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# The Marital Rape Exemption: Evolution to Extinction

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### AUTHOR'S NOTE:

Ohio has recently amended its Rape statute to reflect many of the views set forth in this Note. Particularly, § 2907.02 (G) provides that it is not a defense to a rape charge that the offender and the victim were married or were cohabitating at the time of the commission of the offense. The amendment became effective July 1, 1996.

[A] female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse to her master the last familiarity. Not so the wife: however brutal a tyrant she may unfortunately be chained to-though she may know that he hates her, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him-he can claim her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.<sup>1</sup>

### I. INTRODUCTION

Historically, a man could not be prosecuted for raping his wife.<sup>2</sup> This inability to prosecute was based on the common law definition of rape itself,<sup>3</sup> which exempted husbands from criminal liability.<sup>4</sup> Since the late 1970's, however, several states have partially or completely abolished the common law marital rape exemption.<sup>5</sup> Notably, the abolishment has been accomplished through both legislative enactments and judicial decisions.<sup>6</sup> Those seeking to completely eradicate the marital rape exemption have not enjoyed success in

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<sup>1</sup>JOHN S. MILL, *The Subjection of Women*, in *ON LIBERTY AND OTHER ESSAYS* 226 (E. Neff ed. 1926).

<sup>2</sup>DAVID FINKELHOR & KERSTI YLLO, *LICENSE TO RAPE* 1 (1985)[hereinafter FINKELHOR & YLLO].

<sup>3</sup>Common law rape was defined as "the carnal knowledge of a woman forcibly and against her will." 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*210.

<sup>4</sup>See SUSAN BROWNMILLER, *AGAINST OUR WILL* 380 (1975). The exemption of husbands from rape prosecutions can be traced to our biblical forefathers interpretation of the definition of rape. Any carnal knowledge outside the marriage contract was deemed unlawful, while any carnal knowledge within the marriage contract was considered lawful. *Id.*

<sup>5</sup>Oregon, in 1977, was one of the first states in the United States to completely abolish the marital rape exemption from their statute, following Nebraska's lead in 1976. This was the beginning of a trend to change and abolish the marital exemption throughout the United States. See OR. REV. STAT. §§ 163.305-163.375 (1991); NEB. REV. STAT. § 28-319 (1991).

<sup>6</sup>See DIANA E. H. RUSSELL, *RAPE IN MARRIAGE* 375-82 (1990) (Appendix II provides an updated state-by-state analysis of what the marital rape exemption law is in every state).

every state. Today there are still a large number of states which have not repealed the exemption totally, but have instead permitted a partial exemption allowing a husband to be exempt from prosecution for "raping" his wife under certain circumstances.<sup>7</sup> Ohio still retains such a partial exemption.<sup>8</sup>

It is the position of this Note that true equality between women and men can never exist until every state has completely abolished the marital rape exemption. This abolishment would give every woman, married or unmarried, the freedom to control her own body.<sup>9</sup> The purpose of this Note is to encourage legislators, and those who influence them across the United States, to complete the abolishment of the marital rape exemption. Part II of this Note presents an analysis of the common law origins and legal justifications for the marital exemption. Part III examines the progressive groundbreaking states which have set the pace in the national campaign for complete abolishment. In addition, a current breakdown of every state's law will also be discussed. In Part IV, Ohio's handling of the marital rape exemption will be examined, and the debate surrounding the need for reform of Ohio's marital rape law will be closely analyzed. Part V concludes by suggesting ways in which the complete abolishment of spousal immunity may be achieved to promote equality for women in the legal system.

## II. THE HISTORICAL AND LEGAL BACKGROUND OF THE MARITAL EXEMPTION

### A. *The Exemption*

An unsupported, extrajudicial statement made by British jurist, Sir Matthew Hale gave birth to the marital rape exemption at common law when he declared "[b]ut the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."<sup>10</sup> For more than 330 years this statement has been the justification for the marital rape exemption, as well as serving as the backbone for judicial recognition of spousal immunity in the United States since 1857.<sup>11</sup>

Hale's lack of authority for the marital exemption was first criticized by the English Justice Field as early as 1888, when he stated "[t]he authority of Hale

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<sup>7</sup>*Id.* at 23.

<sup>8</sup>See OHIO REV. CODE ANN. § 2907.02(A)(1)(a) (Anderson 1993).

<sup>9</sup>Martin D. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33, 51 (1982).

<sup>10</sup>1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (Emlin ed. 1736).

<sup>11</sup>In *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489 (1857), the court, using Sir Hale's statement as authority, held that a husband could not be convicted of raping his wife. This Massachusetts case was the first in the United States to adopt Sir Hale's statement as law. Several other courts followed. See, e.g., *State v. Haines*, 25 So. 372, 372 (La. 1899); *Frazier v. State*, 86 S.W. 754, 755 (Tex. Crim. App. 1905).

C.J. on such matter is undoubtedly as high as any can be but no other authority is cited by him for this proposition and I should hesitate before I adopt it."<sup>12</sup> Hale's lack of authority has led many courts to criticize his statement and to rule that the marital exemption is not implicit in the common law.<sup>13</sup> Despite these rulings, and the fact that Hale was known as a "rabid woman-hater,"<sup>14</sup> Hale's statement has traditionally been accepted as the foundation for spousal immunity. Indeed, several additional theories for the marital rape exemption have evolved from this unsupported statement.

## B. *The Common Law Origins for the Marital Rape Exemption*

### 1. Implied Consent and Contract Theory

The most common rationale for the marital rape exemption is Hale's notion that a marriage constitutes a contract. The terms of this contract include a wife's irrevocable consent to have sexual intercourse with her husband, whenever he wishes.<sup>15</sup> This has fostered the notion that a husband has a "marital right" to sexual intercourse. According to the theory of implied consent, marital rape can never occur because all sexual contact within a marriage is assumed to be consensual.<sup>16</sup>

The notion of a husband's implied contractual right to sex has been criticized on several grounds. First, implied consent in rape law is inconsistent with the notion of consent in all other areas of criminal law.<sup>17</sup> The law does not allow a

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<sup>12</sup>See *Regina v. Clarence*, 22 Q.B.D. 23, 57 (Cr. Cas. Res. 1888) (Field, J., dissenting).

<sup>13</sup>*Weishaupt v. Commonwealth*, 315 S.E.2d 847, 850 (Va. 1984).

Hale's statement was not law, common or otherwise. At best it was Hale's pronouncement of what he observed to be a custom in 17th century England. Yet, unlike other customs which form the basis of common law, it nowhere appears that Hale, in making his statement, set forth a general rule of conduct of such long-standing acceptability . . .

*Id.* See also *State v. Smith*, 426 A.2d 38, 41 (N.J. 1981), where the court also held that since there was no authority cited for Hale's statement, "[s]uch a declaration cannot itself be considered a definitive and binding statement of the common law, although legal commentators have often restated the rule since the time of Hale without evaluating its merits."

<sup>14</sup>FINKELHOR & YLLO, *supra* note 2, at 163. Some have argued that Hale "made his mark among his contemporaries by burning women at the stake as witches." *Id.*

<sup>15</sup>BROWNMILLER, *supra* note 4, at 380.

<sup>16</sup>Anne L. Buckborough, Note, *Family Law: Recent Developments in the Law of Marital Rape*, 1989 ANN. SURV. AM. L. 343, 345. For a discussion on the common law origin of implied consent, see generally Sallee F. Waterman, Comment, *For Better or Worse: Marital Rape*, 15 N. KY. L. REV. 611, 613-14 (1988); Abigail A. Tierney, Comment, *Spousal Sexual Assault, Pennsylvania's Place on the Sliding Scale of Protection from Marital Rape*, 90 DICK. L. REV. 777, 781 (1986); Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 311-13 (1977) [hereinafter Note, *Marital Rape Exemption*].

<sup>17</sup>Maria Pracher, Note, *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, 11 GOLDEN GATE U. L. REV. 717, 730 (1981).

person to consent to serious bodily harm or injury inflicted by another.<sup>18</sup> To the contrary, the state has a compelling interest in protecting its citizens from serious bodily harm. Likewise, such an interest bars the state from recognizing a theory of implied consent to the tremendous harms resulting from forced sexual intercourse.<sup>19</sup> A woman may consent to sexual intercourse with her husband when she desires, but to assume that a married woman consents to be harmed exceeds the limits of the law.<sup>20</sup>

The most widespread criticism of the implied consent theory is that the theory does not exist outside of rape law.<sup>21</sup> Domestic relations law shows that in several instances a woman may withhold consent to sexual intercourse with her husband.<sup>22</sup> Therefore, if she can withhold her consent from her husband's demands at specific instances during marriage, the implied consent theory undercuts the basic rationale for upholding spousal immunity.<sup>23</sup> For these reasons the doctrine of implied consent has been widely criticized by several courts and is thus generally rejected as a justification for the marital rape exemption.<sup>24</sup>

The contract theory, also based on Hale's statement, is intertwined with the implied consent theory. Under the contract theory, Hale stated that when a woman marries, she gives up her rights to her body because she has formed a contract with her husband that cannot be retracted.<sup>25</sup> Those opposed to the marital rape exemption suggest that the matrimonial contract is not a valid

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<sup>18</sup>*Id.*

<sup>19</sup>Jan M. Glasgow, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 J. FAM. L. 565, 567 (1980).

