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Michael J. Gonring III

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SPOUSAL EXEMPTION TO RAPE

Universally, rape is seen as a truly reprehensible crime, a crime of violence that not only damages the body, but which also leaves great scars on the mind. Legislatures have acted forcefully against such invasions of a woman's person, giving courts the means to punish the crime. Yet, for reasons that will be explored in this comment, legislatures and courts throughout England and the United States have covered their eyes, closed their ears and sealed their mouths to one of the great inconsistencies in law, the common law sanction of a husband's rape of his wife. A husband not only may demand that his wife consent to sexual intercourse, but should she refuse, he can threaten her with any weapon at his disposal; indeed, he can use physical force to secure his wishes. He is, for the most part, above the law.

Of course, application of this exemption can lead to ridiculous results. For instance, a man can lie in wait and attack and rape an unsuspecting woman, and if it turns out that that woman is his wife, he cannot be prosecuted. Contrarily, if a man should rape a woman whom he believes to be his wife, and it turns out that the marriage is void, presumably he can be prosecuted. Suddenly he has become culpable.

There is no great, impressive body of law supporting the commonly accepted position that a man cannot be guilty of

1. Throughout this comment, when the word "rape" is used, the author intends the following definition: Sexual intercourse by a man who compels a woman to submit by force, threat of death or serious bodily injury or extreme pain; or has used drugs, intoxicants or other means to impair her power to appraise or control her conduct; or sexual intercourse with a woman who is unconscious. MODEL PENAL CODE § 213.1(1) (1980).
2. See generally S. BROWNMILLER, AGAINST OUR WILL (1975).
4. Id.
5. For the origins of the common law sanction, see discussion, § I, A infra.
6. Of course, if the effect of the husband's force meets the elements of assault and battery, the wife can bring charges in that area. However, the harm punished by the crime of assault and battery does not reach the harm accomplished in a rape. See discussion, § I, B infra.
7. Fletcher, The Right Deed for the Wrong Reason: A Reply to Mr. Robinson, 23 U.C.L.A. L. Rev. 293, 295-96 (1975), in which the author deals with justificatory defenses to crimes and the theory that such defenses should be available only to those whose intent is meritorious.
raping his wife.9 Indeed, most courts that have considered the issue seem to have accepted it as a given, a proposition that is so universal as to preclude discussion.10 In truth, enunciation of the spousal exemption dates to 1736, when Lord Matthew Hale wrote: "But 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."11

Hale also spoke of the ease of charging rape and the difficulty of disproving the charge, evidencing his belief in what now would be called the "cry-rape" syndrome.12 Furthermore, his thoughts along this line have been incorporated into the instructions at rape trials in some jurisdictions.13 All of that has led some commentators to attack Hale, along with the outdated theory of a spousal exemption.14 Yet while the various facets of Hale's personality make interesting reading, and give some arguable insight into why Hale believed as he did, such considerations remain unimportant. What matters is that the essence of a statement made over two hundred years ago is still embodied in statutes15 which affect peoples' lives. This comment will discuss the reasons for the spousal exemption, review case law and statutory treatment, and argue that the spousal exemption should be relegated to history.

10. 148 N.J. Super. at ——, 372 A.2d at 388. But see the discussion in 85 N.J. at ——, 426 A.2d at 40-45.
11. 1 M. Hale, Pleas of the Crown 629 (1st Am. ed. 1847) [hereinafter cited as Hale].
12. Id. at 633.
15. See discussion § I, D infra.
I. THE SPOUSAL EXEMPTION TO RAPE

A. Historical Rationales

Hale's pronouncement is the first recorded recognition of the marital rape exemption. But the idea that a husband could not rape his wife probably had its roots in the related theories of the wife as chattel and the unity of marriage, in which a woman was presumed to lose her identity after marriage. As Blackstone wrote: "[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . ."

Indeed, prior to enunciation of Hale's rule, the interrelated concepts of contract/implied consent, wife as chattel, and unity of marriage had existed in English rape laws. For instance, an alleged rapist could avoid punishment if the victim accepted the attacker as her husband. And during the reign of Henry III, a rapist could defend himself by claiming the victim once had been his mistress. In fact, some commentators believe that rape laws were developed primarily to protect men's property interests in their wives or daughters as sexual objects. Hale himself, however, cited no authority for his proposition, and in an early English case, Judge Field said in dissent, "[I] should hesitate before I adopted it."

