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Patricia J. Falk
Cleveland State University, p.falk@csuohio.edu

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HUSBANDS WHO DRUG AND RAPE THEIR WIVES: THE INJUSTICE OF THE MARITAL EXEMPTION IN OHIO'S SEXUAL OFFENSES

*Patricia J. Falk**

When you have been intimately violated by a person who is supposed to love and protect you, it can destroy your capacity for intimacy with anyone else. . . . When you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist.¹

[D]rugging a wife to have sex with her is not an uncommon weapon in a batterer's arsenal.²

I. INTRODUCTION

In May, 2011, Mandy Boardman walked into an Indianapolis, Indiana police station and accused her then-husband, David Wise, of repeatedly drugging and sexually assaulting her, and filming these events on his cellphone over a span of three years.³ In April, 2014, the jury convicted Wise of rape and criminal deviate conduct after a two-day trial.⁴ He was able to be prosecuted because Indiana had repealed its "marital rape

*© Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. J.D., 1983, University of Nebraska-Lincoln; Ph.D., 1988, University of Nebraska-Lincoln. Thanks to Susan J. Becker, April L. Cherry, Jack Guttenberg, James G. Wilson, and Jonathan Witmer-Rich for their thoughtful comments on earlier drafts of this article, to law librarians Amy Burchfield, Neeri Rao, and Brian Cassidy for their excellent research assistance, and to the Cleveland-Marshall Fund for its financial support.

¹ Testimony and Statement in support of H.B. 516 to remove spousal exemption to sexual assault offenses by Dr. David Finkelhor to the Judiciary Committees, New Hampshire State Legislature (Mar. 25, 1981) reprinted in Monica Rickenberg & Joanne Schulman, *Florida, New York, and Virginia Courts Declare Marital Rape a Crime*, 18 CLEARINGHOUSE REV. 745, 745 (1981).

² Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465, 1506 (2003) [hereinafter *Marital Immunity*]; see also Erin Rhoda, *How Living with a Rapist Could Also Mean Living with a Killer*, BANGOR DAILY NEWS (Apr. 25, 2014), <http://arguably.bangordailynews.com/2014/04/25/people/how-living-with-a-rapist-could-also-mean-living-with-a-killer>.

³ Matt Pearce, *No Prison Time for Indiana Man Convicted of Drugging, Raping Wife*, L.A. TIMES (May 19, 2014, 6:27 AM), <http://www.latimes.com/nation/nationnow/la-na-nn-indianapolis-rape-sentence-20140519-story.html> ("She was snippy and it made her nicer when he drugged her," was how the prosecutor described it.).

⁴ *Id.*

exemption” in 1998.⁵ The case garnered national media attention when Superior Court Judge Kurt Eisgruber sentenced Wise to “eight years of GPS-monitored home confinement, with the ability to leave for work and no required therapy,” suspended an additional twelve-year sentence, predicated on Wise’s completion of the eight-year sentence plus two years of probation, and told the victim that she needed to forgive her husband.⁶ Three months later, Wise violated the conditions of his home detention and Judge Eisgruber sent him to jail.⁷

A decade earlier, an Australian man, Maximilian Hoibl, pleaded guilty to “three counts each of rape, administering a stupefying drug to commit an indictable offence, and committing an act likely to cause harm.” He repeatedly drugged and raped his wife (of thirty years) while she was unconscious; his criminal behavior lasted for a period of six years. The defendant also videotaped his conduct with a camera he had hidden in the couple’s bedroom.⁸ Gail Hoibl learned of her husband’s actions when she made a “chance discovery” of some of the videos memorializing the assaults.⁹ In media interviews, Mrs. Hoibl spoke of her sense of betrayal and revealed her fear of having cancer when she experienced a host of mysterious gynecological problems necessitating multiple surgeries.¹⁰ Later, those injuries could be explained by her husband’s conduct. The

⁵ Kristine Guerra, *Man Drugged Wife, Made Videos of Raping Her, Suit Says*, INDYSTAR (Mar. 28, 2014, 5:28 PM), <http://www.indystar.com/story/news/crime/2014/03/28/suit-accuses-ex-husband-drugs-rapes-sex-videos/7026395/>. According to one new report about this case:

The woman declined to comment to The Star about why she didn’t come forward sooner. In court documents, however, she said she didn’t immediately tell police because she didn’t want the now-teenage children she had with Wise to grow up without a father. She also said she wasn’t sure if Wise had committed a crime because they were married. [new paragraph] If the incidents happened about 15 years ago, Wise would not have been charged.

In 1998, Indiana repealed the state’s marital rape exemption, which had given legal immunity to a man accused of raping his wife. The change made sex without consent between spouses like any other sex crime under state law. *Id.*

⁶ Matt Pearce, *Indiana Judge Assailed for Giving No Prison Time to Man Who Drugged, Raped Wife*, L.A. TIMES (May 21, 2014, 9:26 AM), <http://www.latimes.com/nation/nationnow/la-na-nn-indiana-rape-judge-20140520-story.html>.

⁷ Kristine Guerra, *Rape Victim Pleased Ex is Sent to Prison*, INDYSTAR (Jul. 24, 2014, 10:55 AM), <http://www.indystar.com/story/news/crime/2014/07/24/man-sent-home-detention-rape-case-now-sentenced-prison/13090937/>.

⁸ *Man Rapes Drugged Wife*, COURIER MAIL, Aug. 2, 2001, at 5, available at 2001 WLNR 5640141; Sam Weir, *For Six Years, A Husband Drugged His Wife, Raped Her and Videotaped His Actions; Yesterday, He told Her: “I’m so Sorry, I will Always Love You,”* ADVERTISER (Australia), Aug. 2, 2001, at 6, available at 2001 WLNR 5383507; Sam Weir, *Jail for Drugging, Raping Wife*, ADVERTISER (Australia), Aug. 18, 2001, at 16, available at 2001 WLNR 5511738.

⁹ *Id.*

¹⁰ *Man Rapes Drugged Wife*, COURIER MAIL, Aug. 2, 2001, at 5, available at 2001 WLNR 5640141.

judge sentenced Hoibl to 8 ½ years in jail; 3 ½ of which had to be served before he would be eligible for parole.¹¹

In early January, 2014, Utah police officer Joshua Boren shot and killed his wife, two children, and mother-in-law before turning the gun on himself.¹² In July, 2014, the police completed a seven-month investigation into the shootings that revealed Boren had drugged and raped his British wife, Kelly, on numerous occasions and also videotaped the sexual assaults.¹³ Kelly discovered the crime when she found the tapes.¹⁴ On the night before the killings, Boren and his wife exchanged text messages.¹⁵ “In one angry text to him she wrote: ‘You [expletive] drugged and raped me’ followed by four more texts with just the word ‘raped.’”¹⁶ The next day, the entire family was dead.¹⁷ These three examples are illustrative of a multitude of cases from the United States,¹⁸ Canada,¹⁹ and around the world²⁰ encompassing the same sort of behavior among marital partners.²¹

¹¹ *Id.*

¹² Christopher Bucktin, *Utah Cop Drugged, Raped, and Filmed British Wife Then Killed Her, 2 Children, and Mother-in-Law When Confronted*, MIRROR (Jul. 9 2014, 11:30 AM), <http://www.mirror.co.uk/news/uk-news/Utah-cop-drugged-raped-filmed-3831026>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ According to one source, “Every day, three women in the U.S. are murdered by their current or former husbands or boyfriends, and a leading indicator of their deaths is sexual assault. David Adams, in his book ‘Why Do They Kill?’ found that three-quarters of women he interviewed who survived nearly fatal attacks said their abusive partner had raped them.” Rhoda, *supra* note 2.

¹⁸ See, e.g., Sharp v. Sharp, 2014 WL 929325 (Conn. Super. Ct. 2014) (husband repeatedly drugged wife and kept journal of assaults); Kelly v. State, 2014 Tex. App. LEXIS 8596, 2014 WL 3853872 (Tex. App. El Paso Aug. 6, 2014) (husband had nonconsensual sexual contact with sleeping wife); Dozier v. Palmer, 2011 U.S. Dist. Ct. LEXIS 85786 (husband kidnapped, drugged and sexually assaulted former wife); Malmquist v. Malmquist, 2011 WL 1087206 (Ct. App. Tenn. 2011) (wife accused husband of drugging and raping her); Machado v. Ryan, 2011 WL 4625748 (D. Ariz. 2011) (man drugged and sexually assaulted wife, while they were separated); United States v. Foster, 623 F.3d 605, 2010 U.S. App. LEXIS 21607 (8th Cir. 2010) (“For instance, Mr. Foster’s wife, Stephanie Foster, testified that he once picked her up and threw her out of the house and that he videotaped sexually abusive encounters with her; she also said that he kicked her and choked her and sometimes had sex with her when she was asleep.”); Knost v. Warsholl, 2010 WL 760668 (E.D. Cal. 2010) (former fiancée drugged and raped woman); Skolnik v. State, 2010 WL 2783872 (admissibility at punishment phase of video depicting sexual acts on wife who was unconscious due to intoxication; Skolnik testified wife was too incapacitated to consent and admitted he had done wrong); Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007) (woman raped by estranged husband while unconscious; found tape later); People v. Majors, 2002 WL 31781126 (videotape showing appellant having sexual intercourse, orally copulating, and inserting various objects in unconscious ex-wife); People v. Majors, 2004 WL 2729758 (same); Ex parte Weddington, 843 So. 2d 750, 2002 Ala. LEXIS 156 (Ala. 2002) (husband videotaped himself sexually abusing unconscious wife); Trigg v. State, 759 So.2d 448 (Miss. Ct. App. 2000) (husband drugged wife then videotaped himself orally and digitally penetrating her vagina while she was unconscious; defendant explained his conduct as effort to restore marital harmony); Blevins v. State, 18 S.W.3d 266 (Tex. App. 2000) (man drugged and raped wife; protective order against him); *Spousal Rape is Hard to Prove, Officials Say*, COURIER-JOURNAL (Jan. 26, 2012), at A1, [available at http://www.courier-journal.com/article/20120125/NEWS01/301250140/Spousal-rape-hard-prove-officials-say?odyssey=tab|topnews|text|Home](http://www.courier-journal.com/article/20120125/NEWS01/301250140/Spousal-rape-hard-prove-officials-say?odyssey=tab|topnews|text|Home) (husband drugged wife to have sex with her and take

pictures); Joshua Melvin, *Jurors Award \$405,000 to Ex-Wife of Silicon Valley Exec*, SAN JOSE MERCURY NEWS (July 22, 2011), http://www.insidebayarea.com/ci_18533646 (husband drugged wife and had nonconsensual sex with her, claiming he was trying to save the marriage); *Wife: Husband Drugged Her Before Sex*, LAWRENCE JOURNAL-WORLD (Jun. 15, 2007), http://www2.ljworld.com/news/2007/jun/15/wife_husband_drugged_her_sex/ (“The wife of former Ottawa city manager Weldon Padgett testified that he repeatedly laced her drinks with drugs and had sex with her while she was unconscious.” “When she confronted her husband with her suspicions, he said he was concerned with her mental health.”); Laurie Roberts, *1 Lawmaker Stands in Way of Justice for Married Women*, ARIZONA REPUBLIC, May 22, 2004, at B12, available at 2004 WLNR 22984085 (wife was drugged, raped, and videotaped; article discusses fight to change rape law in Arizona); Kathleen Ostrander, *Husband Gets 20 Years in Prison for Having Sex with Drugged Wife*, WISCONSIN STATE J., Aug. 10, 1996, at 3B, available at 1996 WLNR 4495848 (husband pleaded guilty to having sexual intercourse with an unconscious person and administering drugs to facilitate a crime). See also *State v. Beliveau*, No. 01AP-211, 2001 WL 1286495, at *1 (Ohio Ct. App. 2001) (defendant threw girlfriend down and raped her while she was unconscious).

¹⁹ Jake Rupert, *Man Drugged, Raped Wife, Co-Worker: Sentenced, Declared Long-Term Sex Offender*, OTTAWA CITIZEN (Canada), Sept. 5, 2002, at B7, available at 2002 WLNR 8213098 (man drugged and raped wife and co-worker); Kerry Powell, *Man Drugged, Assaulted Wife, Jury Told: Used Date-Rape Drug Bought Over Internet*, EDMONTON JOURNAL (Canada), Dec. 7, 1999, at B1, available at 1999 WLNR 4713374 (man drugged and sexually assaulted unconscious wife); Amanda Morrall, *Date Raping Hubby Jailed*, WINDSOR STAR (Canada), Feb. 5, 2000, at A6, available at 2000 WLNR 5439986; Gordon Kent, *Defendant Admits to Drugging Wife with ‘Date-Rape’ Cocktail: Confession Confirms Victim’s Story, Though it was Denied in First Trial*, EDMONTON J. (CANADA), June 7, 2001, available at 2001 WLNR 6788969 (man drugged wife, but no evidence of sexual assault).

²⁰ ²⁰ See e.g., Louisa Rebgetz, *Brisbane Man Accused of Raping Wife After Spiking Her Drink with Temazepam: A Brisbane Man Pleads Not Guilty to Drugging and Raping His Wife Two Days After Their Wedding Anniversary in 2007*, AUSTL. BROAD. CORP. NEWS, Oct. 19, 2015, available at 2015 WLNR 30997366; *Sleeping Wife Raped, Taped*, COURIER MAIL (Australia), Jan. 16, 2015, available at 2015 WLNR 1516652 (wife believed she was drugged; husband raped her and made videotapes); *Man Drugs Wife, Rapes Her*, TIMES OF INDIA (Sep. 18, 2014), <http://timesofindia.indiatimes.com/city/ludhiana/Man-drugs-wife-rapes-her/articleshow/42763557.cms> (husband booked for drugging and raping estranged wife); Dean Nelson, *Rape in Marriage Not a Crime, Indian Court Rules*, TELEGRAPH (May 12, 2014), <http://www.telegraph.co.uk/news/worldnews/asia/india/10824964/Rape-in-marriage-not-a-crime-Indian-court-rules.html> (man drugged and raped wife; acquitted when court rules that rape does not apply in marriage); *I was Drugged by My Own Husband*, THAT’S LIFE, <http://www.thatsthelife.com.au/Article/Real-Life/Real-Life-Stories/I-was-drugged-by-my-own-husband> (last visited Jan. 4, 2016) (first-person account of being drugged and raped by husband); *Man Drugs Wife for 3-Day Marathon Sex*, PMNEWS (Oct. 29, 2013), <http://www.pmnewsnigeria.com/2013/10/29/man-drugs-wife-for-3-day-marathon-sex/> (Nigerian man drugged wife and had three days of marathon sex with her. The woman had just given birth to the couple’s child a few days earlier and had refused her husband’s demands for sex); *Woman Drugged, Raped by ‘Hubby’, Kin in Moving Car*, HINDUSTAN TIMES (Apr. 12, 2013), <http://www.hindustantimes.com/delhi/woman-drugged-raped-by-hubby-kin-in-moving-car/story-IftXSzHoR08Zpg8f7x9ZJM.html> (woman drugged and gang-raped by husband and two of his relatives); *Husband ‘who drugged his wife and sexually abused her with a tree frog’ is charged with rape and animal cruelty*, DAILY MAIL (Feb. 7, 2014), <http://www.dailymail.co.uk/news/article-2553988/A-husband-accused-drugging-sexually-abusing-wife-tree-frog-charged-rape-cruelty.html#ixzz3wMhFnN00>; *Man Drugged, Raped Friend’s Wife*, YAHOO! NEWS (Aug. 6, 2010), <https://in.news.yahoo.com/man-62-jailed-raping-friend.html> (“In a shocking case, a New Zealand court Friday sentenced a 62-year-old man to nine years in prison for sexually assaulting a woman in tandem with her husband when she was unconscious.”); Reon Suddaby, *Man Drugged, Raped and Filmed Wife Jailed for 20 Years*, NEW ZEALAND HERALD (Aug. 22, 2009), http://www.nzherald.co.nz/bay-of-plenty-times/news/article.cfm?c_id=1503343&objectid=10985798; Andrew Baldwin, *Brave Woman Who Fights Against Forced Marriages*, HUDDERSFIELD DAILY EXAMINER, Jan. 26, 2009, at 6, available at