<sup>20</sup>Pracher, *supra* note 17, at 730. *See also* FINKELHOR & YLLO, *supra* note 2, at 165. A 1967 opinion of an Israeli Judge stressed that any imposition of harm to a woman will nullify the implied consent to sexual intercourse. "Even though a woman agrees by her marriage to live with her husband as man and wife, she does not thereby agree to suffer severe bodily harm." *Id.*

<sup>21</sup>Pracher, *supra* note 17, at 730-31. *See also* Glasgow, *supra* note 19, at 567-68.

<sup>22</sup>Glasgow, *supra* note 19, at 568. These instances include the fact that divorces have been granted when there have been excessive sexual demands made upon the wife which were cruel and demeaning. Also, in divorce law there is the legal concept of "condonation" which states that the wife has a right to refuse sexual intercourse with her husband to avoid condoning his marital disloyalties. *Id.* *See also* Note, *Marital Rape Exemption*, *supra* note 16, at 312. Courts have in several cases refused to grant husbands divorces because their wives refused to have sex with them. *Id.*

<sup>23</sup>Glasgow, *supra* note 19, at 568.

<sup>24</sup>*See* State v. Smith, 426 A.2d 38, 42 (N.J. 1981); *Accord* People v. DeStefano, 467 N.Y.S.2d 506, 514 (Suffolk County Ct. 1983); Weishaupt v. Commonwealth, 315 S.E.2d 847, 850 (Va. 1984).

<sup>25</sup>HALE, *supra* note 10.

contract at all.<sup>26</sup> "[I]ts provisions are unwritten, its penalties unspecified, and the terms of the contract are typically unknown to the 'contracting' parties. Prospective spouses are neither informed of the terms of the contract nor are they allowed any options about these terms."<sup>27</sup>

Two additional arguments have been made to discredit the contract theory. First, under contract law, private parties are not permitted to use self-help methods to remedy a contract breach; normally this must be done through the courts.<sup>28</sup> Further, the remedy for breach of contract for personal services is not specific performance. Personal services are unique, and contract law does not require a person to perform against her will.<sup>29</sup> Hence, even if it were to be accepted that a woman breached the marital contract by not having sexual intercourse with her husband, the husband should not be able to enforce the contract by physically forcing his wife to have sexual intercourse.<sup>30</sup> The fact that the matrimonial "contract" does not resemble a true contract at all is one of the strongest legal arguments for its outright rejection.<sup>31</sup>

## 2. Women as Property

Another common law origin which was a building-block in the foundation for the marital rape exemption was the idea that a husband owned his wife as chattel. Since a husband could not take what he already owned, a husband was no more capable of raping his wife than an owner was of stealing his own property.<sup>32</sup> Since women were regarded as property, the common law treated rape not as a crime against women, but rather as a violation of a man's property interest.<sup>33</sup> The rape laws were concerned with protecting a husband's property interest in his wife's fidelity, and a father's interest in his daughter's virginity.<sup>34</sup>

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<sup>26</sup>Lenora Weitzman, Note, *Legal Regulations of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1170 (1974).

<sup>27</sup>*Id.* See generally ROSEMARIE TONG, WOMEN, SEX, AND THE LAW 95 (1984).

<sup>28</sup>Pracher, *supra* note 17, at 729.

<sup>29</sup>*Id.* See also Geannie A. Morris, Note, *The Marital Rape Exemption*, 27 LOY. L. REV. 597, 598 (1981).

<sup>30</sup>Susan Barry, *Spousal Rape: The Uncommon Law*, 66 A.B.A. J. 1088, 1088 (1980). It is also suggested that a contract does not exist at all because there is not an objective manifestation of intent to agree. A bride does not agree to give up her right to bodily freedom or to any sexual force or brutality. *Id.*

<sup>31</sup>In *State v. Smith*, 372 A.2d 386, 390 (Essex County Ct. 1977), the court rejects the application of contract law to marital rape because "[s]uch a mechanical application of principles of contract law are illogically applied in the area of forcible sexual invasions." *Id.*

<sup>32</sup>Charlotte L. Mitra, "....For She Has no Right or Power to Refuse Her Consent", 1979 CRIM. L. REV. 558, 560.

<sup>33</sup>Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986) [hereinafter Note, *To Have and To Hold*].

<sup>34</sup>*Id.* Rape of an unmarried women decreased her value to a future husband, and

The notion of women as property, however, was founded on premises which are no longer prevalent in our society and which have strongly been rejected in our legal system today.<sup>35</sup>

### 3. Marital Unity

The final common law rationale for the marital rape exemption was that, upon marriage, the wife's identity merged into the existence of her husband. 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 . . . ."<sup>36</sup> This became known as the marital unities doctrine, which provided that a woman could not own property, make contracts, or take part in litigation.<sup>37</sup> This doctrine made the rape of a woman by her husband a legal impossibility since a man could not rape himself.<sup>38</sup>

Blackstone's unity theory lost support in the late nineteenth century with the adoption of the Married Women's Property Act.<sup>39</sup> This Act recognized women's legal personhood, but assigned her a distinct place in society, which was the home, different from that of a man.<sup>40</sup> This became known as the separate spheres doctrine and it gradually replaced the unities theory.<sup>41</sup> Since women today are part of all the "spheres" of society, the ancient marital unities and separate spheres doctrines have been rejected by courts as justifications for the marital rape exemption.<sup>42</sup>

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rape of a married woman brought embarrassment and disgrace to her husband. *Id.*

<sup>35</sup>See, e.g., *People v. DeStefano*, 467 N.Y.S.2d 506, 511 (Suffolk County Ct. 1983); *Trammel v. United States*, 445 U.S. 40, 52 (1980) ("Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel . . . .").

<sup>36</sup>1 WILLIAM BLACKSTONE, COMMENTARIES \*430.

<sup>37</sup>For a discussion of the unities doctrine see Tierney, *supra* note 16, at 781. See also *Warren v. State*, 336 S.E.2d 221, 223 (Ga. 1985); *State v. Smith*, 426 A.2d 38, 44 (N.J. 1981); *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984).

<sup>38</sup>See Tierney, *supra* note 16, at 781.

<sup>39</sup>Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 177 (1982).

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* Under the separate spheres doctrine the husband was the public representative of the couple as well as the breadwinner, while the wife was responsible for taking care of the family. This gave women an identity and an important role to fill in society. At least it was an improvement over the unities doctrine. See Note, *To Have and to Hold*, *supra* note 33, at 1257; Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *POLITICS OF THE LAW* 117, 125 (1982).

<sup>42</sup>See, e.g., *People v. DeStefano*, 467 N.Y.S.2d 506, 512 (Suffolk County Ct. 1983); *Trammel v. United States* 445 U.S. 40, 52 (1980) ("Nowhere in the common-law world—indeed in any modern society—is a woman . . . demeaned by denial of a



### C. Modern Justifications

Historical common law justifications for the marital rape exemption no longer have any legitimacy in the 20th century United States where women are presumed to be equal. Unfortunately, modern arguments have been formed by supporters of the marital exemption to foster the outdated patriarchal notions about women in marriage.<sup>43</sup> There are five modern justifications espoused by those who defend the marital rape exemption. Once closely examined, however, it is apparent these arguments are without merit.

#### 1. Marital Rape is Not as Serious as Other Rape

Defenders of the marital rape exemption have argued that there is both a quantitative and qualitative difference between marital rape and non-marital rape.<sup>44</sup> The quantitative argument is that marital rape does not occur often enough in our society to be recognized as a problem.<sup>45</sup> The qualitative argument is that the damage to a wife from a marital rape is less severe than the damage caused to a victim of non-marital rape.<sup>46</sup>

Dealing with the quantitative argument first, it is unreasonable to believe that rape does not occur in marriage. Existing data suggests that 14% of married women have been raped by their husbands at least once.<sup>47</sup> This is a significant number of marital rape victims. However, even if there was only one woman a year who suffered this indignity, numbers alone should not determine the criminality of an act.<sup>48</sup> Any lack of quantitative information may be due to the fact that marital rape in most states was not a crime until recently, and therefore

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separate legal identity and the dignity associated with recognition as a whole human being.").

<sup>43</sup> See generally Martin D. Schwartz & Gerald T. Slatin, *The Law on Marital Rape: How do Marxism and Feminism Explain its Persistence*, 8 ALSA F.: A J. OF INTERDISCIPLINARY LEGAL STUDIES 244, 247 (1984); Michael D. Freeman, "But If You Can't Rape Your Wife, Who[m] Can You Rape?": *The Marital Rape Exemption Re-examined*, 15 FAM. L. Q., Spring 1981, at 8-9.

<sup>44</sup> For a discussion of this modern justification see generally Schwartz, *supra* note 9, at 42-46; Waterman, *supra* note 16, at 617-19; Tierney, *supra* note 16, at 778-80.