Judges in England and America, unfortunately, have not been affected by the same sense of hesitancy. By accepting the common law exemption to rape given a husband and trumpeted by Hale, they are necessarily accepting the reasons for the exemption contained in Hale's pronouncement. Hale spoke of consent given and contract formed when the matri-

17. 1 W. Blackstone, Commentaries 441 (Sharswood ed. 1859) (emphasis in original).
19. Id.
22. Id. at 57.
monial act takes place. These are the commonly and all-too-readily accepted reasons for the exemption — that by consenting to marriage, a woman forges a contract which makes her body available to her husband at anytime. Of course, Hale made the consent irrevocable, meaning that the woman is always available.

Indeed, courts that have chosen to accept this doctrine blindly have accepted, perhaps unwittingly, some shocking ramifications. One only has to look at Pollock's statement in Regina v. Clarence, one of the first cases to apply Hale's doctrine, to discover what type of pronouncements survive in this area of the common law. Speaking of the "connection," i.e., sexual intercourse, between husband and wife, Pollock said, after quoting Hale, "Such a connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection . . . ."

Not only have statements like Pollock's attached themselves to the exemption, but the contract/implied consent theory relied on by Hale, Pollock, and the courts and legislatures that have considered it, for however short a time, does not provide much current support for retaining the common-law exemption to spousal rape. Simple historical perspective shows that the theory is no longer viable. As one English judge has pointed out, marriage was for all purposes irrevocable at the time Hale defined the common law, so it followed that a wife's consent would be irrevocable too. Today, of course, marriages are ended with what might be considered substantial frequency.

There is also a double standard operative here. A wife is presumed to consent irrevocably to sex, yet courts have been more than willing to ignore an implied consent theory, born of the marriage contract, when rape is not involved. For in-

23. Hale, supra note 11, at 629.
25. Hale, supra note 11, at 629.
27. 22 Q.B.D. 23 (1888).
28. Id. at 64.
stance, a wife is not presumed to consent to assault and battery, yet in many states, all the husband must do to legitimize his assault is to combine it with rape. This is true even though states have taken the position that one cannot consent to serious bodily harm, such as that which results from excessive fraternity hazing and excessive violence in sports.

Consent has been ignored in other areas involving marital sex. Courts have granted divorces on the basis of excessive sexual demands and have refused to grant divorces when a partner has been denied sex for a period of time. Also, in a nonmarital rape situation, a woman may be found to have consented one night but not the next, even if the same man is involved. The same woman would not have that privilege of nonconsent if she had wed the man between the two episodes.

The consent theory especially suffers in situations involving spouses who are separated. A woman's moving out of the house that she shared with her husband would seem to offer strong evidence of a lack of consent, yet in many jurisdictions the husband in that situation is still protected from rape laws, even, in some cases, if the wife has begun divorce proceedings.

The contract that breeds this implied consent is likewise a strange creation. It cannot be thought of as a typical commercial-type contract, where two parties agree to certain terms, bargaining at arm's length. For one thing, the state is involved in the so-called marriage contract from the outset, and that involvement is continued even beyond the day that the con-

30. Marital Rape Exemption, supra note 20, at 311-12.
32. See, e.g., Cimijotti v. Cimijotti, 255 Iowa 77, 121 N.W.2d 537 (1963) (husband insisted on sexual relations almost every night).
33. See, e.g., Dominik v. Dominik, 7 N.J. 198, 81 A.2d 147 (1951) (wife's refusal of normal sexual relations for three weeks did not amount to extreme cruelty, especially in absence of any substantial damage to husband's health).
34. In fact, according to at least one court, a woman (not the wife of the perpetrator) can withdraw her consent prior to the act of penetration, even if she has consented right up to that time. Battle v. State, 414 A.2d 1266, 1270 (Md. 1980). But evidence of prior consent can be used as impeachment testimony if the same man is involved. Milenkovic v. State, 86 Wis. 2d 272, 272 N.W.2d 320 (1978).
35. See discussion, § I, D infra.
tract is revoked. The state is not merely an observer, but an “interested party.”

Furthermore, there is some question about the nature of a contract which may be enforced by whatever means one party chooses, including violence. This surely exceeds the traditional contract remedies. The whole idea of viewing the marriage agreement in strict contract terms, with consent to on-demand sex as part of it, is ludicrous when taken to the extreme.