These cases also demonstrate the perils of Ohio's continued reliance on the marital exemption for the crime of rape and other sexual offenses—an immunity that husbands²² have enjoyed for various types of sexual assault on their wives.²³ If the three foregoing cases had occurred in Ohio rather than elsewhere, then no criminal prosecution of the husbands would have been possible. Under Ohio law, if a husband drugs his wife by force, threat of force, stealth, or deception,²⁴ and then sexually assaults her, the government could not charge him with any of the four major sexual

<http://www.thefreelibrary.com/Brave+woman+who+figh+against+forced+marriages.-a0192614145> (“On the first night I was given warm milk, which made me drowsy, and that I suspect was drugged, then I was raped by my husband.”); Dewi Cooke, *Wife Speaks Out on Marital Sex Attacks*, SYDNEY MORNING HERALD, (July 18, 2008), <http://www.smh.com.au/national/wife-speaks-out-on-marital-sex-attacks-20080717-3gxj.html> (husband drugged wife and forced her to masturbate him); Shelley Hadfield, *Rapist Husband Sent to Prison*, HERALD-SUN (Melbourne), Apr. 18, 2008, at 4, available at 2008 WLNR 7141110 (husband drugged and rape wife, then set fire to her bedroom); *Doctor Jailed for Raping Unconscious Wife*, SYDNEY MORNING HERALD, (Jan. 25, 2007), <http://www.smh.com.au/news/national/doctor-jailed-for-raping-unconscious-wife/2007/01/25/1169594424888.html> (wife took sleeping pills for insomnia; husband sexually assaulted her); Clare Dyer, *Man Used ‘Date-Rape’ Drug on Wife*, GUARDIAN (May 21, 1999), <http://www.theguardian.com/uk/1999/may/22/claredyer> (London man admitted to drugging wife with flunitrazepam (Rohypnol), and having sexual relations with her while she was unconscious. The man claimed that he was trying to save the couple’s marriage.); Elissa Hunt, *Coffee Spiker Loses Appeal*, HERALD-SUN (Melbourne), Dec. 9, 2006, at 16, available at 2006 WLNR 21224823 (man drugged ex-wife’s coffee; wife had dream-like recollections of being in motel with him).

²¹ For a fuller discussion of rape of drugged or intoxicated victims, see Patricia J. Falk, *Rape by Drugs: Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131 (2002).

²² Although Ohio’s sexual offenses are written in gender-neutral terms, statistics indicate the vast majority of perpetrators of rape are men and the vast majority of victims of rape are women. Hasday reports:

All available evidence, for instance, indicates that marital rape is virtually always committed by husbands on wives. . . . Within approximately the past twenty-five years, almost all state exemptions have been revised in a gender-neutral idiom, so that they now regulate the rape of one “spouse” by the other. But it is not the case that wives routinely, or even occasionally, benefit from their immunity from prosecution. Just as a factual matter, husbands experience the marital rape exemption by enjoying immunity from prosecution. Wives experience the marital rape exemption as the person who does not receive the protection of the criminal law for acts that would otherwise be considered serious crimes.

Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (footnotes omitted) [hereinafter Hasday, *Consent*]. Similarly, the FBI Uniform Crime Reports for 2011 finds there were 11,934 male arrests and 135 female arrests for rape. See *FBI Uniform Crime Reports*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-33A>. According to a recent report, Michael Planty, et al., the Bureau of Justice Statistics, *Female Victims of Sexual Violence, 1994-2010*, March 2013, “From 1995 to 2010, approximately 9% of all rape or sexual assault victimizations recorded in the NCVS [National Crime Victimization Survey] involved male victims [.]” (figure omitted). The phenomenon of male rape within prison is a separate issue. See Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259 (2011).

²³ In its purest form, the common law marital rape exemption provided that a husband could not rape his wife under any circumstances.

²⁴ OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (West 2013).

offenses, including rape²⁵ (the most serious crime involving sexual conduct),²⁶ sexual battery (a lesser sexual-conduct crime),²⁷ gross sexual imposition²⁸ (a crime prohibiting sexual contact),²⁹ or even sexual imposition (a lesser sexual-contact crime).³⁰ This result is required because Ohio's marital exemption for rape and other sexual offenses would preclude the prosecution, except in limited circumstances, such as when the parties are in the process of legally altering their marital relationship or living apart from one another.³¹ Undoubtedly, the government could have prosecuted the husband with a crime other than a sexual offense, such as assault,³² felonious assault,³³ or corrupting another with drugs.³⁴ However, these offenses do not vindicate the same social harms as the sexual offenses, most importantly a person's sexual autonomy – the right to choose whether to engage in sexual conduct or contact with another person.³⁵

²⁵ *Id.*

²⁶ Sexual conduct is defined to include vaginal and anal intercourse, oral sex, and object penetration. OHIO REV. CODE ANN. § 2907.01(A) (West 2013).

²⁷ OHIO REV. CODE ANN. § 2907.03 (West 2013). In a similar case, the state of Mississippi prosecuted Trigg for the crime of sexual battery, rather than rape. *Trigg v. State*, 759 So.2d 448 (Miss. Ct. App. 2000).

²⁸ OHIO REV. CODE ANN. §2907.05(A)(2) (West 2013).

²⁹ Sexual contact is defined to as the touching of another's erogenous zones. OHIO REV. CODE ANN. § 2907.01(B) (West 2013).

³⁰ OHIO REV. CODE ANN. §2907.06(A)(3) (West 2013).

³¹ See *infra* notes 78-100 and accompanying text for a discussion of the partial lifting of the marital exemption.

³² Under Ohio law, the marital exemption is confined to the sexual offenses. Thus, a husband who batters his wife, might be subject to prosecution for assault. OHIO REV. CODE ANN. §2903.13(A) (West 2013) (“No person shall knowingly cause or attempt to cause physical harm to another . . .”).

³³ If the injuries to his wife constitute serious physical harm, the husband might face charges of felonious assault under OHIO REV. CODE ANN. §2903.11(A)(1) (West 2013) (felonious assault: “No person shall knowingly . . . Cause serious physical harm to another. . .”).

³⁴ Finally, the introduction of a regulated drug might result in criminal liability for corrupting another with drugs under OHIO REV. CODE ANN. §2925.02 (West 2013) (“No person shall knowingly . . . (1) By force, threat, or deception, administer to another or induce another to use a controlled substance, (2) By any means, administer or furnish to another or induce or cause another to use a controlled substance with purpose to cause serious physical harm to the other person . . . (3) By any means, administer or furnish to another or induce or cause another to use a controlled substance, and thereby cause serious physical harm to the other person. . .”).

³⁵ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 588 (6th ed.) (“Even in the marriage context, rape causes harm not protected by the laws of assault and battery.”) [hereinafter UNDERSTANDING CRIMINAL LAW]; see also Falk, *supra* note 21, (arguing that sexual assault and drugging for the purposes of sexual assault constitute two separate types of physical harms). According to the United States Supreme Court in *Coker v. Georgia*, 433 U.S. 584 (1996):

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the 'ultimate violation of self.' (citations omitted).

This article argues that Ohio's marital rape exemption fails to vindicate the sexual autonomy and physical integrity of all persons in the state to be free from non-consensual sexual conduct. This protection from unwanted, non-consensual sexual violation should be afforded to Ohioans regardless of the victim's marital relationship to the perpetrator.³⁶ Furthermore, the state's sexual offense provisions are plagued with inconsistencies and illogical distinctions with respect to the marital immunity.³⁷ For example, Ohio law abolishes the exemption for forcible rape but retains it for circumstances such as when a husband drugs his wife as a prelude to sexual

³⁶ Multiple grass-roots campaigns have been launched within Ohio calling for the abolition of the marital exemption. See, e.g., Alan Johnson, *Lawmakers want to make it easier to prosecute spousal rape*, Columbus Dispatch (May 27, 2015, 7:17 AM), <http://www.dispatch.com/content/stories/local/2015/05/26/spousal-rape-bill.html>; A woman fighting back against marital rape in Ohio (Mar. 16, 2007 10:35 PM), <https://womenagainstmarralrapeinohio.wordpress.com/2007/03/16/speaking-out-against-unfair-ohio-state-law-of-marital-rape/>; *Marital Rape: A Call to Advocacy*, Penn. Coal. Against Domestic Violence, <s3.documentcloud.org/documents/413656/marital-rape.pdf> (last visited Feb. 10, 2016).

³⁷ In her 1995 article advocating for the complete abolition of the Ohio marital rape exemption, Lalena Weintraub Siegel anticipated the precise problem discussed here:

Currently, Ohio's partial marital rape exemption statute is ambiguous and inconsistent. . . . Unfortunately, the statute is worded in such a way that when a husband substantially impairs his wife's judgment or control by drugs or intoxicants in order to prevent her resistance, a husband cannot be prosecuted for raping his wife. Hence, a woman who lives with her husband without a written separation agreement, or a petition for dissolution of marriage, is not legally protected from being raped if she is drugged or intoxicated by force, threat of force, or deception.

Lalena Weintraub Siegel, *The Marital Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 373 (1995) (footnotes omitted).

Another commentator pointed out the inequality of an earlier version of Pennsylvania's rape statute for much the same reasons:

The most frequent criticism of Pennsylvania's spousal sexual assault law by those who support the abolition of the marital rape exemption is that it perpetuates unequal treatment of rape victims based on their marital status. An illuminating example of this inequity might follow this scenario: *Spouse A* becomes frustrated with her marriage and moves into her own apartment. Her husband rapes her the *first* night she is living on her own. *Spouse B* is married and living with her husband. One night he has too much to drink and violently beats and rapes his wife. Under current Pennsylvania law, *Spouse A* is treated as a non-married victim who may charge her husband with the first degree felony of rape. *Spouse B*, however, may only charge her husband with the second degree felony of spousal sexual assault. In addition, if both of these rapes occurred *after the husbands drugged their wives* so that they became temporarily mentally deficient and the husbands did not use or threaten to use force during their violations, *Spouse A* would have a legal remedy while *Spouse B* would go unprotected under the law.

Abigail Andrews Tierney, *Spousal Sexual Assault: Pennsylvania's Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777, 799 (1986) (footnotes omitted; emphasis added). See Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L. J. 781 (2002) (noting that Mississippi law explicitly lifts the marital exemption for both forcible rape and rape accomplished by the defendant drugging the victim); MISS. CODE ANN. § 97-3-65 (West 2013).

assault. Ohio's partially abolished marital exemption cannot be justified under any coherent theory of justice,³⁸ appears to survive merely due to inertia,³⁹ and certainly does not serve the best interests of Ohio residents. The Ohio General Assembly should finish the legislative reform it started in 1975,⁴⁰ and most recently revisited in 1986,⁴¹ by eliminating the marital exemption in its entirety from the state's rape statute and other sexual offenses.

Part II of this Article summarizes Ohio's four major sexual offense provisions — the rape, sexual battery, gross sexual imposition, and sexual imposition statutes.⁴² Without Ohio's marital exemption, each of these criminal statutes contains one or more subsections that prosecutors might employ to charge an individual who drugs and then sexually assaults his marital partner with a sexual offense.

Part III explores the contours of the current marital exemption and its three separate exceptions: (1) in the definition of spouse used in all four major sexual offenses, (2) in the circumstance of living separate and apart under the rape statute, and (3) in the forcible rape subsection of the rape statute. Part IV considers whether drugging and sexually assaulting one's spouse could constitute a type of forcible rape such that the marital immunity would not apply.

Part V critiques the present status of a partial lifting of the marital immunity and argues for its complete abolition. The simple fact that current law permits a person to drug and rape his spouse with impunity underscores the need for legislative reform.⁴³ Part VI proposes three steps to effectively abolish the marital exemption from Ohio's sexual offense statutes. First, the Ohio General Assembly should eliminate all references to "spouse" in the four sexual offenses and from the definitional provision, making it clear that all sexual offenses can be committed inside or outside of marriage. Second, the legislature should enact a provision that unequivocally states that any prior marital or sexual relationship existing

³⁸ See *infra* notes 123-59 and accompanying text.

³⁹ In *People v. Liberta*, 485 N.Y.S.2d 207 (1984), a case eliminating New York's marital rape exemption, the court quoted from Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897): "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Similarly, the Supreme Court of Wyoming in *Shunn v. State*, 742 P.2d 775 (Wyo. 1987) refused to reinstate the common-law marital exemption. It quoted from another case: " * * * Reason is the soul of law, and when the reason of any particular law ceases so does the law itself * * *" (citation omitted).

⁴⁰ The first change to the marital exemption occurred in 1975, when the word "spouse" that is used in various sexual offense provisions was defined to exclude those who were seeking to terminate the marital relationship. See *infra* notes 78-79 and accompanying text.

⁴¹ The Ohio General Assembly lifted the marital rape exemption with respect to forcible rape to take effect on March 7, 1986. See *infra* notes 93-95 and accompanying text.

⁴² OHIO REV. CODE ANN. § 2907.01 through 2907.06 (West 2013).

⁴³ See *Roberts*, *supra* note 18, for a discussion of a similar case being the impetus to change Arizona's laws.

between the perpetrator and victim is legally irrelevant to the question of whether a sexual offense occurred or whether the victim consented on the occasion in question. Finally, courts should instruct juries in marital rape cases that a marriage or prior sexual relationship between the victim and the defendant has no bearing on criminal liability. Through this three-step process, Ohio's rape and other sexual offense provisions can afford the maximum protection to residents from unwanted, non-consensual sexual exploitation without regard to marital status or prior relationship to the criminal offender.

II. AN OVERVIEW OF OHIO'S SEXUAL OFFENSE PROVISIONS

Ohio's "Sex Offenses" chapter begins with a statute providing relevant definitions⁴⁴ followed by four major offense provisions:⁴⁵ rape,⁴⁶ sexual battery,⁴⁷ gross sexual imposition,⁴⁸ and sexual imposition.⁴⁹ The first two offenses – rape and sexual battery – prohibit "sexual conduct," defined to include vaginal and anal intercourse, oral sex, and object penetration⁵⁰ under specified conditions. For example, the rape statute prohibits sexual conduct accompanied by force or threat of force⁵¹ and the sexual battery statute prohibits sexual conduct when the victim is unaware that the act is being committed.⁵² In terms of offense grading, rape is a felony in the first degree with different levels of punishment depending on the circumstances;⁵³ sexual battery is a felony in the third degree.⁵⁴

The other two offenses – gross sexual imposition and sexual imposition – outlaw "sexual contact," defined as the touching of another's erogenous

⁴⁴ OHIO REV. CODE ANN. § 2907.01(L) (West 2013). A key definition contained in this statute is the one of "spouse."