<sup>45</sup> Schwartz, *supra* note 9, at 42-43.

<sup>46</sup> *Id.* at 43.

<sup>47</sup> RUSSELL, *supra* note 6, at 2. Ms. Russell conducted a survey of 930 women who had been married and found that 14% of them were raped at least once. *Id.* Applied to the population, the results suggested that one out of every seven women who had ever been married was raped at least once by her husband. *Id.* "In other words, we all know women who have been raped by husbands." *Id.* See also FINKELHOR & YLLO, *supra* note 2, at 6-7. They also conducted a survey and found that 10% of the women who had been married said that their husbands used force to try to get them to have sex with them. *Id.*

<sup>48</sup> See Schwartz, *supra* note 9, at 48.

wives were not reporting the incident as rape.<sup>49</sup> Other possible reasons for the lack of reporting include the destruction of the marriage and family, the fear that reporting the crime will be useless, and that the investigative process and accompanying backlash from the guilty spouse may be worse than the crime itself.<sup>50</sup>

Furthermore, the qualitative argument suggests that marital rape is not a serious crime since the victim does not suffer as much as a non-marital rape victim.<sup>51</sup> This argument is also unreasonable. Significant evidence suggests that marital rape can be the most traumatic form of rape, more traumatic than rape by strangers, because of a sense of betrayal, disillusionment, the upset of the whole marriage, and the fact that rape may be repeated for several years.<sup>52</sup> One study reported that victims of spousal rape tended to suffer trauma longer than other victims.<sup>53</sup>

In addition to psychological injuries, marital rape victims also suffer more physical injuries than other rape victims.<sup>54</sup> Studies have shown that women will resist their husbands to a greater degree than other victims will resist strangers because they are less afraid of their husbands.<sup>55</sup> Still, the most distressing thing about marital rape is that a woman will have to face her rapist daily and be constantly reminded of the extreme violation by her husband. Clearly, there is enough quantitative and qualitative evidence to suggest that marital rape is serious and that our legal system needs to address it.

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<sup>49</sup>*Id.* See also Waterman, *supra* note 16, at 618.

<sup>50</sup>See Pamela L. Wood, *The Victim*, 11 AM. CRIM. L. REV. 335, 347-48 (1973).

<sup>51</sup>See Michael G. Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31, 41 (1980).

[A] married person has, to some extent, a lesser expectation of personal autonomy; therefore, the affront to one's autonomy is less in the case of spousal rape than in the case of ordinary rape. Moreover, the harm caused by spousal rape would seem to be less severe than the harm caused by non-spousal rape. While a married person's interest in bodily integrity is not inconsiderable, a balance must be struck between the individual's interest in private autonomy and the public policy favoring spousal immunity.

*Id.*

<sup>52</sup>RUSSELL, *supra* note 6, at 359. See also FINKELHOR & YLLO, *supra* note 2, at 137-38.

<sup>53</sup>RUSSELL, *supra* note 6, at 193. Of the women raped by their husband, 52% reported that the long term effects were severe, as opposed to 39% of women who were raped by strangers. *Id.*

<sup>54</sup>*Id.* at 90. A study showed that 10% of married women experience both wife rape and wife beating. *Id.*

<sup>55</sup>Schwartz, *supra* note 9, at 45.

## 2. Problem of Proving a Marital Rape Case

The second argument offered in support of keeping the marital rape exemption is that it would be impossible to prove a marital rape case when the couple has had consensual sex, perhaps hundreds of times before.<sup>56</sup> Opponents of this argument have claimed that it is possible to prove lack of consent even in a situation where a wife's word is placed against her husband's. Corroborating evidence, such as evidence of physical force through medical testimony, may be available.<sup>57</sup>

Even though convictions may be rare due to the difficulty in proving lack of consent, this is not a valid reason for failing to criminalize marital rape.<sup>58</sup> Other crimes, such as treason,<sup>59</sup> incest,<sup>60</sup> and acquaintance rape<sup>61</sup> also present potentially difficult prosecutions, yet these are still considered crimes. The "difficulty of proof has never been a proper criterion for deciding what behavior should be officially censured by society."<sup>62</sup> Certainly the public policy of protecting a woman from the violent crime of rape by any person, especially her husband, is outweighed by the argument that it may be difficult to prove lack of consent.<sup>63</sup>

Additionally, other arguments that have been advanced to support the criminalization of marital rape have farthered the concepts of law as a deterrent and law as an educational tool.<sup>64</sup> It has been argued that once marital rape is considered a crime, husbands may be deterred from raping their wives out of the fear of being punished.<sup>65</sup> Furthermore, if marital rape is criminalized, the public would be more willing to accept the fact that marital rape does occur and is illegal.<sup>66</sup> Husbands need to be made aware that raping of their wives is socially unacceptable.<sup>67</sup> This goal can be advanced through the complete

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<sup>56</sup>See FINKELHOR & YLLO, *supra* note 2, at 176.

<sup>57</sup>Pracher, *supra* note 17, at 732.

<sup>58</sup>Schwartz, *supra* note 9, at 48. See also *People v. Liberta*, 474 N.E.2d 567, 574 (N.Y. 1984) (stating that proving lack of consent in a rape prosecution is very difficult, but it is not a sufficient rationale for maintaining the marital rape exemption).

<sup>59</sup>See Schwartz, *supra* note 9, at 48.

<sup>60</sup>FINKELHOR & YLLO, *supra* note 2, at 178.

<sup>61</sup>Pracher, *supra* note 17, at 732.

<sup>62</sup>FINKELHOR & YLLO, *supra* note 2, at 177.

<sup>63</sup>Pracher, *supra* note 17, at 732.

<sup>64</sup>See generally, Schwartz, *supra* note 9, at 50-51.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 51. "If the continuation of the marital rape exemption protects male property interests, removal of the exemption asserts the right of married women to the physical

abolishment of the marital exemption. As the abolishment of the marital exemption would do more than just prosecute husbands, the problem of proving lack of consent is not a persuasive argument for continuing to uphold the marital exemption.

### 3. Increase in False Rape Accusations

The third modern justification for spousal immunity is that the criminalization of marital rape will lead to women filing false rape charges in order to gain leverage in divorce and custody proceedings.<sup>68</sup> This argument, predicated on the assumption that women are vindictive liars, is unconvincing for several reasons.<sup>69</sup>

First, our criminal justice system is designed to handle fabricated claims.<sup>70</sup> Indeed, "our jurisprudence is designed to test the very truth or falsity of accusations in all criminal proceedings."<sup>71</sup> There is no legitimate reason to suggest that courts could not expose false accusations of marital rape as skillfully as they expose falsehoods of other alleged crimes. Furthermore, courts have acknowledged that if the likelihood of false accusations were a reason to avoid criminalizing certain activities, then nothing other than murder would be a crime.<sup>72</sup>

In addition, the law recognizes a wife's ability to bring charges against her husband for other criminal acts.<sup>73</sup> If women wanted to seek revenge against their husbands, they could do so by filing false charges of assault and battery.<sup>74</sup> At least one court has expressed doubt that women will make false accusations of rape to obtain better divorce settlements because "the offense of battery which can now be exerted by one spouse against another has not been used for such purpose . . ."<sup>75</sup>

The final weakness with the argument that women take advantage of the legal system by filing false rape charges is the failure to recognize the social

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integrity of their bodies, and of the right to choose what uses their bodies will be put to." *Id.*

<sup>68</sup>For a discussion of this rationale see generally Schwartz, *supra* note 9, at 51-53; Pracher, *supra* note 17, at 732-36; Waterman, *supra* note 16, at 616-17.

<sup>69</sup>For a discussion on "women as liars" see TONG, *supra* note 27, at 100-02.

<sup>70</sup>State v. Smith, 372 A.2d 386, 389 (Essex County Ct. 1977).

<sup>71</sup>*Id.*

<sup>72</sup>People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984).

<sup>73</sup>Smith, 372 A.2d at 389.

<sup>74</sup>*Id.*

<sup>75</sup>State v. Smith, 401 So.2d 1126, 1129 (Fla. Dist. Ct. App. 1981). See also Schwartz, *supra* note 9, at 53. In several jurisdictions where spousal rape prosecutions are allowed, there has been no reason to believe that false accusations are being filed. *Id.*

stigma attached to rape.<sup>76</sup> The reality is that rape victims are hesitant to report the crime due to this social stigma.<sup>77</sup> "Thus it is much more likely that the extraordinary woman who is bent on blackmail or revenge would choose a tactic which is less embarrassing for her and more likely to result in punishment for her purported assailant."<sup>78</sup>

#### 4. Criminal Law Should Not Invade the Sanctity of Marriage

Defenders of the marital exemption who believe that it protects the sanctity of marriage argue that the criminalization of marital rape will destroy any chance of reconciliation and will violate marital privacy.<sup>79</sup> It is indeed likely that a rape prosecution by a wife against her husband would destroy the possibility of reconciliation. However, the tenuousness of this argument lies in the assumption that a marriage of this type is worth saving.<sup>80</sup> A marriage where rape is involved may not be worthy of preservation.<sup>81</sup> The Supreme Court of Virginia argued against this justification by stating:

It is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.<sup>82</sup>

Our society should not attempt to protect a decaying and violent marriage by suggesting reconciliation<sup>83</sup> at the expense of a woman's continuing abuse.<sup>84</sup>

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<sup>76</sup>Schwartz, *supra* note 9, at 52-53.