If the contract/implied consent reasoning is dispensed with, and the ancient theories of wife as chattel and unity of marriage are decreed to be buried under a wealth of legislation intended to give a wife equal rights in a marriage, only the practical considerations that are advanced against the abolition of the spousal exemption remain.

B. Practical Considerations

A number of reasons have been advanced for retaining the spousal exemption to rape, and by far the most popular is that there will be insurmountable proof problems if a wife attempts to bring rape charges against her husband. The basic elements required to establish rape are: (1) lack of consent, (2) use of or threat of use of force, and (3) penetration. Of these, the consent element would be the most difficult to prove. Even though the marriage situation should not give either party a right to sex on demand, it does give rise to a natural inference of consent based on the relationship itself.

Yet consent is a difficult element to prove in any rape case, especially where the parties involved have had previous sexual relations. Such problems do not keep the case out of

37. Id.
38. Consider, for example, the application of traditional contract and related remedies. Shall the husband take the wife to court and sue for damages when she refused sexual intercourse? Should he, in appropriate fact situations, try promissory estoppel, breach of warranty and so on?
40. 65 Am. Jur. 2d Rape §§ 2-7 (1972).
42. Note, If She Consented Once, She Consented Again — A Legal Fallacy in Forcible Rape Cases, 10 Val. L. Rev. 127; 143-46 (1975).
court, however, inasmuch as the judicial system is presumed capable of dealing with the issue.\(^{43}\)

In *State v. Smith*,\(^{44}\) a New Jersey case involving spousal rape, the prosecution in the trial court advanced a limited application of the rape statute to husbands. It suggested that there be a rebuttable presumption of consent by the wife-victim, plus a requirement of more-than-minimal physical violence by the husband.\(^{45}\) Certainly, the elimination of the spousal exemption, even accompanied by the additional proof handicaps, would be an improvement. However, the wife remains disadvantaged. If she claims rape, why should she be subjected to a stricter burden than any other woman who claims rape? The act and the lack of consent are the same in each case.

Another reason advanced by those who would keep the exemption is the possibility of false charges being filed by the wife to exact vengeance or to gain an advantage in property settlements in divorce actions.\(^{46}\) This approach, however, demonstrates little understanding of the human psyche, and the natural shame and embarrassment that would attend any revelation of a rape by one’s husband.\(^{47}\) Also, false charges can be filed in connection with any statutory crime, and the judicial system deals with the problem daily.\(^{48}\) But because it is a wife pressing rape charges against her husband, the talk is of fabrication. No such talk is heard when a wife brings charges against her husband for assault and battery, fraud and, notably, sodomy, all crimes in which the husband is not protected by the law.\(^{49}\) Yet the excuse of fabrication is heard when the subject is the serious one of rape.

Some observers feel that the sanctity of marriage would be jeopardized by an elimination of the exemption, because all possibilities of reconciliation would be destroyed.\(^{50}\) In its com-

\(^{43}\) Marital Rape Exemption, supra note 20, at 315.


\(^{45}\) 148 N.J. Super. at ----, 372 A.2d at 391.

\(^{46}\) Id. at ----, 372 A.2d at 389.

\(^{47}\) BROWNMILLER supra note 2.


\(^{50}\) Comment, Rape and Battery Between Husband and Wife, 6 STAN. L. REV.
ments to the Model Penal Code, the American Law Institute says that abandoning the exemption "would thrust the prospect of criminal sanctions into the ongoing process of adjustment in the marital relationship."51

Both propositions ring hollow. The former assumes that a marriage which has reached the stage of a wife’s prosecution of her husband for rape is capable of being saved at all. The latter makes essentially the same argument, assuming that forcible rape of one’s wife is a matter to which a wife can adjust. Perhaps she can, but a wife should not be forced to make such adjustments.

Others avoid the issue entirely, and suggest that the wife has other means at her disposal, such as actions for assault and battery and divorce.62 The crime of assault and battery, however, is premised on a different type of harm from that of rape.63 Rape leaves a stigma that other crimes do not; it "subjugates and humiliates"64 the woman. As the Massachusetts Supreme Court has said, "The essence of the crime is not the fact of intercourse but the injury and outrage to the feeling of the woman by the forceful penetration of her person. It is a crime radically different from assault and battery . . . ."65 Furthermore, if assault and battery are adequate substitutes for rape, then the penalties should be similar.66 Apparently, the legislatures are aware of the vast difference in harm to the victim.