⁴⁵ An additional statute outlaws unlawful sexual conduct with a minor which nonexclusively prohibits statutory rape—sexual conduct with a person below the age of legal consent. OHIO REV. CODE ANN. § 2907.04(A) (West 2013) ("No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.") This statute grades the offense from a felony in the second degree to a misdemeanor in the first degree depending upon the defendant's previous convictions and the victim's age. OHIO REV. CODE ANN. § 2907.04 (West 2013). The rape and gross sexual imposition statutes prohibit sexual conduct or sexual contact, respectively, when the victim is "less than thirteen years of age, whether or not the offender knows the age of the other person." OHIO REV. CODE ANN. §§ 2907.02(A)(1)(b), 2907.05(A)(4) (West 2013).

⁴⁶ OHIO REV. CODE ANN. § 2907.02 (West 2013).

⁴⁷ OHIO REV. CODE ANN. § 2907.03 (West 2013).

⁴⁸ OHIO REV. CODE ANN. § 2907.05 (West 2013).

⁴⁹ OHIO REV. CODE ANN. § 2907.06 (West 2013). Ohio's sex offense chapter also outlaws other types of conduct, such as importuning and prostitution, (*see, e.g.*, OHIO REV. CODE ANN. §§ 2907.07, 25, respectively) but these are outside the purview of the present analysis.

⁵⁰ OHIO REV. CODE ANN. § 2907.01(A) (West 2013).

⁵¹ OHIO REV. CODE ANN. § 2907.02(A)(2) (West 2013).

⁵² OHIO REV. CODE ANN. § 2907.03(A)(3) (West 2013).

⁵³ OHIO REV. CODE ANN. § 2907.02(B) (West 2013).

⁵⁴ OHIO REV. CODE ANN. § 2907.02(B) (West 2013).

zones for the purposes of sexual arousal or gratification.⁵⁵ These two statutes also differ from one another with respect to the circumstances of the sexual contact. For instance, the gross sexual imposition provision outlaws sexual contact by force or threat of force,⁵⁶ and the sexual imposition outlaws sexual contact if the perpetrator knew the victim submitted because she was unaware of the sexual contact.⁵⁷ In terms of grading, gross sexual imposition is a felony of the third or fourth degree;⁵⁸ sexual imposition may be a misdemeanor of the third or first degree depending upon the defendant's previous convictions of a sexual offense.⁵⁹

A significant parallel exists between the rape and gross sexual imposition statutes, despite prohibiting different types of sexual activity — sexual conduct and sexual contact, respectively. Although not completely co-extensive,⁶⁰ both statutes criminalize sexual activity when the victim is: (1) drugged by the offender by stealth, force, threat, or deception, (2) under 13 years of age, (3) substantially impaired due to a mental or physical condition or advanced age, or (4) compelled to submit by force or threat of force.⁶¹ A lesser parallel exists between the sexual battery and sexual imposition statutes. Although each statute contains unique provisions, both outlaw sexual conduct or contact, respectively, when: (1) the victim is substantially impaired, (2) the victim is unaware that a sexual act is being committed, or (3) the offender is a mental health professional.⁶²

Absent the marital exemption, a husband who drugs and sexually assaults his wife could potentially fall into Ohio's four major sexual offense provisions. Clearly, the conduct would fit squarely within a subsection of the rape statute that provides, "[f]or the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception."⁶³

⁵⁵ OHIO REV. CODE ANN. § 2907.01(B) (West 2013).

⁵⁶ OHIO REV. CODE ANN. §2907.05(A)(1) (West 2013).

⁵⁷ OHIO REV. CODE ANN. §2907.06(A)(3) (West 2013).

⁵⁸ OHIO REV. CODE ANN. § 2907.05(B) (West 2013).

⁵⁹ OHIO REV. CODE ANN. § 2907.06(C) (West 2013).

⁶⁰ See *supra* note 42 and accompanying text.

⁶¹ OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a), (b), (c); (A)(2); 2907.05(A)(1), (2), (4), (5) (West 2013).

⁶² OHIO REV. CODE ANN. §§ 2907.03(A)(2), (3), (10); 2907.06(A)(2), (3), (5) (West 2013).

⁶³ OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (West 2013). Absent defendant administration of the intoxicant, a husband sexually assaulting his unconscious wife might be punishable under another provision of the rape statute:

The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

Arguably, absent the marital exemption, the behavior might also be encompassed in the sexual battery statute's provisions relating to sexual conduct with a person who is substantially impaired or is unaware that a sexual act is occurring. The sexual battery statute contains these two relevant provisions: "The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired."⁶⁴ The offender knows that the other person submits because the other person is unaware that the act is being committed."⁶⁵ If the husband engaged in a less serious form of sexual assault – for instance, groping for sexual gratification or arousal rather than sexual intercourse – this sexual contact might be outlawed by the gross sexual imposition statute under a provision almost identical to the rape statute's drugging provision.⁶⁶ Finally, the sexual imposition statute criminalizes sexual contact with a person who is substantially impaired⁶⁷ or unaware of the sexual contact,⁶⁸ provisions parallel to those found in the sexual battery statute. Unfortunately, the marital exemption in each of these four statutes would operate to prevent the prosecution of such a case, except in limited situations.⁶⁹ The next Part explores Ohio's statutory approach to the marital immunity in its four major sexual offenses in greater detail.

III. THE MARITAL EXEMPTION IN OHIO'S RAPE AND SEXUAL OFFENSE PROVISIONS AND ITS THREE SEPARATE OR DISCRETE EXCEPTIONS

Many legal scholars who have researched and commented upon the marital immunity have focused on state provisions regarding forcible rape. They have ignored or given short shrift to provisions on sexual assault, criminal sexual contact, aggravated sexual abuse, and other sexual offenses. To understand fully the way that marital immunity works in a state, however, it is necessary to examine all of the states' sexual offense provisions.⁷⁰

Ohio's rape and other sexual offense provisions encapsulate almost the entire evolution of the marital exemption in rape law. The statutes include the marital exemption as the baseline or background rule in accordance with the practice of every jurisdiction in the United States, until fairly recently.⁷¹ For instance, the rape statute begins "No person shall engage in

⁶⁴ OHIO REV. CODE ANN. § 2907.03(A)(2) (West 2013).

⁶⁵ OHIO REV. CODE ANN. § 2907.03(A)(3) (West 2013).

⁶⁶ OHIO REV. CODE ANN. § 2907.05(A)(2) (West 2013).

⁶⁷ OHIO REV. CODE ANN. § 2907.06(A)(2) (West 2013).

⁶⁸ OHIO REV. CODE ANN. § 2907.06(A)(3) (West 2013).

⁶⁹ See *infra* Part III.

⁷⁰ *Marital Immunity*, *supra* note 2 at 1486.

⁷¹ As of 2009, "at least twenty-four states retain some form of an exemption. These states criminalize a narrower range of offenses if committed within marriage, subject the marital rape they recognize to less severe sanctions, and/or create special procedural obstacles to marital rape

sexual conduct with another who is not the *spouse* of the offender”⁷² Similarly, the sexual battery statute provides: “No person shall engage in sexual conduct with another, *not the spouse of the offender*, when any of the following apply: . . .”⁷³ The gross sexual imposition statute provides: “No person shall have sexual contact with another, *not the spouse of the offender*; cause another, *not the spouse of the offender*, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: . . .”⁷⁴ Finally, the sexual imposition statute provides: “No person shall have sexual contact with another, *not the spouse of the offender*, cause another, *not the spouse of the offender*, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: . . .”⁷⁵ This language, reminiscent of the full marital rape exemption as it existed in England and, subsequently, in all American jurisdictions,⁷⁶ provides that criminal liability will attach only if the offender engages in the prohibited activities with someone other than his spouse.

Juxtaposed against this background rule, Ohio’s sexual offenses contain three separate exceptions to the marital immunity.⁷⁷ These exceptions can be understood as partially lifting or nullifying the marital exemption under specified circumstances, thereby permitting the criminal prosecution of offenders despite their marital relationship to the victim. More specifically, Ohio’s sexual offense provisions contain three discrete exceptions to the application of the marital exemption: (1) through the operation of the definition of a “spouse,” (2) in the factual circumstance of the offender and victim living separate and apart under the rape statute, and (3) when the offender compels the victim to submit by force or threat of force under the rape statute.

prosecutions.” Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Marital Benefits Arguments for Sex and Race Equality*, 84 NYU L. REV. 1464, 1471 (2009) (footnotes omitted) [hereinafter Hasday, *Protecting Them from Themselves*].

⁷² OHIO REV. CODE ANN. § 2907.02(A)(1) (West 2013) (emphasis added). See the Appendix at the conclusion of the article for the relevant statutory language in all four of Ohio’s sexual offenses.

⁷³ OHIO REV. CODE ANN. § 2907.03(A) (West 2013) (emphasis added).

⁷⁴ OHIO REV. CODE ANN. § 2907.05(A) (West 2013) (emphasis added).

⁷⁵ OHIO REV. CODE ANN. § 2907.06(A) (West 2013) (emphasis added).

⁷⁶ For excellent treatments of the history of the marital exemption, see Siegel, *supra* note 37; People v. Liberta, 485 N.Y.S.2d 207, 215 (1984).

⁷⁷ For a complete break-down of the relevant statutory passages, please see the Appendix. Compare Ohio’s existing statute with the discussion of the evolution in North Carolina’s elimination of the marital exemption contained in Jaye Sitton, *Old Wine in New Bottles: The Marital Rape Allowance*, 72 N.C. L. REV. 261, 283-88 (1993).

A. Exception One: The Definition of Spouse in the Four Major Sexual Offenses

The first exception to the operation of the baseline marital exemption applies to all four major sexual offense provisions. As noted above, each of Ohio's sexual offenses continues to employ the word "spouse" in its operative language. In 1975, the General Assembly began dismantling the marital exemption by altering the meaning of the term "spouse."⁷⁸ In the definitional statute preceding the substantive provisions, the Ohio legislature defined "spouse" as a person "married to an offender at the time of the alleged offense," but the definition specifically excluded three circumstances:

- (1) When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;
- (2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation; [or]
- (3) In the case of an action for legal separation, after the effective date of the judgment for legal separation.⁷⁹

Thus, under Ohio law, only spouses who fall into any of these three excepted categories are protected by the statute from sexual offenses by their marital partners.

Although salutary, this legislative tweaking of the marital immunity is very limited because it protects only those persons who have sought legal redress for their marital troubles. The three circumstances embedded in the definition of "spouse" require formal legal action terminating or legally altering the nature of the marital relationship. In all likelihood, this reform to the marital exemption is premised on the fact that the traditional policies or justifications for the marital exemption — the unity theory,⁸⁰ the contract theory,⁸¹ and the consent theory⁸² — have little bearing when the marriage has reached a state of legal disintegration.⁸³ The fourth

⁷⁸ This reform involving the definition of spouse seems to have occurred in 1975, according to the "legislative history" of OHIO REV. CODE ANN. § 2907.01 (West 2013). Am. Substitute S. Bill 144 (1975). Subsequently, in 1990, the Ohio legislature changed the word alimony to legal separation in OHIO REV. CODE ANN. § 2907.01(L) (2)-(3). 1990 Ohio Laws File 276.

⁷⁹ OHIO REV. CODE ANN. § 2907.01(L) (West 2013). Similarly, the Model Penal Code provided some relief for women who were under a decree of judicial separation. MODEL PENAL CODE § 213.6 (2) (1962) ("The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation.").

⁸⁰ See, e.g., Siegel, *supra* note 37, at 357; Melisa J. Anderson, *Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 GA. J. INT'L & COMP. L. 139, 147-149 (1998) [hereinafter Anderson]; Kelly C. Connerton, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 243-44 (1997); *People v. Liberta*, 485 N.Y.S.2d 207 (1984); Sitton, *supra* note 77, at 264.

⁸¹ See, e.g., Siegel, *supra* note 37, at 354-56; Sitton, *supra* note 77, at 264-65.

⁸² See, e.g., *Marital Immunity*, *supra* note 2, at 1497-1501; Siegel, *supra* note 37, at 354-56; Connerton, *supra* note 80, at 246-47; Sitton, *supra* note 77, at 265.

⁸³ See *infra* notes 123-40 and accompanying text.

traditional rationale — women as the property or chattel of their husbands — has been similarly discredited.⁸⁴

As noted above, Ohio's three other major sexual offense provisions — sexual battery, gross sexual imposition, and sexual imposition — also incorporate the term “spouse” in their operative provisions. This means that the exclusions contained in the definition of spouse would also apply to these other offenses. For instance, a husband could be prosecuted for sexual battery if he has sexual intercourse with his unconscious/unaware wife during their legal separation. Thus, the weakest lifting of the marital exemption — the one that only pertains to those marital partners who have sought to change the legal status of their relationship — has the widest applicability in terms of the sexual offense provisions. In other words, the marital exemption remains in full effect in Ohio's sexual battery, gross sexual imposition, and sexual imposition statutes except when the parties have legally altered their marriage. The problem, of course, with altering the definition of spouse in this fashion to protect those persons who are legally separated or getting divorced is that those who are factually, but not legally, separated or who are still living with their abusive spouses will receive no similar protection.⁸⁵ The background marital immunity rule would continue to prevent any prosecution in those circumstances.

B. Exception Two: Living Separate and Apart from the Offender in the Rape Statute

Ohio's rape statute, and only the rape statute, contains a second discrete exception to the background rule of marital immunity. In 1985, the Ohio General Assembly added the highlighted language to the Ohio rape statute: “No person shall engage in sexual conduct with another *who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender[.]*”⁸⁶ This additional language expands the coverage of the rape statute to those who are factually living separate and apart from the defendant without formally changing their legal

⁸⁴ Emily R. Brown, Changing the Marital Rape Exemption: I Am Chattel(?!); Hear Me Roar, 18 Am. J. Trial Advoc. 657 (1995); see also Lisa Dawgert Waggoner, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, 22 N.M. L. Rev. 551, 552-54 (1992); Sunn v. State, 742 P.2d 775 (Wyo. 1987) (discussing property, unity, and consent theories as “unrealistic and unreasonable”); State v. Morrison, 85 N.J. 193 (1981) (dismissing three major common law justifications for marital exemption).

⁸⁵ See Abigail Andrews Tierney, *Spousal Sexual Assault: Pennsylvania's Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777 (1986) (discussing the inequity resulting from treating these cases differently).

⁸⁶ OHIO REV. CODE ANN. § 2907.02(A)(1) (West 2013) (emphasis added). 1985-86 vol. 141 pt. II 4480 1985 (Am. Substitute H.B. 475). According to the Ohio Pattern Jury Instructions: “Living separate and apart” means the (people) (husband and wife) are living in separate accommodations and apart from each other.” 2 OJI-CR 507.02(A)(1), 2 CR Ohio Jury Instructions 507.02(A)(1).

status under the definition found in Ohio Revised Code § 2907.01(L).⁸⁷ In this way, some additional number of spouses would be protected from rape by their estranged husbands.⁸⁸ One might ask why the Ohio legislature did not simply add the factual circumstance of living separate and apart to the list of exceptions in the definition of “spouse.” The answer appears to lie in the fact that the rape statute is the only one of Ohio’s four primary sexual offenses that contains this additional language about spouses living separate and apart. Thus, a wife who is living separate and apart from her husband without the benefit of a legally recognized separation agreement, a divorce action, or other formal proceeding, will be protected from the crime of rape in all of its forms,⁸⁹ but not from the other three crimes of sexual battery, gross sexual imposition, or sexual imposition. To be protected by these other sexual offense categories, the victim will have to fall within the exceptions listed in the definition of “spouse” made applicable to all sexual crimes. Thus, it appears that the Ohio legislature sought to lift the exemption to a greater extent for the crime of rape than for the other sexual offenses.