<sup>77</sup>*Id.* at 53. See also Barry, *supra* note 30, at 1091.

<sup>78</sup>Note, *Marital Rape Exemption*, *supra* note 16, at 315.

<sup>79</sup>See Waterman, *supra* note 16, at 614-15.

<sup>80</sup>Note, *Marital Rape in California: For Better or For Worse*, 8 SAN FERN. V. L. REV. 239, 251 (1980) [hereinafter Note, *Rape in California*]. See Hilf, *supra* note 51, at 34. Hilf suggests that a curtain should be drawn around the husband and wife to keep the public out and the spouses in together in order to reconcile their differences. *Id.* See also Morris, *supra* note 29, at 602.

<sup>81</sup>Weishaup v. Commonwealth, 315 S.E.2d 847, 855 (Va. 1984).

<sup>82</sup>*Id.*

<sup>83</sup>Morris, *supra* note 29, at 602.

<sup>84</sup>See FINKELHOR & YLLO, *supra* note 2, at 179.

Without the social support of a criminal law stating that she has been wronged, she may continue to tolerate the abuse . . . . To stack the legal deck in the direction of "salvaging" her marriage may mean consigning her to ten more years of abuse. Marriages where marital rape had occurred should not be saved at any cost.

*Id.*

Supporters of this modern justification also suggest that the marital exemption avoids interference with marital privacy.<sup>85</sup> This argument is problematic. Although our legal system prefers to avoid interfering with problems between spouses, the state has a valid interest in preventing violent sexual assaults.<sup>86</sup> The highest court in the State of New York held that "just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy."<sup>87</sup> Because the state intervenes in other areas of domestic violence, such as wife beating, there is no valid reason to exclude marital rape as an area unworthy of state protection.<sup>88</sup>

### 5. Other Remedies Exist

The last of the arguments offered by marital exemption defenders holds that a marital rape victim can pursue other legal remedies, such as assault charges and divorce.<sup>89</sup> Although true, these alternative remedies are inadequate. There is a qualitative difference between the crime of rape and the crime of assault.<sup>90</sup> "The fact that rape statutes exist . . . is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault."<sup>91</sup> Rape laws, unlike assault and battery laws, recognize that rape is a psychological crime, as well as a physical one, which deeply harms a woman's sexual integrity.<sup>92</sup> If assault laws were sufficient to deal with the crime of rape, there would be no reason to have rape statutes.<sup>93</sup>

Another reason why assault law is an inadequate remedy for marital rape victims is that not all women who are raped by their husbands are physically assaulted or battered.<sup>94</sup> If marital rape is not a crime, then these women do not have a prosecutorial remedy.<sup>95</sup> Furthermore, rape penalties are more severe

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<sup>85</sup>Note, *Rape in California*, *supra* note 80, at 246.

<sup>86</sup>*People v. Liberta*, 474 N.E.2d 567, 574 (N.Y. 1984) (holding that the Supreme Court of New York recognized that the Court in *Griswold v. Connecticut*, 381 U.S. 469 (1965), only extended the right of marital privacy to include consensual acts).

<sup>87</sup>*Id.*

<sup>88</sup>Note, *Rape in California*, *supra* note 80, at 247.

<sup>89</sup>For an excellent detailed discussion of this justification see FINKELHOR & YLLO, *supra* note 2, at 181-85.

<sup>90</sup>*People v. Liberta*, 474 N.E.2d 567, 574 (N.Y. 1984).

<sup>91</sup>*Id.*

<sup>92</sup>FINKELHOR & YLLO, *supra* note 2, at 182.

<sup>93</sup>*Id.*

<sup>94</sup>See RUSSELL, *supra* note 6, at 89. It is estimated from a survey of 644 women who had been raped during marriage that 4% experienced rape without beating. *Id.*

<sup>95</sup>Waterman, *supra* note 16, at 620.

than assault penalties; grouping marital rape together with assault will not sufficiently deter men from raping their wives.<sup>96</sup>

Divorce is often offered as an alternative remedy when a woman is raped by her husband.<sup>97</sup> While true, this remedy shifts the burden to the woman. It makes more sense to suggest that if a man is dissatisfied with his sexual marital relationship, he should seek a divorce instead of raping his wife.<sup>98</sup> Hence, the New Jersey Supreme Court held that "[i]f her repeated refusals are a 'breach' of marriage 'contract,' his remedy is in a matrimonial court, not in violent or forceful self-help."<sup>99</sup>

The "alternative remedies" justification is an easy way for supporters of the marital exemption to evade the quandary posed by marital rape. All of these modern justifications have been advanced to stem the growing tide of states which have abolished the exemption. The next logical step in the national campaign for complete abolishment of the marital exemption, is to change the partial exemptions in the majority of the states to reflect complete abolishment of any vestiges of spousal immunity. This can be achieved either through statutory changes or judicial decisions. The starting point is with an analysis of changes and decisions in groundbreaking, progressive states.

### III. PROGRESSIVE MARITAL RAPE STATES: TREND TOWARD ABOLITION

#### A. Statutory Abolishment: Oregon

In 1977 the Oregon legislature, following Nebraska's lead in 1976,<sup>100</sup> deleted the spousal immunity clause from its rape statute.<sup>101</sup> This deletion allowed for the prosecution of husbands who engaged in non-consensual intercourse with their wives. A year later Oregon became the first state to prosecute a husband for raping his wife.<sup>102</sup> In the case of *State v. Rideout*,<sup>103</sup> John Rideout became

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<sup>96</sup>FINKELHOR & YLLO, *supra* note 2, at 183.

<sup>97</sup>*Id.* at 184.

<sup>98</sup>See Schwartz, *supra* note 9, at 53.

<sup>99</sup>*State v. Smith*, 426 A.2d 38, 44 (N.J. 1981).

<sup>100</sup>Even though Nebraska was the first state to abolish the marital exemption, Nebraska's experience is not discussed here because the state did not have a single prosecution under the new statute for six years, until 1982. FINKELHOR & YLLO, *supra* note 2, at 170.

<sup>101</sup>RUSSELL, *supra* note 6, at 18. Oregon's rape statute reads "[a] person who has sexual intercourse with another person commits the crime of rape in the first degree if: (a) The victim is subjected to forcible compulsion by the person . . ." OR. REV. STAT. § 163.375(1) (1991). There is no mention of "spouse" anywhere in the statute. *Id.*

<sup>102</sup>RUSSELL, *supra* note 6, at 18. The Director of the National Clearinghouse on Marital & Date Rape, Laura X, has led a national campaign to abolish the marital rape exemption for the past two decades. The National Clearinghouse on Marital & Date Rape is located at 2325 Oak Street, Berkeley, CA 94708-1697.

<sup>103</sup>No. 108,866 (Marion County Cir. Ct., Or. Dec. 17, 1978) (unreported).

the first husband in the United States charged with the rape of his wife while the two were married and living together.<sup>104</sup>

Of all marital rape cases and trials, the *Rideout* case is the most well known because it brought the issues of marital rape to the forefront of the nation's awareness.<sup>105</sup> The trial itself arose from an incident that occurred on October 10, 1978.<sup>106</sup> According to testimony given at trial, Greta Rideout testified that her husband, John, awoke from a nap and demanded that she have sex with him.<sup>107</sup> When she refused, he became violent,<sup>108</sup> grabbed her and, "under a rain of threats and blows, forced her to engage in sexual intercourse with him."<sup>109</sup>

John Rideout was acquitted on December 27, 1978 of the charge of first degree rape.<sup>110</sup> The jurors decided that John Rideout could not be found guilty beyond a reasonable doubt because they were not sure that Greta's story could be trusted.<sup>111</sup> The outcome of this case was seen by those who opposed Oregon's new rape statute as a confirmation that the state should not become involved in marital relationships.<sup>112</sup> It was also seen as a step backward by those who believed Greta's story and who favored the legal reform.<sup>113</sup> Although the Rideout case resulted in an acquittal, it had a positive effect in that it encouraged women to campaign strongly for the abolishment of the marital exemption in those states where a husband could not yet be prosecuted for raping his wife.<sup>114</sup>

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<sup>104</sup>FINKELHOR & YLLO, *supra* note 2, at 172. *Rideout* was not the first instance of a man being prosecuted for raping his wife in the United States, but it was the first case where the husband was still living with his wife. *Id.*

<sup>105</sup>RUSSELL, *supra* note 6, at 19.

<sup>106</sup>FINKELHOR & YLLO, *supra* note 2, at 171.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* For a further discussion of John and Greta's relationship and the incidents that occurred which led up to the trial see Moira K. Griffin, *In 44 States, it's Legal to Rape Your Wife*, 9 STUDENT LAWYER, Sept. 1980 at 21-23.

