduced, the 1987 legislation would have completely eliminated the marital defense. However, a senate committee radically altered the bill so that it abolished only the formal separation requirement. The sponsor of the amendment reincorporating the exemption, Senator William Barker, expressed the following concern: "Any time a wife gets mad at her husband, she's always going to have this hanging over his head: 'Hey, guess what you did last night? You raped me.'"

During the 1993 legislative session, exemption opponents once again introduced legislation to abolish North Carolina's spousal exemption. Wiser from their 1987 attempt at repeal and aware of allowance laws adopted in other states, proponents of the measure were, from the outset, determined to effect a complete repeal of the exemption and to avoid a compromise. Several newspapers and civic

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168. Id. As initially proposed in House Bill 800, the limitation specified a "decree of divorce from bed and board" (i.e., a partial divorce, by which the parties are separated and forbidden to live together). The legislature subsequently amended the provision to require only a "judicial decree." In State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988), the North Carolina Court of Appeals ignored this legislative history and overturned a husband's conviction for raping his wife solely because there was no final order granting divorce from bed and board. The victim had obtained an ex parte protection order and filed a petition for divorce at the time of the offense, but the court considered these actions insufficient to remove the defendant's spousal immunity under the statute as it then existed. Id. at 31, 365 S.E.2d at 212.


170. Senator Wanda Hunt introduced Senate Bill 751, which would have repealed § 14-27.8, on May 1, 1987. Hunt described her proposal as "a simple bill that will eliminate spousal claims as a defense to rape." Marital Rape Bill One Priority of NOW, CHARLOTTE OBSERVER, Mar. 17, 1987, at 2C.

171. Representative Joe Hackney characterized the change as "a halfway step toward eliminating forcible sexual intercourse in a marriage." Jim Morrill, House OKs Spending Limits, CHARLOTTE OBSERVER, Aug. 7, 1987, at 2E.

172. N.C. Equity, Marital Rape Legislation in North Carolina 15 (1991) (unpublished manuscript, on file with the author). Similarly, Senator Dennis Winner espoused the position that "this bill overkills the problem by putting . . . somebody in danger of a far longer prison term than the potential damage is to the victim." Id. Ultimately, Senate Bill 751 was approved in the Senate by a vote of 35 to 7, and in the House by a margin of 81 to 16. Id.

173. House Bill 214 and Senate Bill 251, identical provisions introduced on February 19, 1993, amended § 14-27.8 of the North Carolina General Statutes to read: "A person may be prosecuted under this Article whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense." Act of July 5, 1993, ch. 274, 1993 N.C. Sess. Laws.


175. It's Time to Get Rid of Marital Exception to Rape, GREENSBORO NEWS & RECORD, Dec. 12, 1992, at A18; The Marital Rape Outrage, CHARLOTTE OBSERVER, Nov. 22, 1992, at 2B.
organizations backed their efforts, expressing opposition to laws condoning spousal rape. In April, the House of Representatives overwhelmingly approved the measure without any amendments. The bill was opposed only by a "small coterie of lawmakers who raised the specter of vengeful wives victimizing their husbands." The proposal faced significantly more opposition in the Senate, where legislators attempted several times to amend the bill. In committee, Senator Dennis Winner proposed treating marital rape differently than other rapes, with a maximum punishment of fifteen, rather than forty, years in prison. Winner later suggested classifying marital rape as a lesser crime when it did not involve a weapon or "serious physical injury." Senators Don Kincaid and Fred Folger offered two separate amendments before the full Senate to establish a requirement that marital rape be reported within a specified time after the alleged offense. Each of these attempts to limit the bill's scope ultimately failed, and the Senate passed the legislation unamended, abolishing North Carolina's marital rape exemption by a vote of forty-four to three.


177. Neff, supra note 36, at 1A. The vote was 106 to 5. Id.

178. Id. Representative Hugh Lee opined: "If this bill is passed, it might be well that if a husband is having any difficulty with his wife and they decide to engage in sexual intercourse, he had better have some witnesses present." Id. at 11A.

Some outside the legislature also opposed the bill. For example, Wake Forest University law professor Don Castleman described the repeal as an "inappropriate and ineffective response" to the problem of domestic violence. Don R. Castleman, A Sensible Response to Domestic Violence, CHARLOTTE OBSERVER, Dec. 23, 1992, at 15A. According to Castleman, "where the attacker is the spouse of the victim, the law should attempt to salvage the relationship and preserve the marriage." Id.

See supra notes 41-43 and accompanying text.

179. See Neff, supra note 37.

For example, Senator John Kerr expressed concern that "women would use the law to exact revenge." Joe Dew, Panel Wants Law on Marital Rape, NEWS & OBSERVER (Raleigh, N.C.), Dec. 19, 1992, at 1A, 12A. "By the time you're charged and it's put in the paper, the damage is done." Telephone Interview with John Kerr, N.C. State Senator (Mar. 17, 1993).