C. Exception Three: The Forcible Compulsion Subsection of the Rape Statute

To make matters even more complex, Ohio’s rape statute (and again only the rape statute) has an additional exception to the marital exemption. Recall that Ohio’s rape statute contains four substantive provisions: (1) drugging a victim to accomplish sexual conduct, (2) having sexual conduct with someone under 13 years of age, (3) accomplishing sexual conduct with a mentally or physically incapacitated person, and (4) compelling the victim to submit by force or threat of force.⁹⁰ Subsection (A)(1) encompasses the first three types of rape;⁹¹ Subsection (A)(2) consists of the “forcible” rape provision: “when the offender purposely compels the other person to submit by force or threat of force.”⁹²

Although all forms of rape are still rape and punishable as such, forcible rape under subsection (A)(2) is treated differently when it comes to the marital exemption. In 1986, the Ohio General Assembly passed the following provision, its most recent major enactment concerning the

⁸⁷ This revision to the rape statute occurred in 1985 in conjunction with a new provision making marriage irrelevant in the context of forcible rape. See Am. Substitute H.B. 475 (1985).

⁸⁸ By “protected,” I mean that a prosecutor could charge their estranged husbands with the crime of rape or another sexual offense.

⁸⁹ This additional lifting of the marital exemption applies whether the defendant accomplishes rape by surreptitious, forcible, or deceptive drugging, involves a substantially impaired victim, or a victim below the age of 13 years old or by the use of forcible compulsion. OHIO REV. CODE ANN. §§ 2907.02(A)(1)(a)-(c), (A)(2) (West 2013).

⁹⁰ See *supra* Section II.

⁹¹ OHIO REV. CODE ANN. § 2907.02(A)(1) (West 2013).

⁹² OHIO REV. CODE ANN. § 2907.02(A)(2) (West 2013).

marital immunity.⁹³ “It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.”⁹⁴ Thus, the Ohio legislature has abolished the marital exemption for forcible rape.⁹⁵ A husband who rapes his wife by force or threat of force can be prosecuted whether the couple are actively cohabiting, living separate and apart, or in the process of legally altering their relationship. In short, the Ohio legislature made the existence of a marital relationship between offender and victim completely irrelevant to criminal liability when the offender uses forcible compulsion to accomplish rape.

The following comment appears in connection with the Ohio Jury Instructions on rape: “The Committee believes that with the enactment of R.C. 2907.02(A)(2), forcible sexual conduct with a spouse is rape. The common law (and statutory) defenses of implied consent and ‘the wife is a man’s chattel’ no longer exist.”⁹⁶ Although the policy reasons for eliminating the marital immunity apply to all types of rape, the legislature did not fully abolish the exemption. Rather, if the husband accomplishes rape by means that do not meet the definition of force or threat of force, then the marital immunity would bar the prosecution, unless the first two exceptions to the marital immunity applied. Thus, a husband is immune from prosecution if he drugs his wife and then has sexual intercourse with her⁹⁷ or if he sexually assaults his wife when she is incapacitated because of a mental or physical condition or because of advanced age,⁹⁸ provided

⁹³ This revision to the rape statute occurred in 1985 (became effective in 1986), and represents the most recent change regarding the marital immunity, except for changing the word alimony to legal separation in the definition of spouse that occurred in 1990.

⁹⁴ OHIO REV. CODE ANN. § 2907.02(G) (West 2013). See Am. Substitute H.B. 475 (1985).

⁹⁵ When searching for the Ohio rape statute on the legal database on Westlaw, this caption appears above OHIO REV. CODE ANN. § 2907.02 (West 2013): “Rape; evidence; marriage or cohabitation not defenses to rape charges,” giving the mistaken impression that marriage or cohabitation are not defenses to all types of rape when that is not the case.

⁹⁶ 2-CR 507 OJI 507.02(A)(1).

⁹⁷ *Marital Immunity*, *supra* note 2, at 1468 reports:

In three of these states—Ohio, Oklahoma, and South Carolina—men are even immune from charges when they themselves administer the drugs, intoxicants, or controlled substances to render their wives mentally incapacitated. In eight other states, men are immune from charges when their wives are rendered incapable of consenting due to drugs or intoxicants administered without consent, which may include when a husband administers intoxicants without his wife’s consent. *Id.* (footnotes omitted).

⁹⁸ According to the same source:

Twenty states exempt men from sexual offense charges when their wives are mentally incapacitated or physically helpless. “Mentally incapacitated” is usually defined as so drugged or intoxicated that one cannot give valid consent. “Physically helpless” is usually defined as unconscious, which includes unconsciousness due to drugging or a coma, for example. In these twenty states, penetrating a woman who cannot consent because she is drugged or unconscious is a crime if the man is not married to the victim. However, it is

that they are not living separate and apart or legally altering their relationship under the statutory language found in the definition of spouse.⁹⁹

It is ironic that the broadest exception to the marital immunity is also the narrowest in scope because it does not apply to any of the other Ohio sexual offenses. No similar language appears, for instance, in the gross sexual imposition statute that punishes those who engage in *sexual contact* with another by force or threat of force — the parallel provision to the rape statute’s subsection (A)(2).¹⁰⁰ The three other major sexual offenses under Ohio law have a much more limited lifting of the marital exemption, relying exclusively upon the definitional exceptions to “spouse” — legally separated or currently divorcing — to provide a partial lifting of the exemption. The tripartite lifting of the marital exemption is confined to Ohio’s rape statute.

In summary, spouses in Ohio are protected from all forms of non-consensual sexual conduct and sexual contact if they are in the process of altering their legal relationship, i.e., by getting an annulment, divorce, dissolution, or legally separating. If the spouses are living separate and apart, they are also protected from various types of rape, those that do and do not include “forcible compulsion,” such as being drugged as a prelude to the sexual assault; none of the other sexual offenses include this language. Finally, if the offender used force to compel his spouse to submit to sexual intercourse (forcible rape), then Ohio spouses receive the full measure of protection against rape — even if they are cohabiting with the offender. However, cohabiting spouses would not be protected from other types of “non-forcible” rape, such as being drugged and sexually assaulted, or less serious types of sexual offenses. Thus, Ohio’s rape and sexual offense provisions contain a complex, multi-tiered partial lifting of the marital exemption, possibly graded by the perceived seriousness of the completed offense, but lacking any other organizational structure.

IV. DOES OHIO’S FORCIBLE RAPE SUBSECTION ENCOMPASS A HUSBAND WHO DRUGS AND THEN RAPES HIS WIFE?

Before discussing the continued vitality of the marital exemption in Ohio’s sexual offense provisions, it is prudent to consider whether the conduct described at the beginning of this article — a husband drugging and then sexually assaulting his wife — would fit under the forcible compulsion

not a crime if the man is married to the victim. *Marital Immunity*, *supra* note 2, at 1468 (footnotes omitted).

See also Rhoda, *supra* note 2, (“In others, it’s permitted for a husband to force sex if his wife is mentally incapacitated.”).

⁹⁹ See *supra* notes 78-85 and accompanying text.

¹⁰⁰ OHIO REV. CODE ANN. § 2907.05(A)(1) (West 2013) (“The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.”).

provision of the rape statute and thereby deprive the husband of immunity from a rape prosecution.¹⁰¹ *Trigg v. State* provides a helpful starting point in answering this question.¹⁰² *Trigg* is a Mississippi case involving a husband who drugged and sexually assaulted his wife, in which the state chose to prosecute the husband for sexual battery, rather than rape.¹⁰³ The jurisdiction's sexual battery statute contained the marital exemption, but also made it inapplicable if force was used in committing the offense.¹⁰⁴ *Trigg* claimed that he should be granted the marital immunity because he did not use force (he used drugs) as required by the statutory exception. In upholding the conviction, the appellate court reasoned: "In any event, rendering her unconscious with drugs, physically undressing her and sexually penetrating her all require some amount of force. Therefore, this argument is without merit."¹⁰⁵ Thus, the *Trigg* court equated the administration of the drugs with the use of "force" to satisfy the statutory language.¹⁰⁶ Could a similar argument be made under Ohio law?

¹⁰¹ See OHIO REV. CODE ANN. § 2907.02(G) (West 2013).

¹⁰² *Trigg v. State*, 759 So.2d 448 (Miss. Ct. App. 2000).

¹⁰³ *See id.* This decision to charge the defendant with a lesser form of sexual assault emphasizes that the marital exemption is not simply a problem regarding the jurisdiction's rape statute, but also effects lesser crimes such as sexual battery or gross sexual imposition.

¹⁰⁴ MISS. CODE ANN. § 97-3-99 (2013), entitled Sexual Battery, Defense of Marriage, provides:

A person is not guilty of any offense under Sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim.

See also Nourse, *Symposium on Unfurnished Feminist Business: The "Normal" Success and Failures of Feminism and the Criminal Law*, 75 CHI-KENT. L. REV. 951, 963 (2000) (discussing Mississippi's sexual battery statute and the marital exemption).

¹⁰⁵ *Trigg v. State*, 759 So.2d at 451. *See also* Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L. J. 781 (2002) (noting that Mississippi law explicitly lifts the marital exemption for both forcible rape and rape accomplished by the defendant drugging the victim). The law states:

(4)(a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; . . .

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not. MISS. CODE ANN. § 97-3-65 (West 2013).

¹⁰⁶ Anderson makes a similar point in her excellent article on the marital exemption:

The use of drugs is analogous to the use of physical force to render a woman incapacitated. Some men beat or choke their wives to render them unconscious before raping them. . . . Although most states would recognize the choking here as force that makes the sexual offense rape, too many states would not recognize drugging a wife for the identical purpose as force that makes the sexual offense rape. *Marital Immunity*, *supra* note 2, at 1507 (footnotes omitted).

Interpreting Ohio's forcible rape subsection to include the circumstance when a husband administers a drug to his wife and subsequently rapes her is problematic for a number of reasons. First, the rape statute contains a separate provision that specifically covers the precise circumstance of an offender using drugs to subdue the victim as a prelude to sexual assault.¹⁰⁷ An important rule of statutory construction is that the courts should give effect to statutory provisions without rendering other provisions as surplusage. According to the United States Supreme Court, "one of the most basic interpretive canons [states] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'"¹⁰⁸ As the Court commented: "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."¹⁰⁹

Utilizing this rule of statutory interpretation, we must assume that the legislature would not enact a provision that was completely subsumed under, or duplicative of, existing statutory language. Thus, if every case involving a criminal offender who administers a drug to his victim followed by rape would fall under the forcible compulsion subsection, then the drugging provision would be made superfluous. To avoid rendering the drugging subsection surplusage, one must conclude that the Ohio legislature must have understood these two provisions as prohibiting different evils, otherwise no need existed to include the drugging provision in the rape statute when a force provision was already present in that statute. The pattern of rape statutes including both drugged-rape and forcible-rape provisions is quite common among other state sexual offense provisions, strengthening the argument that these represent attempts to punish separate types of harm.¹¹⁰

A second problem with a court reading the forcible compulsion provision as being broad enough to cover the factual circumstance of a husband drugging his wife as a prelude to sexual assault is the wording of the drugging provision. The anti-drugging subsection of the rape statute specifies multiple methods of accomplishing the drugging:

For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or

¹⁰⁷ OHIO REV. CODE ANN. § 2907.01(A)(1)(a) (West 2013).

¹⁰⁸ *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

¹⁰⁹ *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013); *see also* *Boise Cascade Corp. v. U.S. Evntl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

¹¹⁰ For a fuller discussion of the phenomenon of rape by drugs, *see* Falk, *supra* note 21.

controlled substance to the other person surreptitiously or by force, threat of force, or deception.¹¹¹

One of the enumerated methods is “by force.” Here it becomes even clearer that the legislature viewed the drugged and forcible rape provisions as prohibiting separate evils because using force to drug a victim is treated differently than using force to physically subdue the victim. In this way, the legislature appears to have explicitly rejected the argument made by the *Trigg* court in equating these two applications of force.

Third, and perhaps more importantly in this context, the Ohio General Assembly’s deliberate decision to carve out an exception to the marital exemption for forcible rape cases, but not for cases involving rape accomplished by the administration of an intoxicating substance to the victim (by force, threat, stealth, or deception), weighs strongly against ignoring this legislative distinction and subsuming drugged rape under the forcible rape provision. The plain language of the rape statute embodies a legislative intent to treat these two methods of accomplishing rape differently in terms of the marital exemption. Thus, a court would be defeating this legislative judgment by equating them for purposes of the immunity. In other words, if every type of rape could be reclassified as “forcible rape” by asserting that drugging the victim constituted force or that the force necessary for completing the sexual assault itself was sufficient, then the legislature’s judgment in only removing the marital exemption for forcible rape would be defeated.¹¹² If the legislative intent in enacting these separate exceptions is to be respected and effectuated by courts interpreting the statute, then it is necessary to treat drugged and forcible rape cases differently in terms of the marital immunity.

Finally, we must also consider another canon of statutory construction specifically applicable to criminal statutes: the rule of lenity or the doctrine of strict construction of statutes.¹¹³ The rule of lenity provides that if a criminal statute is ambiguous, then that ambiguity must be resolved on the side of the criminal defendant. According to the Supreme Court, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”¹¹⁴ The importance of this canon of statutory construction is underscored by the fact that Ohio has statutorily enacted it: “Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed

¹¹¹ OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (West 2013) (emphasis added).

¹¹² Of course, I do not agree that these types of rape should be treated differently in terms of the marital immunity, but the solution should be for the legislature to amend the rape law not for courts to disregard plain legislative intent.

¹¹³ According to Joshua Dressler, “when a criminal statute is subject to conflicting reasonable interpretations, the statute (including sentencing provisions thereto) should be interpreted in favor of the defendant.” UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 47.

¹¹⁴ *Rewis v. United States*, 401 U.S. 808, 812 (1971).

against the state, and liberally construed in favor of the accused.”¹¹⁵ The rule was designed to encourage the legislature to be clearer about what constitutes criminal conduct, rather than leaving that question to the courts.¹¹⁶ As Joshua Dressler notes, the rule of lenity “support[s] the principle of legality by preventing a court from inadvertently enlarging the scope of a criminal statute through its interpretive powers.”¹¹⁷ Thus, if it is ambiguous whether a person who drugs and sexually assaults his wife would fit under the forcible rape provision because of the existence of a separate drugging subsection specifically covering that behavior, then the court would be required to find the provision inapplicable under the rule of strict construction. The criminal defendant should be given the benefit of doubt based on the ambiguity in the statute. Thus, the principle of lenity weighs against expanding the coverage of the forcible rape provision to include offenders who drug and then rape their victims.