<sup>110</sup>*Id.* at 23.

<sup>111</sup>*Id.*

<sup>112</sup>RUSSELL, *supra* note 6, at 20. See also Barry, *supra* note 30, at 1090, where the defense attorney in the case, Charles Burt, used the common law origins as a justification for the marital exemption: "it points out the absurdity of bringing the crime of rape as a law into marriage. [A] woman who's still in a marriage is presumably consenting to sex . . . maybe this is the risk of being married, you know?" *Id.*

<sup>113</sup>RUSSELL, *supra* note 6, at 20.

<sup>114</sup>Griffin, *supra* note 109, at 23.



*B. Judicial Abolishment: New York*

Judicial abolishment provides an additional method of eliminating the marital rape exemption. In New York, the marital exemption was abolished in the landmark case of *People v. Liberta*.<sup>115</sup> In this case, the defendant-husband lived apart from his wife pursuant to a restraining order which required the defendant to stay away from his wife, but allowed him to visit his son on the weekends.<sup>116</sup> After missing a visit, the defendant arranged to meet his wife and son at the motel where the defendant resided.<sup>117</sup> The defendant promised his wife that a friend would be present the entire time, however, the friend departed and the defendant forcibly raped and sodomized his wife in front of their two and one-half year old son.<sup>118</sup>

Although New York's statute for rape<sup>119</sup> contained a marital exemption, the defendant was prosecuted under the statutory provision which deemed him unmarried because he was living apart from his wife pursuant to a court order.<sup>120</sup> The defendant appealed the application of this exception and challenged the constitutionality of the rape and sodomy statutes as violative of the equal protection rights of unmarried men under the Fourteenth Amendment to the United States Constitution.<sup>121</sup> He also alleged that because the forcible rape statute was gender specific, it unconstitutionally discriminated on the basis of sex.<sup>122</sup>

The state's highest court agreed with both constitutional attacks. In particular, the Court held that there was "no rational basis for distinguishing between marital rape and non-marital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions . . . or are unable to withstand even the slightest scrutiny."<sup>123</sup> In addition, the court rejected several of the modern justifications for the marital exemption.<sup>124</sup> The court declared that the marital exemption for rape in the New York statute,

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<sup>115</sup>474 N.E.2d 567 (N.Y. 1984).

<sup>116</sup>*Id.* at 569.

<sup>117</sup>*Id.*

<sup>118</sup>*Id.*

<sup>119</sup>Under the New York Penal Code "[a] man is guilty of rape in the first degree when he engages in sexual intercourse with a female . . . by forcible compulsion." N.Y. PENAL LAW § 130.35 (McKinney 1987). A female is defined as "any female person who is not married to the actor." § 130.00(4).

<sup>120</sup>A person is considered unmarried when the female and actor are living apart pursuant to an "order issued by a court of competent jurisdiction which by its terms or in its effect requires such living apart . . ." § 130.00(4)(b)(i).

<sup>121</sup>*Liberta*, 474 N.E.2d at 571.

<sup>122</sup>*Id.*

<sup>123</sup>*Id.* at 572.

<sup>124</sup>*Id.* at 573-75. See *supra* notes 74, 88, 92 and accompanying text.

as well as its gender specifications, were unconstitutional.<sup>125</sup> Since only the exemption and not the general rape statute was struck down, *Liberta's* conviction was upheld.<sup>126</sup>

In deferring to the New York legislature, the court chose not to strike down the entire rape statute, choosing instead to strike only the marital and gender exemptions.<sup>127</sup> As a result of the court's action the legislature enacted a new rape statute, which states: "that any person who engages in sexual intercourse . . . with any other person by forcible compulsion is guilty of either rape in the first degree or sodomy in the first degree."<sup>128</sup>

*Liberta* has impacted the future of the marital exemption. Indeed, several courts have followed the constitutional arguments set forth in this opinion to strike down the marital exemption.<sup>129</sup> In order to abolish the marital exemption completely, more courts, like the *Liberta* court, must be willing to strike down statutes which are discriminatory and based on archaic, outdated notions. Courts which give great deference to the legislative process and will not strike down poorly constructed statutes impede the national campaign for abolishment of the marital exemption.<sup>130</sup>

### C. Status of Abolishment Among the Several States

The national campaign for abolishment of the marital exemption has had significant success since the early 1980's. In 1980, only three states had completely abolished the marital exemption.<sup>131</sup> At that time, there were ten states which had an absolute exemption where a husband could never be prosecuted for raping his wife as long as the parties were legally married.<sup>132</sup> A prosecution could only be successful when the parties were legally divorced.<sup>133</sup> Currently, no state belongs in this "absolute exemption" category.<sup>134</sup>

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<sup>125</sup>*Liberta*, 474 N.E.2d at 573-75.

<sup>126</sup>*Id.* at 579.

<sup>127</sup>*Id.* at 578-79.

<sup>128</sup>*Id.* at 579.

<sup>129</sup>See, e.g., *Williams v. State*, 494 So.2d 819 (Ala. Crim. App. 1986); *Shunn v. State*, 742 P.2d 775 (Wyo. 1987).

<sup>130</sup>*State v. Smith*, 372 A.2d 386, 393 (Essex County Ct. 1977). "[I]t is more properly a legislative, rather than a judicial function, to determine or redetermine the type of conduct which will constitute the substantive crime of rape, especially when, as here, serious societal objectives, philosophical evaluations and moral judgments are involved." *Id.*

<sup>131</sup>Oregon, Nebraska, and New Jersey. See RUSSELL, *supra* note 6, at 21.

<sup>132</sup>*Id.* at 375.

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

In the 1980's the goal of the national campaign was to make marital rape, at least in most circumstances, a crime in every state.<sup>135</sup> Since this first step has been achieved, the goal of the national campaign is now to abolish completely all remnants of the marital exemption.<sup>136</sup>

Today, there are three main categories of marital exemption law.<sup>137</sup> The first category consists of those states in which a husband cannot be prosecuted for rape unless the couple is living apart, legally separated, or has filed for divorce or order of protection.<sup>138</sup> In the four states which have this type of exemption,<sup>139</sup> Kentucky, Missouri, Oklahoma, and South Carolina, the burden is on the wife to leave her husband or file for divorce.<sup>140</sup> If she fails to do so, the state will not be able to prosecute her husband if he rapes her. The states in this first category provide the least protection to married women.

The second category of states are those in which husbands can be prosecuted for raping their wives in certain circumstances, but are exempt from prosecution in other situations that are prosecutable for non-marital rape.<sup>141</sup> There are twenty-four states which fall into this second category of partial exemptions.<sup>142</sup> A majority of these "partial exemption" states exempt husbands only from prosecution of "less harmful" forms of rape—those that do not involve force or threat of force.<sup>143</sup> There are sixteen states which fall into this category: Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Nevada, Ohio, Pennsylvania, Tennessee, Washington, and Wyoming.<sup>144</sup> California, Illinois, and Washington also

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<sup>135</sup>*Id.*

<sup>136</sup>See RUSSELL, *supra* note 6, at 25.

<sup>137</sup>*Id.* at 23.

<sup>138</sup>*Id.*

<sup>139</sup>*Id.* at 23, 377-82. This state law chart shows eight states in this category as of January, 1990. Updated information on states' activities from 1990-1993 was supplied by The National Clearinghouse on Marital & Date Rape, *supra* note 102.

<sup>140</sup>See KY. REV. STAT. ANN. § 510.010(3) (Baldwin 1987); MO. REV. STAT. § 566.030 (Supp. 1993); OKLA. STAT. tit. 21, § 1111 (Supp. 1994); S.C. CODE ANN. § 16-3-658 (Law. Co-op. 1985).

<sup>141</sup>RUSSELL, *supra* note 6, at 21.

<sup>142</sup>*Id.* at 23, 377-82.

<sup>143</sup>*Id.* at 377-82.

<sup>144</sup>See ARIZ. REV. STAT. ANN. § 13-1404-06 (Supp. 1993); CAL. PENAL CODE § 262 (West Supp. 1993); CONN. GEN. STAT. § 53a-67(b) (1985); DEL. CODE ANN. tit. 11, §§ 763-775 (Supp. 1992); HAW. REV. STAT. §§ 707-732 (1985); IDAHO CODE § 18-6107 (Supp. 1993); ILL. REV. STAT. ch. 725, para. 5/115-11.1 (1993); KAN. STAT. ANN. § 21-3501-3 (Supp. 1992); MD. CODE ANN., CRIM. LAW § 27-464D (1992); NEV. REV. STAT. § 200.373 (1991); OHIO REV. CODE ANN. § 2907.02 (Anderson 1993); PA. STAT. ANN. tit. 18, § 3103 (Supp. 1993); TENN. CODE ANN. § 39-2-610 (1991); WASH. REV. CODE § 9A.44.010 (Supp. 1993); WYO. STAT. § 6-2-307 (1995).

require that the wife report the rape within a certain period of time, ranging from 30 to 90 days. Four states have a partial exemption which exempt husbands from prosecution for the more serious first degree rape.<sup>145</sup> Instead, husbands can only be charged with a lesser crime of rape. Another group of states with a partial exemption only exempt husbands who rape their wives who are under the age of consent or who are mentally or physically disabled.<sup>146</sup>

Lastly, there are those states which have no marital rape exemption. There are twenty-two states which have completely abolished the marital rape exemption—choosing to make no distinction between "marital rape" and "non-marital rape."<sup>147</sup> The states in this category correctly recognize that the archaic common law notions and modern justifications are inadequate to support the marital rape exemption. The goal of those opposed to the marital exemption is to push the remaining twenty-eight states which have not completely abolished the marital rape exemption into this final category.