As to the argument that divorce is an alternative,67 the trial court in Smith found little use for that reasoning. Said the court, "It is small comfort to a married woman whose husband has forcibly ravished her against her will to know that

719, 725 (1954).
51. MODEL PENAL CODE, § 213.1, Comment 8(c) (1980).
52. Id. See also State v. Smith, 148 N.J. Super. at ——, 372 A.2d at 390.
53. Marital Exception to Rape, supra note 18, at 275.
56. See, e.g., Wis. STAT. § 940.19(2) (1979) (Aggravated battery, a Class C felony, punishable by a fine or imprisonment of up to 10 years); Wis. STAT. § 940.225(1) (1979) (First degree sexual assault, a Class B felony, punishable by imprisonment of up to 20 years).
57. For some persons, albeit a dwindling number, divorce is not an alternative for religious reasons.
she may resort to the matrimonial courts to recapture or retrieve her right to sexual privacy. Also, as has been mentioned before, a wife can remain vulnerable right up to divorce in many jurisdictions.

The modern reasoning that supports the exemption is faulty, yet the exemption survives, almost unchallenged in the courts.

C. Case Law

1. In England

The approach to the spousal exemption to rape in England should be examined to determine how English judges have coped with Hale’s doctrine. Regina v. Clarence, mentioned previously in connection with Judge Pollock’s comments, involved a husband’s having sexual relations with his wife even though he knew he had gonorrhea. The case did not involve rape, but the prosecution introduced it to make the point that if the wife had resisted, the husband would have been guilty of rape. That gave the thirteen King’s Bench judges an opportunity to consider that issue, and several seized upon it, Pollock being the most notable. The case also is often cited for a dissent by Field, in which, the possibility of a criminal charge in the right case is mentioned.

Three more English cases have varied the theme. In Regina v. Clarke, decided sixty-one years after Clarence, the court said that a separation order that explicitly cut off sexual rights would leave a husband liable for rape, but affirmed Hale’s doctrine in other situations. In Regina v. Miller the Clarke rationale was applied to a husband who forced his wife to have intercourse after she had petitioned for divorce. The court found that although assault could be found, rape could

58. 148 N.J. Super. at —, 372 A.2d at 390.
59. See discussion, § I, D infra.
60. 22 Q.B.D. 23 (1888).
61. Id. at 64. See text accompanying note 28 supra.
62. Id.
63. Id. at 57.
64. [1949] 2 All E.R. 448.
65. Id.
67. Id. at 292.
not, because the divorce proceedings had not gone far enough.68 Finally, in Regina v. O'Brien,69 the wife had a preliminary decree of divorce. The court decided that the proceedings had in fact gone far enough and that the husband was liable.70

2. In the United States

Case law involving marital rape is sparse in the United States, and one can only speculate as to the reasons. Reluctance of women to even attempt prosecution of their husbands certainly is one reason. And, perhaps, as has been suggested, those who do wish to prosecute are informed of the concomitant problems by prosecutors, who advise the wives to drop the charges or pursue assault and battery instead.71

Much of the case law that does exist does not meet the issue with factual situations that are precisely on point. For instance, there are cases that hold that the spousal rape exemption does not apply when a husband aids and abets in the rape of his wife by a third party.72 No cases can be found contradicting that rule. There are other cases dealing with the pleadings of a rape charge or the instructions at a rape trial, and whether the complaint and the instructions must specifically state that a victim was not the wife of the defendant.73 There are still other cases in which a husband is found guilty of forcible sexual perversion on his wife.74

However, cases involving a husband's rape of his wife, with no third party involved, are not abundant. The first case on record which mentioned the doctrine at all concerned a procedural question on the framing of the complaint. In Commonwealth v. Fogerty,75 the court ruled that it was not necessary to put the "not his wife" language in the complaint. But that court used the occasion to mention that a defense to the

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68. Id. at 290.
70. Id. at 665.
71. Geis, supra note 14, at 286.
72. See, e.g., State v. Drope, 462 S.W.2d 677 (Mo. 1971). As the court mentions in that case, no cases can be found contrary to the holding that a husband can be found guilty of raping his wife if he assists a third person. Id. at 680.
75. 74 Mass. (8 Gray) 489 (1857).
charge of rape would be that the victim was the wife of the defendant. The defendant's attorney cited Hale to bolster his case.