Based on the foregoing analysis, the problem of the marital immunity barring prosecution of husbands who drug and sexually assault their wives cannot be solved by trying to subsume this behavior under the forcible compulsion subsection of the rape statute. Even if it could be solved by doing so, other types of rape – sexual penetration of a person who is mentally or physically incapacitated – and other sexual offenses like sexual battery would still fall outside the realm of punishment. The solution must come in terms of legislative enactment rather than judicial expansion of the scope of existing statutory provisions.¹¹⁸

V. AN INDEFENSIBLE NO-MAN’S LAND: A CRITIQUE OF OHIO’S PARTIAL LEGISLATIVE ABOLITION OF THE MARITAL EXEMPTION

More than 1 in every 7 women who have ever been married have been raped in marriage!¹¹⁹

“I believed my husband loved and respected me and would have protected me from harm, Instead he violated and betrayed my trust (and) treated my body with total disregard and contempt.”¹²⁰

¹¹⁵ OHIO REV. CODE ANN. § 2901.04(A) (West 2013).

¹¹⁶ UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 47.

¹¹⁷ *Id.*

¹¹⁸ In *Garnett v. State*, 632 A.2d 797 (1993), the Court of Appeals of Maryland has to decide whether to uphold Maryland’s strict liability statutory rape law. In deciding to do so, the court wrote: “Maryland’s second degree rape statute is by nature a creature of legislation. Any new provision introducing an element of *men rea* * * * should properly result from an act of the Legislature itself, rather than judicial fiat.” *Id.* at 805 (emphasis in original).

¹¹⁹ DIANA E. H. RUSSELL, RAPE IN MARRIAGE (1990).

¹²⁰ *Man Rapes Drugged Wife*, COURIER MAIL, Aug. 2, 2001, at 5, available at 2001 WLNR 5640141.

Beginning more than forty years ago in 1975 and most recently in 1986,¹²¹ the Ohio legislature has lifted the marital immunity for certain categories of spouses (*e.g.*, those who are legally separated, getting divorced, living separate and apart, or forcibly violated), but not for other spouses (*e.g.*, those who are drugged then raped or those who are substantially incapacitated and incapable of consenting). This statutory scheme defies logic in terms of both the historical and modern legal and public policy justifications for the exemption, undervalues the quantum of harm experienced by victims of these offenses, violates the prevailing legal norms in the treatment of women, and defies the values of statutory clarity and comprehensibility in criminal statutes. The partial lifting of the marital immunity has created an indefensible no-man's land, uncomfortably suspended between the traditional rule and the strong modern trend toward complete abolition.

The reasons that the marital immunity should be abolished in a prosecution for forcible rape apply with equal or greater force to other types of rape and to other sexual offense categories. The grave injustice of failing to protect women who are married to the same extent as women who are not married exists whether the rape is accomplished by forcible compulsion or by drugging. As a factual matter, men who batter women are not limited to using their fists, but also render their victims unconscious by drugging or other means.¹²² To allow prosecution only in cases involving physical force privileges certain battering conduct, based on little more than the fortuitous choice of criminal means. Finally, a set of criminal statutes so full of exemptions and exceptions that it rivals the complexity of the Internal Revenue Code should be replaced by simple and clear legislation that provides justice to victims of these horrendous crimes and puts potential offenders on notice of the criminal nature of their conduct.

A. *The Traditional Legal and Policy Justifications for the Marital Exemption Are Outmoded and Untenable*

"Rape entered the law through the back door, as it were, as a property crime of man against man. Woman, of course, was viewed as the property."¹²³

¹²¹ In 1975, the Ohio General Assembly altered the definition of spouse. In 1985, it added the "living separate and apart" language to the rape statute. In 1986, it eliminated the marital exemption for forcible rape. In 1990, it altered the definition of spouse in OHIO REV. CODE ANN. § 2907.01 (L) (2) & (3), such that the word "alimony" was replaced by "legal separation." See *supra* note 78 and accompanying text.

¹²² See *Marital Immunity*, *supra* note 2, at 1506.

¹²³ SUSAN BROWNMILLER, *AGAINST OUR WILL* 18 (Simon and Schuster 1975). See also Alexandra Wald, *What's Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 462-63 n.14 (1997).

By marriage, the husband and wife are one person in law: that is, 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; under whose wing, protection and cover, she performs everything. . . .¹²⁴

Three hundred years ago, Matthew Hale published an extra-judicial statement about the relationship between marriage and the crime of rape that has continued to affect the prosecution of modern rape cases into 21st-century America: “[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.”¹²⁵ Another English jurist, William Blackstone contributed this conceptualization of the relationship between husbands and wives: “This doctrine contends that ‘the husband and wife are one person in law,’ with the ‘legal existence of the woman . . . suspended during the marriage.’”¹²⁶

Over the ensuing centuries, legal commentators have derived four related rationales for the marital exemption from these statements by Hale and Blackstone, namely that upon marriage: (1) the woman became the chattel or property of her husband,¹²⁷ (2) the woman and man became one legal entity – the man,¹²⁸ (3) a contract existed between the couple such

¹²⁴ See Siegel, *supra* note 37 (“Essentially, husband and wife were one flesh; but the man was the owner of that flesh.”). See also Lisa R. Eskow, *The Ultimate Weapon? Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677, 679-84 (1996) (quoting Lawrence Freidman).

¹²⁵ MATTHEW HALE, *HISTORIA PLACITORUM CORONAE, THE HISTORY OF THE PLEAS OF THE CROWN* 629 (2003) (originally published in 1736). Hasday points out that the struggle to do away with the marital exemption began in the 1800s:

Scholars have frequently assumed that marital rape was a private concern that nineteenth-century feminists feared discussing in any public or systematic way. But the historical record makes clear that these advocates not only publicly demanded the right to sexual self-possession in marriage, they pressed the issue constantly, at length, and in plain language. Hasday, *Consent*, *supra* note 22, at 1378-79.

¹²⁶ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *442.

¹²⁷ Emily R. Brown, *Changing the Marital Rape Exemption: I Am Chattel(!); Hear Me Roar*, 18 Am. J. Trial Advoc. 658 (1995); see also Waggoner, *supra* note 84 at 552-54; R v. R [1991] 2 All ER 257 (discussing the notion that the woman gave her person or body to her husband upon marriage); Susan MCoin, *Law and Sex Status: Implementing the Concept of Sexual Property*, 19 Women’s Rts. L. Rep. 237, 243 (1998).

¹²⁸ Siegel, *supra* note 37, at 357

In 1765, Blackstone stated “[b]y marriage, the husband and wife are one person in law: that is, 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; under whose wing, protection and cover, she performs everything. . . .” This became known as the marital unities doctrine, which provided that a woman could not own property, make contracts, or take part in litigation. This doctrine made the rape of a woman by her husband a legal impossibility since a man could not rape himself.

that the wife could not deny her husband any form of sexual activity,¹²⁹ and (4) the woman irrevocably consented to all types of sexual activity.¹³⁰ In the modern era, courts,¹³¹ commentators,¹³² and legislators have reacted to these justifications for the marital exemption with understandable derision. Wayne LaFave simply states: "None of the historical justifications for the marital rape exemption have any validity today."¹³³ As John F. Decker and Peter G. Baroni, note in their recent survey of rape law:

The exemption is rooted in a centuries-old extrajudicial statement and has persisted in the common law tradition ever since. The cases that have dealt with the marital exemption at length have exposed it as irrational and ungrounded, and have provided a blueprint for eliminating the marital exemption altogether.¹³⁴

It is now universally agreed that women are not the property of their husbands and that women have a separate legal existence from their husbands.¹³⁵ In an era when divorce rates are about 50 per cent,¹³⁶ the notion of an irrevocable contract between husband and wife may be similarly disputed.¹³⁷ Finally, rape law has evolved to the extent of recognizing that consent may be withdrawn at any time up to sexual

¹ William Blackstone, Commentaries *430 (footnote omitted).

¹²⁹ See Eskow, *supra* note 124, at 679-84 (discussing contract theory).

¹³⁰ See Jonathan Witmer-Rich, *It's Good to be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law*, 5 CRIM. L. & PHIL. 1, 12 (2011) (discussing the notion of irrevocable prospective consent via the marital exemption); R[1991] 2 All ER 257 (English case eliminating marital exemption, discussing the notion of consent, and concluding "It can never have been other than a fiction, and fiction is a poor basis for the criminal law.").

¹³¹ *People v. Destefano*, 121 Misc. 2d 113, 120 (N.Y. Co. Ct. 1983); see also *People v. Liberta*, 485 N.Y.S.2d 207 (1984) (discussing consent, property, and no separate legal existence arguments).

¹³² See e.g., UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 587-89; WAYNE R. LAFAVE, CRIMINAL LAW 923 (5th ed. 2010).

¹³³ LAFAVE, *supra* note 132, at 923.

¹³⁴ John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J.CRIM. L. & CRIMINOLOGY 1081, 1166 (2011).

¹³⁵ See LAFAVE, *supra* note 132, at 923; see also Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (discussing the elimination of coverture – the legal doctrine whereby the rights of a married woman were subsumed under those of her husband).

¹³⁶ See Divorce Rate (Most Recent) By Country, NATIONMASTER, available at http://www.nationmaster.com/graph/peo_div_rat-people-divorce-rate (2011). The current divorce rate in the United States is nearly 50 percent, the highest rate amongst countries world-wide. *Id.*

¹³⁷ See Witmer-Rich, *supra* note 130, at 12 (noting that all jurisdictions have dropped the irrevocable consent argument even if they have retained the marital exemption). He also finds: "The most recent American case to affirm an acquittal or reverse a conviction for rape or sexual assault based on the irrevocable consent rationale is from 1944. *State v. Ward*, 28 S.E.2d 785, 787 *S.C. 1944)." *Id.*

penetration, and even post-penetration,¹³⁸ rendering any notion of long-term, irrevocable consent as simply untenable.¹³⁹

Turning to Ohio law, reconsider the comments attached to the pattern Ohio Jury Instructions for forcible rape:

*The Committee believes that with the enactment of R.C. 2907.02(A)(2), forcible sexual conduct with a spouse is rape. The common law (and statutory) defenses of implied consent and “the wife is a man’s chattel” no longer exist.*¹⁴⁰

On its face, the logic of this comment is unassailable. The problem is that the repudiation of these ancient justifications does not go far enough in Ohio. Why is it only limited to cases involving forcible rape, when it should be applied much more broadly to encompass the other types of rape as well as the other sexual offenses? Could one seriously contend that women do not impliedly consent to forcible rape by their husbands, but they do impliedly consent to being drugged and then raped by their husbands? Similarly, could one argue the notion that “the wife is a man’s chattel” does not apply in the circumstance when a husband forcibly rapes his wife, but that it *does* apply in the situation when he uses drugs to subdue her so she cannot express lack of consent? To ask these questions is to answer them.

Despite the broad-reaching language of the comment to the jury instructions, Ohio’s sexual offenses continue to protect those who engage in sexual assaults that cannot be classified as “forcible,” such as when the assailant subdues his marital partner by drugging her or when he takes advantage of a marital partner with significant mental or physical impairments. Similarly, the repudiation of the marital unities theory and the marriage contract theory cannot be confined to a partial lifting of the marital exemption. These justifications do not furnish support for any type of marital immunity.

B. Modern Legal and Policy Justifications Cannot Support the Marital Exemption

“All of *the* prominent reasons used to justify marital rape rules, such as privacy and family harmony, fear of vindictive complaints, and problems of proof, have fared poorly in the face of equal protection and statutory challenges.”¹⁴¹

¹³⁸ See, e.g., Katlyn Hood, *State v. Baby: A Woman May Withdraw Consent for Sexual Intercourse After Penetration, and Continuation of Sexual Intercourse after Withdrawal of Consent through Force or Threat of Force Constitutes Rape*, 39 U. BALT. L.F. 114 (2008); Amy McLellan, *Post-Penetration Rape—Increasing the Penalty*, 31 SANTA CLARA L. REV. 779 (1991).

¹³⁹ Witmer-Rich, *supra* note 130, at 8-12.

¹⁴⁰ 2-CR 507 OJI 507.02(A)(1).

¹⁴¹ Nourse, *supra* note 104, at 965.

The modern defenders of the marital rape exemption, in contrast, submerge and deny the harm that the rule causes women. This has been good strategy for a reason. It is much more difficult to justify the harm that marital rape inflicts upon wives, and explain the absence of legal remediation, in a nation now formally committed to women's legal equality and the undoing of women's subjection at common law.¹⁴²

A second, more modern set of rationales or justifications for the marital exemption have taken the place of the traditional or historical ones. These rationales are as flawed as the ones they replaced. The most common modern justifications are: (1) marital unity should be protected against the intrusion of the state, (2) greater proof problems will arise with respect to rape in marriage, (3) women may lie about the fact of rape within marriage,¹⁴³ and (4) marital rape is not as serious an offense as other forms of sexual assault.¹⁴⁴ None of these rationales have held up on closer scrutiny; they have been sharply disputed by commentators, researchers, and courts.¹⁴⁵

Perhaps the most important modern justification of the marital exemption is that rape within marriage is less serious, damaging, or harmful than other forms of sexual violation — after all, the parties are married to each other and the woman has presumably had sexual intercourse with her husband on numerous occasions.¹⁴⁶ Joshua Dressler explains: “When intercourse is coerced on a given occasion in the marital relationship, the argument proceeds, the wife’s autonomy is less seriously violated than if the perpetrator were a stranger or someone with whom the victim had not indicated a general willingness to have sexual relations.”¹⁴⁷

¹⁴² Hasday, *Consent*, *supra* note 22, at 1504.

¹⁴³ Dressler notes: “Beyond this, it is odd at best for the law to take sides with a wrongdoer against his victim on the unproven assumption that the victims, as a group, will behave improperly in civil proceedings.” UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 588.

¹⁴⁴ LAFAVE, *supra* note 132, at 923-24 (discussing multiple modern justifications and counterarguments); UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 587-89 (discussing protection of marriage, protection of husband in divorce proceedings, and less serious harm rationales).

¹⁴⁵ See Siegel, *supra* note 37; UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 587-89; LAFAVE, *supra* note 132, at 923; *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (discussing and dismissing four more modern rationales for the marital exemption).

¹⁴⁶ Susan Estrich disputed the notion that “real” rape is only when the parties are strangers to one another, when force and violence is manifest, and when physical injuries are sustained by the victim. SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987). See also Emily J. Sack, *Is Domestic Violence a Crime? Intimate Partner Rape as Allegory*, 24 ST. JOHN’S J. L. COMM. 535 (2010) (“Just as marital rape is not truly considered ‘real’ rape. Perhaps we do not think that domestic violence deserves to be considered a ‘real’ crime.”).

¹⁴⁷ UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 588. See also *Marital Immunity*, *supra* note 2, at 1543 (“a number of scholars have argued that spousal sexual offenses in general are not harmful enough for the justice system to criminalize.”) In February 2015, a Utah lawmaker argued that sex with an unconscious wife is less criminal than sex with an unconscious first date. Juliet Lapidus, *In Utah, Wondering What Rape Really Is*, N.Y. TIMES (Feb. 4, 2015), http://takingnote.blogs.nytimes.com/2015/02/04/in-utah-wondering-what-rape-really-is/?_r=0.