#### IV. OHIO'S PAST, PRESENT, AND FUTURE

##### A. Legislative History

Ohio has been a partial exemption state for the past nine years.<sup>148</sup> Prior to March 7, 1986, Ohio did not recognize marital rape unless the parties had a written separation agreement or a court action had been filed to dissolve the marriage.<sup>149</sup> Ohio moved forward with the enactment of House Bill 475 in 1985,

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<sup>145</sup>See R.I. GEN. LAWS § 11-37-1 (Supp. 1993); TEX. PENAL CODE ANN. § 21-02(a), 21-12 (West Supp. 1993); VA. CODE ANN. § 18.2-61 (Michie Supp. 1993); W. VA. CODE § 61-8B-6 (Supp. 1995).

<sup>146</sup>See ARK. CODE ANN. § 5-14-103 (Michie 1987); MICH. COMP. LAWS § 750.520 (1991); MINN. STAT. § 609.349 (1987); N.H. REV. STAT. ANN. § 632-A2, A3, A5 (Supp. 1993); R.I. GEN. LAWS § 11-37-1 (Supp. 1993). See RUSSELL, *supra* note 6, at 377, which states that Arkansas' statute is silent on whether husbands who do not have minor wives can be convicted of rape.

<sup>147</sup>See generally ALASKA STAT. § 11.41-443 (Supp. 1993); COLO. REV. STAT. ANN. § 18-3-401 (West Supp. 1993); FLA. STAT. ANN. § 794.011 (West Supp. 1993); GA. CODE ANN. § 16-6-1(a) (1992); IND. CODE § 35-42-4-1(b) (Supp. 1993); LA. REV. STAT. ANN. § 14.41-43 (West Supp. 1993); ME. REV. STAT. ANN. tit. 17A §§ 251, 252 (West Supp. 1993); MASS. GEN. L. ch. 265 § 22 (1990); MISS. CODE ANN. §§ 97-3-95 to 103 (1991); MONT. CODE ANN. § 45-5-506 (1992); NEB. REV. STAT. § 28-319 (1989); N.J. REV. STAT. § 2C:14-5b (1982); N.M. STAT. ANN. § 30-9-10 (Michie Supp. 1993); N.C. GEN. STAT. § 14-27.8 (1993); N.D. CENT. CODE § 12.1-20-01, 02 (Supp. 1993); OR. REV. STAT. § 163.305 (1987); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1993); UTAH CODE ANN. § 76-5-402, 407 (Supp. 1993); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1993); WIS. STAT. ANN. § 940.225(6) (West Supp. 1993). See also RUSSELL, *supra* note 6, at 377-382. For New York law see *supra* notes 112-130 and accompanying text. For Alabama law see *Merton v. State*, 500 So.2d 1301 (Ala. 1988). The updated information has been provided by the National Clearinghouse on Marital & Date Rape. See *supra* note 102.

<sup>148</sup>See RUSSELL, *supra* note 6, at 23.

<sup>149</sup>See OHIO REV. CODE ANN. § 2907.01(L), .02 (Anderson 1993).

which recognized that rape is a crime under certain specific circumstances when a husband and wife are living together.<sup>150</sup> This recognition placed Ohio in the partial marital exemption category. Ohio rape law, however, will not advance to full equality for married women until it joins the category of states which have completely abolished the exemption.

Prior to the changes made to Ohio's rape statute in 1986, Ohio Revised Code 2907.02(A)(1) read: "No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply . . . ."<sup>151</sup> Section 2907.01(L) defines spouse as "a person married to an offender at the time of an alleged offense . . . ."<sup>152</sup> Section 2907.01(L) further states that a person is not considered a spouse when there has been a written separation agreement, a petition for dissolution of marriage, or a legal action for separation.<sup>153</sup> These two sections read together made it impossible for a woman who was living with her husband to prosecute him for rape.<sup>154</sup>

The years of 1985 and 1986 were busy ones for the Ohio legislature in dealing with marital rape exemption issues. In 1985, Senate Bill 17 was proposed by Senator Michael White to eliminate spousal immunity from the offense of rape and felonious sexual penetration.<sup>155</sup> This Bill was a result of a recommendation by the Governor's Task Force on Family Violence.<sup>156</sup> The Governor's Task Force suggested that section 2907.02 of the Ohio Revised Code be amended so that husbands could be prosecuted for raping their wives.<sup>157</sup> The Task Force concluded that rape should not be defined by the legal or social relationship between the victim and the offender.<sup>158</sup>

Senate Bill 17, if enacted, would have abolished the marital exemption from section 2907.02 of the Ohio Revised Code. The strength of the bill a rose from

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<sup>150</sup>H.B. 475, 116th General Assembly, Regular Sess., §§ 2907 et seq. (1985-1986) [hereinafter H.B. 475].

<sup>151</sup>*Id.*

<sup>152</sup>OHIO REVISED CODE ANN. § 2907.01(L) (Anderson 1993).

<sup>153</sup>*Id.*

<sup>154</sup>*See supra* notes 143-47 and accompanying text.

<sup>155</sup>S.B. 17, 116th General Assembly, Regular Sess., §§ 2907 et seq. (1985-1986) [hereinafter S.B. 17]. H.B. 63, 116th General Assembly, Regular Sess. was identical to S.B. 17 as proposed by Senator Sheerer.

<sup>156</sup>Letter from Richard F. Celeste, Governor of Ohio, to Paul E. Pfeifer, State Senator from Bucyrus (Oct. 9, 1985).

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* The Governor concluded from the Task Force's recommendation that "spousal rape is one facet of the total family violence picture and should receive the same serious consideration by the General Assembly as other forms of violence and abuse." *Id.* *See also Make Spousal Rape A Crime In Ohio, Task Force Urges*, FINDLAY COURIER, Dec. 28, 1984, at A10.

the fact that it did not contain the word "spouse".<sup>159</sup> The Bill read "No person shall engage in sexual conduct with another when . . . (1) The offender purposely compels the other person to submit by force or threat of force . . .",<sup>160</sup> as opposed to the pre-1986 section 2907.02 which had the language "who is not the spouse of the offender."<sup>161</sup> The main thrust of the Bill was the addition of section G, which read "[i]t is not a defense to a charge under this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense."<sup>162</sup> With the addition of this section, Senate Bill 17 would have abolished spousal immunity from the Ohio rape statute and Ohio would presently be categorized as a progressive state on this issue.

In 1985, however, Senate Bill 17 caused great controversy. Although segments of the Bill were eventually attached to House Bill 475 which passed in 1985, Senate Bill 17 was never heard by the Senate Judiciary Committee.<sup>163</sup> The chairperson of that Committee, Senator Paul Pfeifer, refused to begin hearings on the Bill.<sup>164</sup> Senator Michael White attempted for more than ten months to schedule Senate Bill 17 for hearings.<sup>165</sup> He made several requests to Senator Pfeifer, in addition to having other senators and Governor Celeste write letters to Senator Pfeifer, urging the Committee to take action on the Bill.<sup>166</sup> In a press release by Senator White's Office, he said that he would appeal to the Committee members since he had exhausted all other ways in which to get the committee to begin hearings on the Bill.<sup>167</sup> Senator White claimed that Senator Pfeifer based his refusal to hear the Bill on his adherence to 17th century legal philosophy which proclaimed that women gave up their right to consent when they married.<sup>168</sup>

Several Ohio newspapers captured the spirit of the heated controversy. Senator Pfeifer's reasons for not hearing Senate Bill 17 were reportedly based on several of the meritless modern justifications, i.e. that any time a married couple had a fight the wife would go to the prosecutor's office and file a rape

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<sup>159</sup>S.B. 17, *supra* note 155.

<sup>160</sup>*Id.* at § 2907.02(A).

<sup>161</sup>*See supra* notes 158-60 and accompanying text.

<sup>162</sup>S.B. 17, *supra* note 155, at § 2907.02(G).

<sup>163</sup>Memorandum from Michael R. White, State Senator from Cleveland, to All Democratic Senators in Ohio (Oct. 2, 1985).

<sup>164</sup>*Id.*

<sup>165</sup>*Id.*

<sup>166</sup>*Id.* *See also* letter from Michael White, State Senator from Cleveland, to Paul E. Gillmor, President of the Ohio Senate (Oct. 2, 1985) (on file with the National Clearinghouse on Marital & Date Rape, *supra* note 102).