Another early case, State v. Haines, is not directly on point either, but involved a related issue. The husband was found guilty as an accessory to the rape of his wife, and was imprisoned for life, but the principal was acquitted and the husband appealed. After terming the issue a "unique and novel" question, the court found that the conviction could not stand, even though the husband had forced sexual intercourse upon the wife, because "of the matrimonial consent which she has given, and which she cannot retract."

The first American case directly on point was Frazier v. State, in which a wife attempted to divorce her husband, but was refused a divorce by the court. She therefore stayed in the same house, sleeping in a bedroom with her daughter while her husband supported her and she did the "ordinary duties devolving upon the wife in regard to household matters." The husband thereafter forced himself upon his wife, the wife brought charges, and the court restated the common law, declaring that "all the authorities" held that a man could not rape his wife.

The implied consent theory was followed again in State v. Parsons. In that case, a divorce had been granted, and the husband's plea that sexual intercourse had been accomplished by mutual agreement was to no avail. The consent had been terminated by the divorce. The same situation applied in Baugh v. State. Even though the judge did not sign the judgment of divorce until six days after it had been granted (the husband had raped the wife the day it had been granted), the court found that all the issues had been adjudicated, and

76. Id. at 491.
77. Id. at 490.
78. 25 So. 372 (La. 1899).
79. Id.
80. Id. (citation omitted).
81. 48 Tex. Crim. 142, 86 S.W. 754 (1905).
82. Id. at ______, 86 S.W. at 754.
83. Id.
84. 285 S.W. 412 (Mo. 1926).
the marriage had ended. Reliance on such technicalities is needed when the common law is adhered to in this area.

Several state trial courts have dealt with the exemption recently, including the widely publicized State v. Rideout. Rideout was the first case brought under Oregon's revised statute, which allowed for prosecution of the husband. The husband was acquitted by a jury, but commentators point out that the case did not offer a clear factual picture, and that it was thus not a good test of the statute's effectiveness.

Another case, State v. Chretien, involved a Massachusetts statute that made no mention of the exemption although the jurisdiction had, of course, adopted the exemption. In this case, however, the couple was living apart, awaiting a final divorce decree, and the husband was convicted.

Two other recent cases have touched the issue peripherally. In State v. Bateman, the husband attempted to use privacy arguments grounded on Eisenstadt v. Baird and Griswold v. Connecticut to avoid a conviction for forcing his wife to commit oral sex upon him. The court recognized that a wife could refuse that variety of sex but made no mention of sexual intercourse.

In People v. Hartwell, a wife accused of murdering her husband claimed she was defending herself from sexual attack. The judge, in his instruction to the jury, said that "[A] married woman is not compelled by law to submit against her will to sexual contact which she finds offensive." The most encouraging and well-developed case law treatment of the issue thus far was provided by the various New

86. Id. at 769.
88. OR. REV. STAT. § 163.375 (1979).
89. Legal Sanction, supra note 24, at 579; Barry, supra note 14, at 1091.
91. MASS. GEN. LAWS ANN. ch. 265, § 22 (West 1974).
93. 113 Ariz. 107, 547 P.2d 6 (1976).
95. 381 U.S. 479 (1965).
97. Marital Rape Exemption, supra note 20, at 321.
Albert Smith was accused of raping his estranged wife on the basis of a New Jersey statute which made no mention of the spousal exemption and which had never been specifically construed by the state courts as including the common law approach. Smith, of course, claimed that the statute should continue to be interpreted to include the exemption. The trial court, in a well-reasoned and lengthy opinion, critically traced the history of the exemption and the reasons for it. However, the court deferred to the legislature, as did the intermediate appellate court on appeal, pointing out that the statute was in the process of revision.

When the Supreme Court of New Jersey took the case, New Jersey had enacted its new statute eliminating the spousal exemption. Nevertheless, the court, dealing with the old statute because of its application to Smith, surveyed the common law and decided that the existence of a spousal exemption "is not as obvious as the lower courts here or courts in other jurisdictions have believed." The reason for the court's doubt was its belief that the rule could not have been meant to apply to revocable marriages.