Empirical data support the opposite conclusion.¹⁴⁸ The victims of marital rape do experience multiple physical, psychological, and emotional harms.¹⁴⁹ The bodily consequences of victimization include physical injuries, unwanted pregnancy, sexually transmitted diseases, and exposure to HIV and AIDS.¹⁵⁰ As one commentator states:

One of the biggest myths about marital rape is that “it’s no big deal” — that the woman says she’s tired and wants to go to bed, and the husband misunderstands. That’s not reality. A rape or sexual assault is a horrifying experience that is used as a means to degrade, humiliate and control. There is no way the crime can be rationalized or excused whether it happened between strangers or intimate partners.¹⁵¹

In fact, compelling evidence supports the conclusion that marital rape is *more* harmful than rape outside of marriage.

Research indicates that wife rape victims are more likely to be raped multiple times compared with stranger and acquaintance rape victims. In research with wife rape victims, most report being raped more than once, with at least 1/3 of the women reporting being raped more than 20 times over the course of their relationship (citations omitted). Women who experience wife rape suffer long lasting physical and psychological injuries as severe or more severe than stranger rape victims.¹⁵²

Similarly, Jill Elaine Hasday reports: “[T]he best available empirical studies report that marital rape is both widespread and extremely damaging, frequently causing even more trauma than rape outside of marriage.”¹⁵³

The psychological consequences of rape can be debilitating: “Despite commonly held views, the psychological reactions of victims of intimate partner rape can be far more severe than the response of those who have

¹⁴⁸ The *Liberta* court noted:

“Moreover, there is no evidence to support the argument that marital rape has less severe consequences than other rape. On the contrary, numerous studies have shown that marital rape is frequently quite violent and generally has *more* severe, traumatic effects on the victim than other rape.” *People v. Liberta*, 474 N.E.2d 567, 575 (N.Y. 1984) (emphasis in the original) (citations omitted).

¹⁴⁹ Dressler notes that rape causes different harms than those resulting from assault and battery. UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 588; Leslie Bender, *Teaching Torts as If Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL’Y & L. 115, 148-50 (1994) (arguing that tort law undervalues emotional as opposed to physical security and property claims, which harms women).

¹⁵⁰ *Man Rapes Drugged Wife*, COURIER MAIL, Aug. 2, 2001, at 5, available at 2001 WLNR 5640141 (Mrs. Hoibl experienced a host of gynecological problems as a result of her husband’s repeated rape of her while she was drugged).

¹⁵¹ Rhoda, *supra* note 2. In the same article about the Utah lawmaker resurrecting notions of less harm in marital rape scenarios, a representative of a local rape crisis center said, “Instead of dicing and parsing and saying, ‘Well, what about a wife if she’s asleep?’ just look at what is happening and the prevalence of sexual assault in our world. . . . It’s a tool of power. That might be why they’re parsing. They don’t want to look at what is going on around them.” Lapidus, *supra* note 147.

¹⁵² Patricia Mahoney, *The Wife Rape Fact Sheet*, <http://mainweb.v.musc.edu/vawprevention/research/wiferape.shtml>.

¹⁵³ Hasday, *Protecting Them from Themselves*, *supra* note 71, at 1471 (footnotes omitted).

suffered rape by a stranger, because in addition to all the other horrors, there is the sense of betrayal and destruction of any trust that once existed.”¹⁵⁴ Anderson points out: “[C]ontrary to popular belief, wife rape tends to be more violent and psychologically damaging than stranger rape.”¹⁵⁵ The sense of betrayal suffered by marital partners is considerable.¹⁵⁶

Research also confirms that sexual assault in marriage may be a precursor to homicide,¹⁵⁷ and that sexual assault within marriage must be understood as simply one category of spousal abuse and battering. Rather than viewing rape as a single isolated event in a marriage, sexual assault is part of the pattern of abuse that occurs in battering relationships.¹⁵⁸

Every day, three women in the U.S. are murdered by their current or former husbands or boyfriends, and a leading indicator of their deaths is sexual assault. David Adams, in his book “Why Do They Kill?” found that three-quarters of women he interviewed who survived nearly fatal attacks said their abusive partner had raped them.¹⁵⁹

Thus, the legal argument or public policy rationale that rape or other sexual assaults are less serious offenses when they occur in marriage rather than outside of it cannot be supported by either theory or fact.

C. *Drawing the Line at Force or Violence Privileges Other Forms of Coercion*

The marital rape exemption might also be understood as part of a larger trend in the history of rape law to keep the crime of rape narrow. The effect of narrowing the scope of rape law is to privilege a host of morally

¹⁵⁴ Sack, *supra* note 146, at 535.

¹⁵⁵ *Marital Immunity*, *supra* note 2, at 1475.

¹⁵⁶ Many of the victims discussed in the first section of this article expressed their deep sense of betrayal in being sexually assaulted by their spouses. See, e.g., *Man Rapes Drugged Wife*, COURIER MAIL, Aug. 2, 2001, at 5, available at 2001 WLNR 5640141.

¹⁵⁷ Sack, *supra* note 146, at 548 (“There is also evidence that batterers who rape their partners may be among the most dangerous perpetrators of domestic violence. . . . And victims of domestic violence who are also the victims of intimate partner rape are subject to more serious physical abuse and a greater risk of homicide.”).

¹⁵⁸ According to Hasday, “Many women’s experiences combine marital rape and wife beating, doubly undercutting the proposition that the exemption is protecting marriages that are otherwise peaceful, harmonious, and mutually supportive.” Hasday, *Consent*, *supra* note 22, at 1497. See also Sack, *supra* note 146; Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law’s Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819 (2011).

¹⁵⁹ Rhoda, *supra* note 2. Recall the Boren case from the beginning of this article. John Chapman, *Policeman Husband that Filmed Himself Raping His Unconscious Wife Slaughters Family*, DAILY AND SUNDAY EXPRESS (July 10, 2014), <http://www.express.co.uk/news/world/487866/Rapist-Police-Husband-Rape-Film-Drugged-Family-Death-Murder-Manslaughter-Shot-Shooting>; *Police: Officer Who Killed Family had Raped Wife*, YAHOO (July 7, 2014), <http://news.yahoo.com/police-officer-killed-family-had-raped-wife-235805261.html>.

blameworthy and socially intolerable behaviors. In this context it is impossible to ignore the feminist critique of the history of rape law,¹⁶⁰ namely that it privileges one gender at the expense of the other and that the legal rules are “‘boys’ rules’ applied to a boys’ fight.”¹⁶¹

Despite the gender-neutral language in most modern rape or sexual assault statutes, the vast majority of victims are women¹⁶² and the vast majority of perpetrators are men.¹⁶³ Thus, maintaining the marital immunity and lifting the exemption only in a very narrow set of circumstances actually privileges men to sexually exploit women. As Dorothy Roberts cogently argues in a slightly different context:

If rape is violence as the law defines it (weapons, bruises, blood), then what most men do when they disregard women’s sexual autonomy is not rape. If rape is committed only by violent men, then very few men are rapists. By defining most male sexual conduct as nonviolent, even when it is coercive, it has been possible to exempt a multitude of attacks on women’s autonomy from criminal punishment, or even critical scrutiny. The category of violence, far from punishing all sexual assaults, actually privileges most of them.¹⁶⁴

Similarly, a legal regime that abolishes the marital immunity when it comes to forcible rape, but continues to permit the immunity when it comes to rape of a drugged or substantially impaired victim perpetuates the privilege enjoyed by husbands to sexually assault their wives in these latter contexts.

¹⁶⁰ Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1118 (1986), (“Most of the time, a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. . . . In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims.”). “[If] there is one area of social behavior where sexism is entrenched in law - one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited - it is in the area of sex itself, even forced sex.” Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 814-15 (1991).

¹⁶¹ *Id.*

¹⁶² Michael Planty, et al., *Bureau of Justice Statistics, Female Victims of Sexual Violence*, 1994-2010, March 2013, “From 1995 to 2010, approximately 9% of all rape or sexual assault victimizations recorded in the NCVS [National Crime Victimization Survey] involved male victims [].” (figure omitted).

¹⁶³ In 2011, there were 11,934 male arrests and 135 female arrests for rape. *The FBI Uniform Crime Reports for 2011*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-33A>.

¹⁶⁴ Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 CHI.-KENT L. REV. 359, 362-63 (1993). See also CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 649 (1979) (arguing the legal definition of rape corresponds to “the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim’s, or women’s, point of violation.”). Roberts also points out: “I fear as much that disconnecting all seemingly nonviolent sexual coercion from sex accompanied by physical violence will obscure the common nature of both.” Roberts, *supra*, at 381. Susan Estrich concurs: “The ‘rape as violence’ approach may strengthen the case for punishing violently coerced sex, but it may do so at the cost of obscuring the case for punishing forced sex in the absence of conventional violence, the usual pattern in the simple rape.” Estrich, *supra* note 160, at 1150.

The logic of alleviating the marital exemption for forcible rape as compared to the other forms of rape is not unassailable.¹⁶⁵ To return to the example at the beginning of this article – when a husband drugs and then sexually assaults his wife – failure to criminalize this behavior seems indefensible when one considers the type of victim involved in these cases. Spouses who have been drugged or who lack the mental or physical capacity to consent to sexual conduct are deserving of *more, not less*, protection from the criminal justice system because they are the most vulnerable victims. As one commentator states with respect to similar provisions in Alaska¹⁶⁶ and Rhode Island:¹⁶⁷ “The logic of this approach is difficult to follow, since it denies state protection to those women least capable of defending themselves.”¹⁶⁸

Similarly, an argument that no real harm befalls victims who are drugged or incapacitated is deeply flawed. Anderson comments: “As a practical matter, the argument that incapacitated and unconscious rape are not harmful reveals ignorance of the perils of sexual penetration for a woman. A man who penetrates a woman when she is unconscious denies her the power to negotiate the use of contraceptives and other protection to prevent pregnancy and disease.”¹⁶⁹ Anderson also discusses the physical consequences for a woman who is subjected to sexual exploitation when she is in an unconscious state.¹⁷⁰ Thus, taken as a whole, these provisions have no internal logic or coherence, but rather appear to be arbitrary decisions by lawmakers.

A second major problem with statutorily enshrining the marital exemption to rape and other sexual offenses in Ohio is that no other criminal offenses have such an exemption. If the scenarios discussed at the beginning of this article had occurred in Ohio, the husband could not be prosecuted for any sexual offense, but he might face prosecution for another type of crime, such as assault, felonious assault, or corrupting another with drugs because these latter offenses do not contain a marital exemption.¹⁷¹ This means the sexual offenses are treated differently from all other crimes in Ohio. The “special treatment” of the sexual offenses

¹⁶⁵ Sack, *supra* note 146, at 538.

¹⁶⁶ See ALASKA STAT. § 11.41.432 (2014).

¹⁶⁷ See, e.g., R.I. GEN. LAWS § 11-37-2 (2014) (“A person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person, and if any of the following circumstances exist: (1) The accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.”).

¹⁶⁸ Sitton, *supra* note 77, at 279. The author continues: “Statutory rape is another offense from which allowance states frequently exempt spouses.” *Id.* at 280. This reflects the case in Ohio.

¹⁶⁹ *Marital Immunity*, *supra* note 2, at 1508. For a first-hand account of the harm of drugged rape, see Andrea Dworkin, *The Day I was Drugged and Raped*, THE NEW STATESMAN (June 5, 2000, 1:00 PM), <http://www.newstatesman.com/node/137791> (“I have been tortured and this drug-rape runs through it, a river of horror. I’m feeling perpetual terror, . . . I’m ready to die.”).

¹⁷⁰ *Marital Immunity*, *supra* note 2, at 1508.

¹⁷¹ OHIO REV. CODE ANN. §§ 2903.11, 2903.13, 2925.02 (West 2013), respectively.

through the imposition of the marital immunity represents a significant departure from the overall background rule that the criminal law should apply to all persons equally without exception.

D. The Marital Rape Exemption Violates Equal Protection of the Laws

Just as a factual matter, husbands experience the marital rape exemption by enjoying immunity from prosecution. Wives experience the marital rape exemption as the person who does not receive the protection of the criminal law for acts that would otherwise be considered serious crimes.¹⁷²

That these inequalities remain on the statute books should be surprising, not only because many believe that the marital rape exemption has been banished, but also because marital rape differentials have been widely held to be unconstitutional. All of the prominent reasons used to justify marital rape rules, . . . have fared poorly in the face of equal protection and statutory challenges.¹⁷³

Rape is a sex-based crime, the only crime in which men are the offenders and women the victims.¹⁷⁴

Some courts have held¹⁷⁵ and commentators have argued¹⁷⁶ that continuation of the marital immunity to rape law is a violation of state and federal constitutional law, more specifically the Equal Protection provisions.¹⁷⁷ Legal scholar Robin West comments “[t]he marital rape exemption denies married women protection against violent crime solely on the basis of gender and marital status. What possibly could be less rational than a statute that criminalizes sexual assault, and punishes it severely, unless the victim and assailant are married.”¹⁷⁸

Thus, the equal protection inquiry is as follows: if sexual offenses are designed to protect the sexual autonomy and physical integrity of Ohio residents, then why should married individuals receive only part of the

¹⁷² Hasday, *Consent*, *supra* note 22, at 1496.

¹⁷³ Nourse, *supra* note 104, at 965 (footnote omitted).

¹⁷⁴ Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1059 (1991).

¹⁷⁵ See LAFAVE, *supra* note 132, at 924 for a list of state courts that have found the marital exemption unconstitutional.

¹⁷⁶ See Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 Fla. L. Rev. 45 (1990). See also Theresa Fus, *Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches*, 39 Vand. J. Transnat'l L. 481 (2006) (advocating the use of equal protection analysis); Lawrence G. Sager, *Congress's Authority to Enact the Violence against Women Act: One More Pass at the Missing Argument*, 121 Yale L.J. Online (April 17, 2012), <http://www.yalelawjournal.org/forum/congresss-authority-to-enact-the-violence-against-women-act-one-more-pass-at-the-missing-argument> (arguing that women have been oppressed throughout history).

¹⁷⁷ West, *supra* note 176, at 45; see also FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 328-32 (2009) (discussing West's article).

¹⁷⁸ *Id.*

protections that the Ohio legislature designed for all other residents? Although these arguments are typically addressed to the courts in suits challenging legislative enactments as violating constitutional protections, legislators also have a duty to evaluate the potential impact of a criminal statute on constitutional rights.¹⁷⁹

A second type of equal protection argument might be made based on the fact that the sexual offenses are the only group of criminal offenses in Ohio that use the marital exemption to exclude certain classes of individuals (marital partners) from prosecution. If it is true that the vast majority of victims of sexual offenses (at least outside the prison context) are women and the vast majority of the perpetrators are men, then a rule that provides for special protection for male perpetrators is suspect. And the question naturally follows – why should males be protected from charges of rape or other forms of sexual assault when they are not protected in other criminal contexts such as murder, assault, or robbery?

E. Marital Rape as a Human Rights Violation

In nearly every country in the world, the most dangerous place for women is the home. While men find refuge there, for millions of women, the home is a prison and a torture chamber. The torture comes at the hands of men who claim to love them.¹⁸⁰

Women worldwide ages 15 through 44 are more likely to die or be maimed because of male violence than because of cancer, malaria, war and traffic accidents combined.¹⁸¹

In 1991, the English House of Lords decided *R. v. R.*, a case challenging the continued vitality of the marital exemption by holding that the immunity was no longer valid.¹⁸² The husband in *R.* sought an appeal to the European Court of Human Rights “arguing that to convict him would amount to an ex post facto conviction in violation of Article 7 of the European Convention on Human Rights.”¹⁸³ Before that appeal was heard, Parliament codified the elimination of the marital immunity.¹⁸⁴ In 1995, the European Court of Human Rights held there was no violation of the Human Rights Convention because the decision by the House of Lords was an incremental and reasonably foreseeable interpretation of the English

¹⁷⁹ LAFAVE, *supra* note 132, at 924 (“Sometimes this [reform] has been accomplished by state courts finding their marital exemption provisions unconstitutional, but more often it has come about as a result of legislative action.”).