<sup>167</sup>Press Release from Senator Michael White's Office (Oct. 8, 1985) (on file with the National Clearinghouse on Marital & Date Rape, *supra* note 102).

<sup>168</sup>*Id.*

charge<sup>169</sup> and that women would use rape charges as a weapon in separation and divorce settlements.<sup>170</sup> Senator Pfeifer also argued that marital rape is too difficult to prove and therefore should not be a crime.<sup>171</sup> His argument that abolishing the marital rape exemption would be unworkable, because it would create a burden on prosecutors, led to the demise of the Bill. It was never heard by the Senate Judiciary Committee.<sup>172</sup>

The battle did not end with Senator Pfeifer's refusal to hear Senate Bill 17. Portions of that Bill were amended to Representative Davidson's Domestic Violence Bill, House Bill 475, in the Senate Judiciary Committee.<sup>173</sup> Senator White managed to have the Judiciary Committee vote on an amendment which permitted the filing of spousal rape charges when the rape occurs while a couple is living apart and when the rape is committed under force or threat of force when the couple is living together.<sup>174</sup> The amendment to the Domestic Violence Bill was approved by a 29 to 2 vote in the Senate Judiciary Committee, despite Pfeifer's efforts.<sup>175</sup> The Bill was returned to the House for review of the amendment along with other changes made by the Senate.<sup>176</sup> On December 6, 1985 it was approved, and the Bill became effective March 7, 1986.<sup>177</sup>

### B. Ohio's Current Rape Statute

Senator White criticized Senator Pfeifer's efforts to include a marital rape provision in the Domestic Violence Bill by claiming that it was a "half-hearted

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<sup>169</sup>See Mary A. Sharkey, *Pfeifer Holds up Bill for Marital Rape Law*, THE PLAIN DEALER, Oct. 2, 1985, at 1-A.

<sup>170</sup>See James Bradshaw, *Bill Would Allow Women to Charge Husbands With Rape*, THE COLUMBUS DISPATCH, Oct. 3, 1985, at 4B. See also Lee Leonard, *Senate Unit Shuns Attempt at Spousal Rape Legislation*, COLUMBUS CITIZEN J., Oct. 3, 1985, at 3A.

<sup>171</sup>See also *supra* notes 58-69 and accompanying text.

<sup>172</sup>See *Pfeifer Wrong about Rape Law*, MEDINA COUNTY GAZETTE, Oct. 4, 1985, at A4.

<sup>173</sup>H.B. 475, *supra* note 150. In addition to limiting spousal immunity, Davidson's Domestic Violence Bill (House Bill 475) dealt with permitting spouses to testify against each other in prosecution of such offenses, to increase the penalty for subsequent violations of domestic violence protection orders or consent agreements, to require courts to consider certain factors when setting bail for persons who commit domestic violence, to permit the ordering of a psychiatric examination of persons who violate such order or agreements, and to authorize a court that sentences a person for domestic violence or violating such an order or agreement to place the person on probation for treatment if he has a drug or alcohol problem. *Id.*

<sup>174</sup>See Mary G. Poldomani, *Ohio Senate Toughens Day-Care, Rape Bills*, THE AKRON BEACON J., Nov. 15, 1985, at D1.

<sup>175</sup>*Id.*

<sup>176</sup>See Poldomani, *supra* note 174.

<sup>177</sup>See H.B. 475, *supra* note 150.

attempt to placate the thousands of Ohioans on the issue of marital rape."<sup>178</sup> Indeed, the amendment which passed failed to resolve the marital rape issue because the changes simply moved Ohio from the category of states that do not recognize spousal rape as a crime to the category of "partial exemption" states that recognize rape as a crime only in limited circumstances.<sup>179</sup> While House Bill 475 placed Ohio on the proper path for complete abolishment of the marital rape exemption, there have been no changes (see HB 395 next section) to the marital exemption since House Bill 475 became effective.<sup>180</sup>

Currently, Ohio's partial marital rape exemption statute is ambiguous and inconsistent. The statute provides that husbands cannot be prosecuted for the rape of their wives if the two live together, but a person can be prosecuted for rape if the spouse-victim lives separately and apart from the offender.<sup>181</sup> However, when a person engages in sexual conduct with another and compels the other to submit by force or threat of force, the fact that the offender and victim were married, or cohabiting, will not be a defense to the crime of rape.<sup>182</sup> If the statute had provided that marriage was not a defense to any form of rape, then Ohio would have completely abolished the marital rape exemption. 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.<sup>183</sup> 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.<sup>184</sup>

### C. Proposal for Ohio's Complete Abolishment

Ohio is not alone in the partial marital exemption category,<sup>185</sup> but Ohio legislators have not offered a legitimate justification for allowing husbands to escape prosecution when they drug or intoxicate their wives in order to rape them. Ohio's rape statute needs to be amended to allow the prosecution of any

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<sup>178</sup>Press release from Senator Michael White's Office (Oct. 3, 1985).

<sup>179</sup>OHIO REV. CODE ANN. § 2907.02 (Anderson 1993).

<sup>180</sup>*Id.*

<sup>181</sup>§ 2907.02(A)(1). For the definition of "spouse" see § 2907.01(L).

<sup>182</sup>§ 2907.02(G). This same idea that being married is not a defense applies in the felonious sexual penetration statute. § 2907.12. However, the marital rape exemption still applies for the sex offenses of sexual battery, gross sexual imposition, and sexual imposition. § 2907.03, .05, .06.

<sup>183</sup>§ 2907.02(A)(1)(a), .02(G).

<sup>184</sup>§ 2907.01(A)(1), .01(A)(1)(a). Additionally, a woman who is drugged or intoxicated by her husband will not be able to prosecute him for felonious sexual penetration. § 2907.12(A)(1)(a).

<sup>185</sup>See *supra* notes 148-53 and accompanying text.



husband who rapes another person in all circumstances, whether the victim is the offender's spouse or not. Two simple amendments should be applied to section 2907.02 which would completely abolish the marital rape exemption. First, the word "spouse" should be removed from the main provision in the statute so that it would read "[n]o person shall engage in sexual conduct with another . . . ." This is the most important step in treating married and unmarried women equally.

The second amendment should be the addition of a provision that clearly states that this section applies whether or not the offender is married to the victim. Section 2907.02(G) should read that it is not a defense to a charge of rape under any provision in this statute "that the offender and the victim were married or were cohabiting at the time of the commission of the offense."<sup>186</sup> Utah, North Carolina, and Alaska have recently amended their rape statutes by adding a provision stating that marriage is never a defense to the crime of rape.<sup>187</sup>

The question that needs to be addressed is why Ohio should change its rape statute to reflect a complete abolishment of the marital rape exemption? The answer is embedded in a fundamental notion of respect for a woman's autonomy and the basic right to control the use of her own body. Within the past decade, numerous states have changed their statutes to reflect a complete abolishment of the marital rape exemption.<sup>188</sup> The only explanation for these changes in marital rape exemption laws is that there has been a very slow, but steady, realization that married women are not chattel of their husbands and that they deserve equal protection of the laws, whether they are raped by their husband or any other man.<sup>189</sup> The complete removal of Ohio's marital exemption will give married women the power to assert the physical integrity of their bodies.<sup>190</sup> Any remaining vestiges of spousal immunity in Ohio's rape law should be destroyed because "if women are to be what we believe we are - equal partners - then intercourse must be construed as an act of mutual desire and not as a wifely 'duty' enforced by the permissible threat of bodily harm or of economic sanctions."<sup>191</sup> Ohio legislators have no reason not to amend the current rape statute. As discussed in Part II of this Note, the common law origins and modern justifications for upholding any form of spousal immunity

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<sup>186</sup>See OHIO REV. CODE ANN. § 2907.02(G) (Anderson 1993). Senate Bill 17 proposed these exact changes, but was never accepted. See *supra* notes 158-61 and accompanying text.

<sup>187</sup>See ALASKA STAT. § 11.41.443 (Supp. 1993); N.C. GEN. STAT. § 14-27.8 (1993); UTAH CODE ANN. § 76-5-404 (Supp. 1993).

<sup>188</sup>See *supra* note 154 and accompanying text.

<sup>189</sup>See generally RUSSELL, *supra* note 6, at introduction. See also Williams, *supra* note 39, at 176-79.

<sup>190</sup>See Schwartz, *supra* note 9, at 51.

<sup>191</sup>BROWNMILLER, *supra* note 4, at 381.

are meritless because they are based on archaic and sexist rationales that should no longer play a role in our modern society.