For purposes of inquiry, the court presumed that some form of exemption had existed when New Jersey drafted its old statute from the common law. The question, said the court, was whether the exemption existed when Smith raped his wife in 1975. The court found that Smith was not covered by an exemption, and although the court limited its holding to the facts of the case, specifically the fact that the Smiths were separated, it noted that an exemption might

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102. Id. at ___, 372 A.2d at 393.
106. Id. at ___, 426 A.2d at 42-43.
107. Id. at ___, 426 A.2d at 43.
108. Id. at ___, 426 A.2d at 45.
not apply even if they had not been separated.

The court's limited holding was a disappointment, given the fact that the legislature already had spoken and the court gained nothing by forsaking a broad holding. Also, the court had conducted a lengthy survey of what it called the three major justifications of the exemption — the wife as property; the husband and wife as one; and the implied, irrevocable consent of Hale. The court devoted most of its treatment to the final justification, stressing the fact that if marriages could be terminated, especially in states with so-called no-fault divorce, consent could not be irrevocable. More importantly, the consent could be revoked before the marriage was legally terminated, as in separations.

Thus, the most recent case, although limited in its holding, is the most encouraging appellate decision yet. Perhaps legislators can be similarly persuaded.

D. Statutes

Although commentators often perceive some progress when they look at legislative action in regard to marital rape, the fact remains that with a few exceptions, it is legal for a husband to rape his wife in any state in the United States. In some cases, this is true even if they are living apart. Furthermore, several states not only give the exemptions to husbands, but to men who live with women without being married. There are instances in which the same state has an exemption for rape but no exemption for sexual perversion or sodomy.

Seven of the jurisdictions, Florida, Georgia, Massachusetts, Mississippi, Nebraska, Virginia and the

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109. Id. at ___, 426 A.2d at 43-44.
110. Id. at ___, 426 A.2d at 44-45.
111. Id.
112. Geis, supra note 14, at 303.
District of Columbia\textsuperscript{121} are silent on the spousal exemption. That is, rape is defined in the statute absent the "not his wife" language, and there is no other place in the statute, such as the definition section, where the exemption is mentioned. Courts in these states probably can be presumed to apply the common law exemption if called upon,\textsuperscript{122} if past practice in other states can be used as an example.\textsuperscript{123}

Eleven of the states still have an express exemption for spouses, or, if they have not made the non-generic leap, for husbands.\textsuperscript{124} Those states are Alabama,\textsuperscript{125} Connecticut,\textsuperscript{126} Illinois,\textsuperscript{127} Kansas,\textsuperscript{128} Montana,\textsuperscript{129} Oklahoma,\textsuperscript{130} South Dakota,\textsuperscript{131} Texas,\textsuperscript{132} Vermont,\textsuperscript{133} Washington\textsuperscript{134} and West Virginia.\textsuperscript{135} South Dakota, in fact, eliminated the exemption one year,\textsuperscript{136} then added it the next.\textsuperscript{137}

Other states ignore the exemption under certain circumstances, with several clear patterns. Ten states\textsuperscript{138} require that the wife have a judicial decree of divorce or separation in hand before the exemption is eliminated. Thus, a wife can move out of the house, get an attorney, file for divorce and be waiting for a court date and still be subject to her husband's

\textsuperscript{121} D.C. CODE ENCYCL. § 22-2801 (West 1967).
\textsuperscript{123} See, e.g., State v. Drope, 462 S.W.2d 677 (Mo. 1971).
\textsuperscript{124} Louisiana, for instance, has changed from "not the wife of" to "not the spouse of." LA. REV. STAT. ANN. § 14:41 (West Supp. 1981).
\textsuperscript{125} ALA. CODE § 13A-6-60 (1977).
\textsuperscript{126} CONN. GEN. STAT. ANN. § 53a-65 (West Supp. 1981).
\textsuperscript{127} ILL. ANN. STAT. ch. 38, § 11-1 (Smith/Hurd 1979).
\textsuperscript{128} KAN. CRIM. CODE ANN. § 21-3502 (Vernon 1974).
\textsuperscript{129} MONT. REV. CODE ANN. §§ 45-5-502 to -503 (1979).
\textsuperscript{130} OKLA. STAT. ANN. tit. 21, § 1111 (West 1951).
\textsuperscript{132} TEX. PENAL CODE ANN. tit. 5, § 21.02 (Vernon 1974).
\textsuperscript{133} VT. STAT. ANN. tit. 13, § 3252 (Supp. 1981).
\textsuperscript{134} WASH. REV. CODE ANN. § 9A.44.040 (Supp. 1981).
\textsuperscript{135} W.VA. CODE § 61-8B-1 (1976).
\textsuperscript{136} 1975 S.D. SESS. LAWS.
\textsuperscript{137} 1976 S.D. SESS. LAWS.
sexual demands.