¹⁸⁰ Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence against Women*, 33 WILLAMETTE L. REV. 773, 775 (1997).

¹⁸¹ Nicholas D. Kristof, Op-Ed., *Is Delhi So Different From Steubenville?*, NY TIMES (Jan. 13, 2013), <http://www.nytimes.com/2013/01/13/opinion/sunday/is-delhi-so-different-from-steubenville.html>.

¹⁸² *R. v. R.*, [1992] 1 AC 599.

¹⁸³ Fus, *supra* note 176, at 492.

¹⁸⁴ Criminal Justice and Public Order Act, 1994 C.33 (Eng.).

law.¹⁸⁵ In contrast, some authors have contended that recognition of a marital immunity to rape and other sexual offenses should constitute a human rights violation.¹⁸⁶

F. Ohio's Marital Exemption Scheme Defies the Prevailing Legal Norms of Statutory Clarity and Comprehensibility in Criminal Statutes

Punishment is sometimes spoken of as the purpose of the criminal law, but this is quite erroneous. The purpose of the criminal law is *to define* socially intolerable conduct, and to hold conduct within the limits which are reasonably acceptable from the social point of view. . . . An incidental but very important function of the criminal law is *to teach* the difference between right and wrong.¹⁸⁷

Understanding precisely how this [marital exemption] works can often be a rather complex process, rivaling the unraveling of tax code regulations.¹⁸⁸

Ohio's marital exemption in its rape and sexual offense provisions with its three discrete exceptions is a complicated and convoluted statutory scheme that defies easy description or understanding. Due process and public policy dictate that criminal statutes should be clear, rather than so vague or ambiguous that the average person would struggle to understand their meaning.¹⁸⁹ Dressler explains: "A corollary of the common law legality principle – one that is constitutionally enforceable through the Due Process Clause – is that a criminal statute must 'provide a person of ordinary intelligence fair notice of what is prohibited.'"¹⁹⁰ The void for

¹⁸⁵ Fus, *supra* note 176, at 516.

¹⁸⁶ See Felice D. Gaer, *Rape as a Form of Torture: The Experience of the Committee Against Torture*, 15 CUNY L. REV. 293 (2012). See also Diane Hickey, *The As Yet Unfulfilled Promise and Potential of European Union Human Rights Law*, 30 WOMEN'S RTS. L. REP. 647 (2009); Julie Goldscheid, *Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches*, 28 T. JEFFERSON L. REV. 355 (2006).

¹⁸⁷ ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 5-6 (3rd ed. 1982) (emphasis added). "In one of his most celebrated essays, Oliver Wendell Holmes explained that the law does not exist to tell the good man what to do, but to tell the bad man what not to do." Susan Estrich, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

¹⁸⁸ See Nourse, *supra* note 104, at 964:

How could the average citizen/advocate/reformer possibly untangle the Maryland statute? Indeed, even for scholars of rape law, the time and effort to try to discover the precise interconnections between the exemptions and their relationship to general nonspousal statutes is relatively exhausting and largely unknown. It is within this complexity that the norms of relationship live on and hold court, albeit silently. *Id.* at 967.

¹⁸⁹ "The due process clause of the Fourteenth Amendment requires that an accused have had fair warning at the time of his conduct that such conduct was made criminal by the State." *People v. Liberta*, 485 N.Y.S.2d 207, 219 (1984) (citing *Bouie v. City of Columbia*, 378 U.S. 347).

¹⁹⁰ UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 43 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

vagueness doctrine applies to criminal statutes because we seek to provide the population with fair notice of what conduct is legally permissible and what conduct crosses the line into criminal behavior.¹⁹¹ If criminal provisions fail to reach a minimal level of clarity, then they must be set aside. In addition to informing the public of the parameters of the criminal law, the void for vagueness doctrine operates to circumscribe the discretion of police and prosecutors in applying and enforcing the law.¹⁹² Thus, the virtues of statutory clarity and comprehensibility should not be underestimated when it comes to crafting criminal statutes; laws that are difficult to fathom, obtuse, and esoteric should be avoided.

In writing about Maryland's rape statute and its marital exemption, one author likens the understanding of the state's marital immunity to "the unraveling of tax code regulations."¹⁹³ Similarly, Ohio's piece-meal lifting of the exemption makes it very difficult to determine what degree of the marital exemption applies within the crime of rape as well as with respect to the other three sexual offenses. The tripartite lifting of the marital exemption requires close statutory analysis to determine the contours of "legal" conduct. Criminal statutes should clearly inform the public – as well as police, prosecutors, and defense attorneys – what constitutes an offense and what behavior falls within the purview of legal sanction. Failure to do so raises constitutional notice and due process issues.¹⁹⁴

In addition to the due process and notice arguments for statutory clarity, the rule of lenity or doctrine of strict construction provides that any

¹⁹¹ *Id.*

¹⁹² UNDERSTANDING CRIMINAL LAW, *supra* note 35, at 43.

¹⁹³ Nourse, *supra* note 104, at 964 gives this example:

The bottom line is that, in Maryland, if you accomplish sexual intercourse by threatening to kill your wife, you have not committed first-degree rape, but you have if you similarly threaten a stranger. Indeed, because of the way rape is defined, you can threaten to kidnap your wife or bring along a few others to "aid and abet" sexual intercourse, and this conduct could not be prosecuted as first-degree rape, although it would be if the victim were a stranger. Maryland, unfortunately, is not the only state in which this kind of complex "partial repeal" governs marital rape. *Id.* See MD CODE ANN., CRIM. LAW § 3-318 (West 2014) (formerly MD CODE Art. 27 § 464D) for the spousal defense statute.

¹⁹⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Id.*

ambiguity in a criminal statute must be resolved in favor of the accused.¹⁹⁵ As the United States Supreme Court directed:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals [or rapes], it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.¹⁹⁶

Thus, it is critical that the criminal law provide a reasonable person fair notice of what is prohibited conduct. Failure to do so inheres to the benefit of the putative defendant.

Victoria Nourse suggests a darker motive may exist for legislative ambiguity: “That old, discarded norms might survive post-reform is not only predictable because legislatures trade in deliberate ambiguity, but also because ambiguity nurtures overtly rejected norms. Ambiguity works to hide discarded or unlikely norms *by making it difficult to obtain the information about precisely what the norm is.*”¹⁹⁷ If Nourse is correct, the ambiguity inherent in Ohio’s treatment of the marital exemption in its rape and other sexual offenses actually provides a mechanism for perpetuating those norms. The ambiguity helps to retain the marital immunity and reinforce the characterization of some married women as underserving of the law’s protection. Based on the foregoing critiques, the next part offers suggestions for statutory reform.

VI. SUGGESTIONS FOR STATUTORY REFORM: ABOLISHING THE MARITAL EXEMPTION FROM OHIO’S RAPE AND OTHER SEXUAL OFFENSE PROVISIONS

We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.¹⁹⁸

“[I]f a person is unconscious, sex with him or her ‘is rape. Period. End of story.’”¹⁹⁹

To complete a reform begun more than 40 years ago and to solve the problem posed by this article – criminalizing the drugging and subsequent raping of one’s spouse – the Ohio General Assembly should take three

¹⁹⁵ *Rewis v. United States*, 401 U.S. 808, 812 (1971) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”).

¹⁹⁶ *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

¹⁹⁷ Nourse, *supra* note 104, at 960.

¹⁹⁸ R[1991] 2 All ER 257.

¹⁹⁹ Lapidus, *supra* note 147.

interrelated steps to abolish the marital exemption from the state's rape and sexual offense provisions.²⁰⁰ First, the legislators should eliminate any reference to "spouse" from the text of Ohio's sexual offenses.²⁰¹ Second, it should enact new language explicitly stating that marriage, cohabitation, or a previous sexual relationship between the perpetrator and victim is not legally relevant to the questions of whether a sexual offense occurred, or whether the victim consented, on the occasion in question. Third, the legislature should request that the Ohio Judicial Conference²⁰² devise and promulgate pattern jury instructions for sexual assault cases involving marital partners. These instructions would be based on the newly enacted language of the sexual offense provisions and inform juries that marriage, cohabitation, or a prior sexual relationship has no bearing on criminal liability or on the issue of consent.

A. Delete the Word "Spouse" from the Definitional Statute and the Operative Provisions of Ohio's Sexual Offenses

The first and most important step that the Ohio General Assembly should undertake in addressing the problem of the marital exemption is to delete the word "spouse" from all the major sexual offense provisions²⁰³ as well as the definitional statute preceding the operative statutes.²⁰⁴ This simple step would abolish the marital exemption in its entirety and make the existence of a marital relationship between the perpetrator and the victim legally irrelevant. Ohio law would then provide no safe haven for those who happen to be the "spouse" of the victim, bringing the law in line with modern thinking about marriage, women's roles in marriage, and the notion of what consent means within a marital relationship. It would acknowledge that marital rape is as harmful and worthy of criminal sanction as rape that occurs outside of marriage. It would eliminate any constitutional equal protection argument by equalizing the treatment of married and unmarried women. This change would also bring the sexual

²⁰⁰ The same recommendation applies to other state legislatures with similar types of marital rape immunities still on their books.

²⁰¹ See *infra* Part VI.A. LAFAVE, *supra* note 132, at 924 (discussing the action by some legislatures in "removing the words 'not his spouse,' 'to whom he is not married,' or 'unlawful' from an existing rape statute.").

²⁰² According to the statute creating the Ohio Judicial Conference, its purposes are "to study the coordination of the work of the several courts in Ohio, To encourage uniformity in the application of the law, rules, and practice throughout the state and within each division of the courts as an integral part of the judicial system of the state; To promote an exchange of experience and suggestions respecting the operation of the judicial; system, and To consider the business and problems pertaining to the administration of justice and to make recommendations for its improvement." OHIO REV. CODE ANN. § 105.91 (West 2013).

²⁰³ OHIO REV. CODE ANN. § 2907.02 (West 2013) (rape); OHIO REV. CODE ANN. § 2907.03 (West 2013) (sexual battery); OHIO REV. CODE ANN. § 2907.05 (West 2013) (gross sexual imposition); OHIO REV. CODE ANN. § 2907.06 (West 2013) (sexual imposition).

²⁰⁴ OHIO REV. CODE ANN. § 2907.01 (West 2013) (defining the various terms used throughout the revised code).

offenses in line with all other criminal offenses in the state, none of which segregate those who are married for special treatment or exemption.²⁰⁵ The elimination of the word “spouse” would simplify and clarify the prevailing legal rules so that putative perpetrators, prosecutors, defense attorneys, judges, and juries would not have to parse the complex language of Ohio’s three-tiered marital immunity. Thus, it would be irrelevant to criminal liability whether the marital partners were getting divorced, lived separately, or continued to cohabit. Finally, this simple step would complete a reform that the Ohio General Assembly began more than forty years ago and would align Ohio with the majority of American jurisdictions that have eliminated the marital exemption in its entirety.²⁰⁶

B. Enact a Provision Making Marriage, Cohabitation, or a Prior Sexual Relationship Between Perpetrator and Victim Legally Irrelevant

In addition to deleting the word “spouse” from the text of the sexual offenses, the Ohio General Assembly should enact a provision making marriage, cohabitation, or a prior sexual relationship between the offender and the victim legally irrelevant. While it appears that the first step should resolve the entire issue, some legal commentators offer a cautionary note. They contend that removing statutory language about spouses in the operative provisions of the relevant sexual offenses may be insufficient to abolish the marital exemption in practice. This is because some courts or jurors may interpret the operative statute’s silence as to marital status as consistent with historical views on the marital exemption (that it is alive and well) rather than its abolition.²⁰⁷

Consider one recent example of this phenomenon. In February, 2015, a Utah lawmaker proposed removing the phrase “has not consented” from a provision that made it sexual assault if “the victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist.”²⁰⁸ The legislator’s rationale for removing the phrase was that the language provided a potential loophole and was unnecessary because an unconscious victim cannot consent.²⁰⁹ However, a second Utah legislator was not so sure that this amendment was a good idea. He argued, “[i]f an individual has sex with their [sic] wife while she is unconscious, . . . a prosecutor could then charge that spouse with rape, theoretically.” That, he continued “makes sense in a first date scenario, but to me, not where people have a history of years of sexual

²⁰⁵ See *supra* Part V.C.

²⁰⁶ Hasday, *Protecting Them from Themselves*, *supra* note 71.

²⁰⁷ *Marital Immunity*, *supra* note 2, at 1553.

²⁰⁸ Lapidos, *supra* note 147.

²⁰⁹ *Id.*

activity.”²¹⁰ Other legislators noted that spousal rape is a very real and serious problem and agreed that sexual intercourse with an unconscious person is rape, pure and simple.²¹¹ This example demonstrates that even legislators may be confused about the parameters of criminal liability for sexual assault, reading into a statute that is silent on the subject an exclusion for marital partners that does not exist.

Thus, Ohio should preempt any potential future misunderstanding of the scope of the state’s sexual offenses by taking a second step: inserting language into those provisions clarifying that a marital relationship between the perpetrator and victim is not relevant to the question of whether a sexual offense has been committed or whether the victim consented to the sexual conduct or contact on the occasion in question. This step would be similar to the language enacted in 1986 when Ohio abolished the marital exemption in forcible rape cases: “It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were co-habiting at the time of the commission of the offense.”²¹²

Examples of this type of language are found in other states that have eliminated the marital exemption. For instance, Colorado’s statute provides:

Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense under this part 4 unless such a defense is specifically set forth in the applicable statutory section by having the elements of the specifically exclude a spouse.²¹³

New Hampshire uses a slightly different approach: “An actor commits a crime under this chapter even though the victim is the actor’s legal spouse.”²¹⁴ The statute in Wisconsin states: “A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.”²¹⁵ Thus, the safest course is to eliminate language pertaining to spouses and also to insert an explicit provision stating that the marital exemption to rape and other sexual offenses is abrogated.

Although salutary in making clear that silence does not denote acceptance of the marital immunity, some of these provisions may not go far enough. According to some legal commentators,²¹⁶ the marital

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² OHIO REV. CODE ANN. § 2907.02(G) (West 2013).

²¹³ COLO. REV. STAT. ANN. 18-3-409 (West 2010).

²¹⁴ N.H. REV. STAT. ANN. § 632-A:5(6) (2010).

²¹⁵ WIS. STAT. ANN. § 940.225(6) (West 2010).