180. Joseph Neff, Senate Vote on Marital Rape Bill Delayed, NEWS & OBSERVER (Raleigh, N.C.), June 25, 1993, at 3A.

181. Joseph Neff, Marital Rape Bill Survives Toughest Test, NEWS & OBSERVER (Raleigh, N.C.), June 30, 1993, at 3A. Apparently, Winner did not consider the rape itself to be a "serious physical injury."

182. Rhee, supra note 12, at 6A. Kincaid's amendment, which failed by a vote of 42 to 5, would have required that marital rape charges be reported within 30 days of the alleged offense. Id. Folger's amendment, defeated by a margin of 33 to 13, would have required that such charges be filed within five years. Id.

183. Senators Bob Carpenter, Don Kincaid, and Dan Simpson voted against the bill. Id. at 6A.
In its repeal of the state’s marital rape exemption, the General Assembly of North Carolina also rejected a marital rape allowance. Nevertheless, the concerns expressed during the debate and the proffered amendments, as well as the failed attempt to abolish the exemption in 1987, indicate that the legislative process might have resulted in an allowance. State legislators—and the women’s groups who lobbied them—should be commended for rejecting the type of political compromise produced in numerous other states.

VII. CONCLUSION

Despite the willingness of many states to abolish the marital rape exemption and the rejection of a marital rape allowance by some others, the issue of marital rape offers stark proof that women still have far to go to achieve full equality. In light of the significant questions about both their constitutionality and rationality, it is noteworthy that the elimination of these laws generates such controversy. Furthermore, in a majority of states, the effort to abolish the marital rape exemption has been only partially successful, resulting in a marital rape allowance instead. Unfortunately, the marital rape allowance is, in most respects, every bit as problematic as the exemption it replaced.

Both the marital rape allowance and the marital rape exemption are inherently sexist, in that they elevate men’s interests in their reputations over the right of women to be free from a particularly heinous form of assault. Primarily, these laws reflect the male fear that a vindictive wife or lover may falsely accuse them of rape. Even if this concern is taken seriously—and such accusations are rare—putting these anxieties above the right of women to be protected from sexual assault by their husbands is unjustified, as the trial process offers a clear opportunity to expose such claims. Indeed, the legal protection afforded the accused is extensive, since the state must prove its case beyond a reasonable doubt. In addition, while

184. See supra notes 37, 42, 145, 178-79.
185. See supra notes 180-83 and accompanying text.
186. See supra notes 169-72 and accompanying text.
187. Representative Bertha Holt, sponsor of the legislation, credited its unqualified success “to lobbying by women’s groups, unity among all 31 female legislators, and the influx of younger male lawmakers.” Rhee, supra note 12, at 6A.
188. See supra notes 116-44 and accompanying text.
189. North Carolina Representative Bertha Holt observed: “All they’re thinking about is the potential for men to become victims. They’re not thinking about the victims who are out there now.” Dennis Patterson, Attitudes Inching Ahead on Marital Rape, Some Say, NEWS & OBSERVER (Raleigh, N.C.), June 29, 1993, at 3A.
190. See supra note 39.
the instance of wife abuse, including rape, is known to be high,\textsuperscript{191} there is no corresponding evidence indicating that false claims of rape are a comparable social problem.\textsuperscript{192} Legislation that, contrary to the evidence, places the interests of men above those of women in this way ignores the promise of the Fourteenth Amendment.

Although one might hope that recent developments in the law of marital rape across the country represent an improvement, this is not necessarily the case. The common replacement of the marital rape exemption with a marital rape allowance is, in some respects, a step backwards. While the marital rape exemption, although dated and sexist, was at least internally consistent, the marital rape allowance is simply the irrational outcome of political divisions within our legislative institutions. This irrationality is most evident in laws that apply the kind of outmoded thinking exemplified by the marital rape exemption to nonmarital relationships.\textsuperscript{193} Rather than recognize recent changes in the way men and women relate to one another, these new allowance laws seek to place novel relationships into a purportedly discarded framework—perpetuating a system fraught with dangerous consequences for women.

\textbf{Jaye Sitton}

\textsuperscript{191} See supra note 47.
\textsuperscript{192} See supra note 39.
\textsuperscript{193} Catharine MacKinnon has written:

As marital exemptions erode, preclusions for cohabitants and voluntary social companions may expand. . . . \textit{[T]he partial erosion of the marital rape exemption looks less like a change in the equation of women's experience of sexual violation and men's experience of intimacy, and more like a legal adjustment to the social fact that acceptable heterosexual sex is increasingly not limited to the legal family.}

\textbf{MacKinnon, supra} note 32, at 176.