#### *D. Current Attempts at Change in Ohio*

The Ohio Legislature has recently taken a step toward the abolishment of the marital rape exemption and all other forms of spousal immunity present in other criminal offenses with the proposal of House Bill 395 by Representative Betty Sutton.<sup>192</sup> This Bill specifies that the language from the rape<sup>193</sup> and felonious sexual penetration<sup>194</sup> statutes stating that it is "not a defense that the offender and the victim were married or were cohabiting at the time of the commission of the offense" should be added to twenty-three other criminal offenses in the Ohio Revised Code.<sup>195</sup> The offenses to which the new provision would be added are: aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, felonious assault, aggravated assault, assault, aggravated menacing, menacing by stalking, menacing, kidnapping, abduction, extortion, sexual battery, aggravated arson in instances in which a risk of physical harm to a person is involved, arson, aggravated robbery, robbery, aggravated burglary, burglary, aggravated trespass, intimidation, and intimidation of a crime victim or witness.<sup>196</sup> The Bill also expands the existing specification for rape and felonious sexual penetration to state that it is not a defense that the offender and the victim were married or were cohabiting "prior to" the time of the commission of the offense.<sup>197</sup>

Although at first glance this Bill seems to rid the Ohio penal code of all remnants of spousal immunity, this is not the case. The Bill does not apply to the offenses of gross sexual imposition and sexual imposition, nor does the Bill remove Ohio from the partial marital rape exemption category.<sup>198</sup> However, despite the fact that the Bill would not resolve every issue, if approved by the legislature, Ohio would be one step closer to obtaining the complete abolishment of the marital rape exemption. Unfortunately, on December 29, 1994, House Bill 395 died in the House Judiciary Committee, but there are plans to reintroduce it in 1995.<sup>199</sup> If the bill is eventually passed it will show a

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<sup>192</sup>H.B. 395, 120th General Assembly, Regular Sess. (1993-1994) (introduced on June 3, 1993 by Representative Sutton, D-Barberton) [hereinafter H.B. 395].

<sup>193</sup>§ 2907.02(G).

<sup>194</sup>§ 2907.12(C).

<sup>195</sup>See H.B. 395, *supra* note 192.

<sup>196</sup>*Id.* See also §§ 2903.01-.04, .11-.13, .21-.22, 2905.01, .02, .11, 2907.03, 2909.02, .03, 2911.01, .02, .11, .12, .211, 2921.03, .04.

<sup>197</sup>See H.B. 395, *supra* note 192.

<sup>198</sup>*Id.* See also § 2907.05, .06.

<sup>199</sup>Telephone interview with the Ohio Legislative Information Bureau and Representative Betty Sutton's office on Jan. 17, 1995.

recognition and awareness by those in political power that spousal immunity should not exist in any form of Ohio law.

### *E. Marital Rape in Ohio*

When speaking in legislative terms, one can lose sight of the reasons and motivations for wanting to change the law. The primary motivation for urging complete abolishment of Ohio's marital rape exemption is to give married women the right to prosecute their attackers in *all* situations, regardless of the marital relationship of the victim and the perpetrator. Since House Bill 475 became effective in 1986, there have been a number of cases in Ohio where a husband has been prosecuted for raping his wife.<sup>200</sup> The fact that marital rape does occur in Ohio and that married women have used the statute to prosecute their husbands should alert the legislators, as well as Ohio residents, that changing rape laws to reflect equality among married and unmarried women is an issue worthy of social, legislative, and judicial attention.

Nevertheless, although there have been instances of husbands being prosecuted and convicted for raping their wives in Ohio, if Ohio law were to completely abolish the marital exemption, more women who have been raped by their husbands may be encouraged to prosecute them based on the premise that *all* forms of marital rape are criminal.<sup>201</sup> Changing the law is pivotal to deterrence because too few husbands recognize that marital rape is unacceptable and too many wives believe that they do not have a right to refuse their husbands sexual advances.<sup>202</sup> If Ohio law is changed to reflect complete abolishment of the marital rape exemption it will set the moral boundaries which will remind husbands that they can be prosecuted for raping their wives and that wives have the right to prosecute their husbands for rape.<sup>203</sup>

The fact that Ohio does have instances of marital rape and that women are exercising their right to prosecute their husbands<sup>204</sup> for rape should be an encouraging sign to Ohio legislators that they are on their way to providing equal rape laws to married women. This battle should not stop until the issue is completely resolved, and full resolution can only occur when Ohio places itself in the category of states which have completely abolished the marital rape exemption.

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<sup>200</sup>See, e.g., Jim Dillon, *Cedarville Man Facing Charges Under New Spousal-Rape Law*, THE DAYTON DAILY NEWS, June 19, 1986, at 14; Julia Helgason, *2 Cases: 1 Conviction, 1 Acquittal*, THE DAYTON DAILY NEWS, April 8, 1990, at 1A; Michele Lesie, *Spousal Rape Confusing to Men, Women*, THE PLAIN DEALER, May 1, 1991, at 4A; Scott Stephens, *Elyria Man Guilty of Raping Pregnant Wife*, THE PLAIN DEALER, Aug. 14, 1993, at 1B.

<sup>201</sup>See FINKELHOR & YLLO, *supra* note 2, at 198.

<sup>202</sup>*Id.*

<sup>203</sup>*Id.*

<sup>204</sup>See Stephens, *supra* note 200.

V. SUGGESTIONS TO ADVANCE THE NATIONAL CAMPAIGN FOR COMPLETE  
ABOLISHMENT OF THE MARITAL EXEMPTION

There are numerous steps that need to be taken in order to accomplish the goal of eliminating existing marital rape exemption statutes nationwide. The first step is to criminalize marital rape in the four holdout states which do not recognize rape as a crime when a husband and wife live together.<sup>205</sup> The second step is to change the law in the twenty-four states which have partial marital rape exemption statutes.<sup>206</sup> One way to effectuate these changes is for citizens to lobby the legislature of each state for change. In those states where the marital rape law is unsatisfactory, women can organize a class action suit in an attempt to strike down the marital exemption or partial marital exemption as unconstitutional.<sup>207</sup> Additionally, in these four holdout states where marital rape is still not prosecutable when the spouses live together, women can try to sue their husbands for damages in civil court.<sup>208</sup>

Perhaps the most effective way to achieve these essential legislative changes is to change the underlying social conditions which have fostered spousal immunity.<sup>209</sup> Women need to be empowered with improved economic and social opportunities so that they are not vulnerable partners in marriage.<sup>210</sup> However, deeply embedded in our culture exists a sexist ideology about women's sexuality which has fostered violence against women.<sup>211</sup> In order for women to have control over their own bodies this ideology must be forgotten. But, because these views are embedded in the fundamental values of our society, changing sexist ideologies has been and will continue to be a very slow and arduous experience.<sup>212</sup>

One way in which to change the sexist views about women in our society may be to elect more women legislators.<sup>213</sup> With more women making law, there will arguably be a greater concern and awareness for issues which affect women.<sup>214</sup> This may spur the awareness of women and men that marital rape should be a crime and that married women do have the right to choose how to use their own bodies.<sup>215</sup>

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<sup>205</sup>See RUSSELL, *supra* note 6, at 25. See *supra* notes 143-47 and accompanying text.

<sup>206</sup>See RUSSELL, *supra* note 6, at 25. See *supra* notes 148-53 and accompanying text.

<sup>207</sup>See RUSSELL, *supra* note 6, at 25.

<sup>208</sup>*Id.*

<sup>209</sup>See FINKELHOR & YLLO, *supra* note 2, at 186.

<sup>210</sup>*Id.* at 187.

<sup>211</sup>*Id.*

<sup>212</sup>*Id.*

<sup>213</sup>See RUSSELL, *supra* note 6, at 26.

<sup>214</sup>*Id.*

<sup>215</sup>See Schwartz, *supra* note 9, at 51.

Removing the marital exemption is viewed as an educational statement about the rights of partners in marriage.<sup>216</sup> If the goal is to promote a society where there is a belief in the equal worth of women and that marriage is based on equality and partnership,<sup>217</sup> then the only logical step toward promoting this goal is to completely abolish all remnants of spousal immunity in the law.<sup>218</sup>

These changes in the law will neither be easy nor sudden, but an awareness that marital rape is wrong will lead to changes in the law. With women gaining more political power and equality, eventually states will have no choice but to completely abolish the marital rape exemption giving every woman the freedom to use her own body as she chooses.

## VI. CONCLUSION

For the past two decades there has been a massive amount of legislative activity dealing with the marital rape exemption. 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 and that when a woman marries, she consents to unconditional sexual intercourse with her husband. This idea came from the common law origins of the 17th century and has lasted until the present day. In the later half of the 20th century, these common law origins have been rejected by the courts as justifications for the marital rape exemption. Since these common law origins have been abandoned, defenders of the marital rape exemption have attempted to come up with modern justifications for the marital rape exemption, such as the inappropriate invasion of marital privacy and harm to the marital bond. However, these modern justifications are based on weak and sexist arguments that also have been rejected by the courts.

The marital exemption should be given priority by legislators until it is completely abolished in every state. Partial exemption states, such as Ohio, should follow the lead of other states which have amended their statutes to reflect complete abolishment of the marital exemption. Since there is no legal or logical basis for the marital exemption, Ohio, as well as all other states who have any form of a marital exemption, should amend their statutes to promote a society where women are equal partners in marriage and have the right to control access to their own bodies.

LALENYA WEINTRAUB SIEGEL

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<sup>216</sup>*Id.*

<sup>217</sup>*Id.* at 35.

<sup>218</sup>See Waterman, *supra* note 16, at 621.