²¹⁶ *Id.* See also CATHARINE A. MACKINNON, SEX EQUALITY: RAPE LAW 870 (2001) (“In light of the widespread social and legal reluctance to effectively address rape among familiars, the marital rape

exemption is merely one incarnation of a larger problem systemic to rape law — the privileging of perpetrators who have had prior sexual relationships with their victims.²¹⁷ In other words, offenders who have cohabiting relationships or even more causal sexual relationships with victims may be able to exploit those prior relationships in arguing consent. To be even more explicit about the elimination of the marital exemption and to capture other types of non-marital sexual relationships, Professor Michelle Anderson proposes the following statutory language:

A prior or subsequent sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense and shall not affect the grading of a sexual offense. The sole fact that the complainant consented to the same or different acts with the defendant on other occasions shall not be a sufficient basis for inferring consent on the instance in question. The mere existence of such a sexual relationship shall not be a sufficient basis for the defendant to claim a mistake of fact as to consent defense.²¹⁸

Only by explicitly directing the fact finder that such a prior relationship between the offender and the victim is not legally relevant, Anderson argues, will the inherent and unspoken bias created by that relationship be overcome.

Three states and the federal government have laws that embrace Anderson's perspective. California has a statute clarifying that a prior relationship between the victim and defendant does not bear on the question of consent:

In prosecutions under Section 261 [rape], 262 [spousal rape], 286 [sodomy], 288a [oral copulation], or 289 [penetration by foreign object], in which consent is at issue, "consent shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

exclusion can be seen as only the most formal expression of a tendency that extends across the design and deep into the administration of the law of rape to make closeness a proxy for consent.”)

²¹⁷ Norwegian psychologist Christie discusses the ideal victim in a rape case—not knowing the defendant is one of the characteristics. In other words, a pre-existing relationship between the defendant and the victim damages a rape case. Hannah Brenner, *Beyond Seduction: Lessons Learned About Rape, Politics, and Power From Dominique Strauss-Kahn and Moshe Katsav*, 20 MICH. J. GENDER & L. 225 (2013). The Model Penal Code made rape a less serious offense if the victim was a voluntary social companion of the defendant—one of its most controversial provisions. MODEL PENAL CODE § 213.1(1) (1962); Deborah Denno, *Commentary Symposium: Model Penal Code Second: Good or Bad Idea?: Why the Model Penal Code's Sexual Offense Provisions Should be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003).

²¹⁸ *Marital Immunity*, *supra* note 2, at 1543.

A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289.²¹⁹

Colorado and Minnesota have inserted similar language in their respective definitions of consent in the context of their sexual offense chapters. Colorado's definition provides:

"Consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. *A current or previous relationship shall not be sufficient to constitute consent* under the provisions of this part 4. Submission under the influence of fear shall not constitute consent.²²⁰

Minnesota's definition of consent includes the following language:

"Consent" means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a *prior or current social relationship* between the actor and the complainant or that the complainant failed to resist a particular sexual act.²²¹

Finally, the federal Uniform Code of Military Justice, that governs the prosecution of persons in the armed forces, provides:

(A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. *A current or previous dating or social or sexual relationship by itself* or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious.²²²

²¹⁹ CAL. PEN. CODE § 261.6 (2010) (explanatory parenthetical information and emphasis added).

²²⁰ COLO. REV. STAT. ANN. § 18-3-401(1.5) (2013).

²²¹ MINN. STAT. § 609.341 subd. 4(a) (2013) (emphasis added).

²²² 10 U.S.C.A. § 920, Art. 120(g)(8)(A), (B) (2013) (emphasis added). Ohio has adopted a version of this Uniform Code for cases arising within the military in Ohio. The relevant provisions are:

(L)(1) An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from an accused's use of force, threat of force, or placing another person in fear does not constitute consent. *A current or previous dating relationship by itself* or the manner of dress of a person involved with the accused in the sexual conduct does not constitute consent.

Undoubtedly, foresight in anticipating and resolving questions of statutory interpretation is a hallmark of legislative acumen in general. In a field of law as fraught with peril as rape law, such legislative foresight is highly desirable, if not essential.

C. Develop and Promulgate Ohio Pattern Jury Instructions with Appropriate Commentary

As a third and final step, the Ohio General Assembly should encourage the Ohio Judicial Conference to develop a set of pattern jury instructions that clearly articulates Ohio's rejection of the marital exemption and a presumption of consent based on a current or former relationship between the victim and the accused. This third step is critical because these reforms will prove effective only if prosecutors, judges, and juries understand that marital status is irrelevant in adjudicating sexual offenses.²²³ When the Ohio legislature partially lifted the marital exemption with respect to forcible rape, a comment was added to the Pattern Jury Instructions on rape stating: "*forcible sexual conduct with a spouse is rape. The common law (and statutory) defenses of implied consent and 'the wife is a man's chattel' no longer exist.*"²²⁴ In the same way, it is important to signal that neither the historical nor more modern policy justifications for the marital exemption still apply in cases of rape or other sexual offenses involving spouses.

Jury instructions in rape cases have been the subject of considerable controversy. American jurisdictions used to routinely give an instruction that encapsulated Matthew Hale's cynical views about rape: "[I]t must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, [though] never so innocent."²²⁵ Some commentators have argued that the prevalence of rape myths in society and amongst both judges and jurors²²⁶ make rape and other sexual assault cases an area particularly in need of jury

(2) A person cannot consent to sexual conduct if the person is substantially incapable of any of the following:

(a) Appraising the nature of the sexual conduct due to mental impairment or unconsciousness resulting from consumption of alcohol, drugs, or a similar substance or any other cause or to mental disease or defect that renders the person unable to understand the nature of the sexual conduct[.] OHIO REVISED CODE ANN. § 5924.120 (West 2014) (emphasis added).

Thus, military members are given more protection from sexual offenses while stationed in Ohio than they would be if they had not been in the military. *Id.*

²²³ *Marital Immunity*, *supra* note 2, at 1547 ("This new law on sexual offenses by intimates would authorize prosecutors to obtain jury instructions that would limit the jury's ability to infer consent from a prior sexual relationship between the parties.").

²²⁴ 2-CR 507 OJI 507.02(A)(1).

²²⁵ HALE, *supra* note 125, at 634.

²²⁶ Torrey, *supra* note 174, at 1017.

instructions.²²⁷ This third step completes the two earlier reforms by addressing the problem on a less abstract, more concrete basis by educating the fact finder about the relevant law and recent changes to it.

In summary, the Ohio General Assembly should take these three steps: (1) eliminate references to "spouse" in its sexual offense provisions, (2) explicitly state that marriage, cohabitation, or a previous sexual relationship between offender and victim is legally irrelevant to charges of rape and other sexual offenses, and (3) encourage the creation of jury instructions that encapsulate the new law abrogating the marital exemption. In concert, these steps would eliminate the marital immunity in its entirety. This will demonstrate that all Ohioans, including those who are married, are afforded the full protection of the criminal statutes outlawing sexual offenses. These steps would resolve the problem of statutory ambiguity by clarifying that not only marriage but other types of intimate sexual relationships as well do not privilege assailants by protecting them from criminal charges. Finally, they would communicate the results of this legislative mandate to the relevant decision makers in our criminal justice system – the jury.

VII. CONCLUSION

Although the political climate was favorable, [rape reform] proposals often encountered resistance, particularly from defense attorneys within state legislatures, who argued that the proposed changes would unfairly impinge on the rights of defendants. Thus, reformers in many jurisdictions were forced to delete changes from their reform packages or to substitute weaker versions of particular changes. . . . In a number of jurisdictions, reform bills were passed only after proponents abandoned their attempts to eliminate the marital exemption for rape or agreed to a number of exceptions to the rape shield statute.²²⁸

More than forty years ago, and most recently in 1986 after considerable debate, controversy, and ultimately compromise,²²⁹ the Ohio General Assembly partially lifted the marital exemption, clearing the way for the criminal prosecution of perpetrators for rape and other sexual offenses within marriage under a limited set of circumstances. Perhaps, the most

²²⁷ See, e.g., Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203 (1997) (discussing the efficacy of simple jury instructions telling jurors that "she asked for it" is not a defense).

²²⁸ Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 121-22 (1999) (footnotes omitted). See also RUSSELL, *supra* note 119, at 18 (1990) (quoting state legislators in Florida and California). Nourse argues that "Almost all controversial legislation—and that includes rape reform—is purchased at the cost of deliberate ambiguity. No piece of major legislation can obtain the collective consensus required by legislatures without compromise." Nourse, *supra* note 104, at 958-59.

²²⁹ In her article, Siegel explored in some detail the move to abolish the marital immunity in Ohio. Siegel, *supra* note 37, at 369-70; Spohn, *supra* note 228, at 117. See also RUSSELL, *supra* note 119, discussing legislation in other states.

important of these circumstances is when the defendant uses force or threat of force to compel submission by the victim.²³⁰ From March 7, 1986 when the last amendment took effect until today, no further significant²³¹ progress has been made in the abolition of the marital exemption from Ohio's rape statute or its other sexual offenses. Yet, in the three decades since the legislature's partial lifting of the marital immunity much has changed. A majority of American jurisdictions has done away with the marital immunity in its entirety, and no jurisdiction in the United States continues to use the full marital rape exemption.²³² England²³³ and a number of countries around the world have eliminated the exemption.²³⁴ There has been an avalanche of scholarly books²³⁵ and articles²³⁶ advocating the complete abolition of the marital immunity. Courts, legislatures, and commentators have uniformly rejected the old policy rationales for the exemption as outdated notions of marriage and women's roles within marriage.²³⁷ Likewise, more "modern" justifications have been severely critiqued and dismissed as indefensible.²³⁸ Empirical research has revealed the harm suffered by those who are raped or sexually

²³⁰ OHIO REV. CODE ANN. § 2907.02(G) (West 2013).

²³¹ In 1990, the legislature did slightly alter the definition of spouse in OHIO REV. CODE ANN. § 2907.01 (L) (2) & (3), such that the word "alimony" was replaced by "legal separation."

²³² A recent article reports that "at least twenty-four states retain some form of an exemption. These states criminalize a narrower range of offenses if committed within marriage, subject the marital rape they recognize to less severe sanctions, and/or create special procedural obstacles to marital rape prosecutions." Hasday, *Protecting Them from Themselves*, *supra* note 71, at 1465. *But see Marital Immunity*, *supra* note 2, at 1522.

²³³ *R v. R* [1991] 2 All ER 257 (The House of Lords called it anachronistic and offensive.) Subsequently, Parliament codified the elimination of the marital immunity. Criminal Justice and Public Order Act, 1994 (Eng.); Fus, *supra* note 176, at 482.

²³⁴ According to one source, "By the time marital rape was criminalized in England, it was already illegal in Scotland, eighteen American states, three Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, the Soviet Union, Poland, and Czechoslovakia." Francis Gibb, *Lords Say Rape is Rape in or out of Marriage*, *TIMES* (London), Oct. 24, 1991, available at 1991 LEXIS, News Library, UK News Stories File. *See also* Wendy Larcombe & Mary Heath, Case Note, *Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: PGA v The Queen*, 34 SYDNEY L. REV. 785 (2012) (discussing Australian approach); Morgan Lee Woolley, Note, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269 (2007) (describing the international trend to urge criminalization of marital rape). Sonya A. Adamo, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries*, 4 AM. U. J. INT'L. & POL'Y 555 (2012).

²³⁵ DAVID FINKELHOR & KERSH YLLO, LICENSE TO RAPE: SEXUAL VIOLENCE AGAINST WIVES (1985); RUSSELL, *supra* note 119; PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH (Jana L. Jasinski & Linda M. Williams eds. 1998).

²³⁶ *See e.g.*, Judith A. Lincoln, *Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape*, 35 WAYNE L. REV. 1219 (1995); Sallee Fry Waterman, *For Better or Worse: Marital Rape*, 15 N. KY. L. REV. 611 (1988); Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman's Right to Privacy*, 11 GOLDEN GATE U. L. REV. 717 (1981).

²³⁷ *People v. Liberta*, 485 N.Y.S.2d 207, 213 (1984); Siegel, *supra* note 37, at 378 ("The national campaign for complete abolishment of the marital rape exemption has made great strides in its attempt to legally change the sexist and archaic ideology that a woman is the property of her husband.).

²³⁸ *Liberta*, 485 N.Y.S.2d at 213-15; Siegel, *supra* note 37, at 378.

assault by their spouses.²³⁹ Litigants launching constitutional Equal Protection attacks on state rape statutes and their marital immunities have succeeded and been emulated throughout the country.²⁴⁰ In 1994, the United States Congress passed the Violence Against Women Act²⁴¹ and awareness about domestic violence has blossomed in the intervening years. Today, in an increasingly global or transnational world, the treatment of women in and outside of marriage has been characterized as a major human rights concern.²⁴²

A series of recent, high-profile cases involving husbands who drugged and raped their wives, sometimes videotaping these sexual assaults, have highlighted the injustice of the marital rape exemption in Ohio. These cases should provide the impetus for the Ohio legislature to rethink the continued vitality of the marital exemption in its rape and other sexual offenses. The cases illustrate in graphic detail the harm that befalls women in marriage, not just when the offender uses his fists but when he subdues his victim wife with intoxicating substances or engages in sexual contact with a spouse who is unconscious or unaware of the sexual act. For those reasons and the other rationales presented throughout this article, Ohio should demonstrate its respect for women's sexual autonomy, physical integrity, and human dignity by criminalizing all acts of sexual aggression committed against them regardless of whether such heinous acts are committed within or outside of marriage. The marital exemption to rape and other sexual offenses should be abolished in its entirety.

APPENDIX I

The Three Statutory Exceptions to the Marital Exemption in Ohio's Rape and Sexual Offense Provisions

I. Narrowest Exception with Broadest Applicability: The Definition of Spouse

OHIO REV. CODE ANN. § 2907.01 (West 2013) Definitions (emphasis added)

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

When the parties have entered into a written separation agreement authorized by section 3103.06 of the Revised Code;

During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation;

²³⁹ See *supra* notes 148-59 and accompanying text.

²⁴⁰ See Decker & Baroni, *supra* note 134, at 1165.

²⁴¹ Violence Against Women Act, 42 U.S.C. §§ 13701 - 14040 (1994).

²⁴² See *supra* Part V.E.

In the case of an action for legal separation, after the effective date of the judgment for legal separation.

OHIO REV. CODE ANN. § 2907.02 (West 2013) Rape (emphasis added)

(A)(1) No person shall engage in sexual conduct with another who is *not the spouse* of the offender . . . , when any of the following applies: . . .

OHIO REV. CODE ANN. § 2907.03 (West 2013) Sexual Battery (emphasis added)

No person shall engage in sexual conduct with another, *not the spouse* of the offender, when any of the following apply: . . .

OHIO REV. CODE ANN. § 2907.05 (West 2013) Gross Sexual Imposition (emphasis added)

No person shall have sexual contact with another, *not the spouse* of the offender; cause another, *not the spouse* of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: . . .

OHIO REV. CODE ANN. § 2907.06 (West 2013) Sexual Imposition (emphasis added)

No person shall have sexual contact with another, *not the spouse* of the offender; cause another, *not the spouse* of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: . . .

II. Middle Exception with Moderate Applicability: Rape Statute's Living Separate and Apart Language

OHIO REV. CODE ANN. § 2907.02 (West 2013) Rape (emphasis added)

(A)(1) No person shall engage in sexual conduct with another . . . who is *the spouse of the offender but is living separate and apart from the offender*, when any of the following applies: . . .

III. Broadest Exception with Narrowest Applicability: Forcible Rape

OHIO REV. CODE ANN. § 2907.02 (West 2013) Rape (emphasis added)

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were *married or were cohabiting* at the time of the commission of the offense.