Five states, including Wisconsin, require that the parties be living apart and that an action be filed. Ohio requires that an action be started or that a written agreement exist. South Carolina requires that the parties be living apart, and there be a high degree of physical injury.

Nine states require merely that the parties be living apart, although there are variations from state to state. Alaska will prosecute if the parties are living apart or if there is a physical injury. In Nevada, New Hampshire and New Mexico the parties can continue to live together, but the wife will be protected if she begins an action for separation or divorce. In Pennsylvania, a decree or an agreement will protect the wife if she decides to continue to live in the same residence as the husband. Idaho protects the wife if she has started proceedings or if she has lived apart for 180 days. One commentator suggests, with some force, that a denial of equal protection may exist when a wife who moves out of the house is protected even though she remains married, while a wife who stays at home is not protected. That, of course, is a problem with the statutes that attempt halfway measures.

One state is particularly difficult to classify. Arkansas is silent in its rape statute on spousal exemption, but uses the

"not his spouse" language in regard to other sexual offenses.\textsuperscript{151}

The remaining states have made the most progress in sending Hale's doctrine back to the eighteenth century. While the New Jersey court was busy leaving it up to the legislature in \textit{Smith},\textsuperscript{152} the legislature was revising the rape laws to exclude the spousal exemption.\textsuperscript{153} The statute now reads, "No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim."\textsuperscript{154}

Oregon had done the same,\textsuperscript{155} and California also revised its statutes to eliminate the spousal exemption,\textsuperscript{156} but the California statute requires resistance overcome by force or threats of "great and immediate bodily harm."\textsuperscript{157} Thus, for example, a husband could drug his unsuspecting wife, or wait until she was unconscious, before having intercourse with her, and escape the bite of the California statute. The Model Penal Code endorses this approach, pointing out that a man who has sexual intercourse with his unconscious wife "should scarcely be condemned to felony liability on the ground that the woman in such circumstances is incapable of consenting to sex with her own husband, at least unless there are aggravating circumstances."\textsuperscript{158} Violating the person of a woman who has not consented, no matter what the circumstances, should be enough.

Iowa,\textsuperscript{159} Delaware\textsuperscript{160} and Hawaii\textsuperscript{161} attempt to meet the problem by classifying rape by degree. In Iowa, the husband is liable for first or second degree sexual abuse, which involves serious injury, the use of a deadly weapon or the threat of death or serious injury.\textsuperscript{162} The husband cannot be prosecuted, however, for third degree sexual abuse, which involves the use

\begin{footnotes}
\item 151. \textit{Id.} at §§ 41-1804 to -1810 (Supp. 1981).
\item 154. \textit{Id.}
\item 155. OR. REV. STAT. § 163.375 (1979).
\item 157. \textit{Id.}
\item 158. \textit{Model Penal Code} § 213.1, Comment 8(c) (1980).
\item 159. IOWA CODE ANN. §§ 709.1--.4 (West 1979).
\item 160. DEL. CODE ANN. tit. 11, §§ 763-64 (1979).
\item 161. HAWAII REV. STAT. §§ 707-730, -731 (Supp. 1980).
\item 162. IOWA CODE ANN. §§ 709.1--.3 (West 1979).
\end{footnotes}
of force. 163

Delaware and Hawaii are similar, in that in both states a
defense to first degree rape is that the female is or has been a
voluntary social companion. In Delaware, if the woman is a
voluntary social companion on that occasion, and has allowed
the man sexual contact in the past, the man is exempt. 164 In
Hawaii, the woman must be a voluntary social companion who
had permitted the defendant to have sexual intercourse
within the past twelve months. 165 In both states, a husband
can be charged with the lesser crime of second degree rape, 166
doing some damage to Hale's rule, but the Delaware and Ha-
waii approaches are discouraging nonetheless. In both states,
the wife's prior submission precludes a charge of first degree
rape, and in Delaware, it makes no difference how long ago that
submission occurred. In Hawaii, a woman can have sexual in-
tercourse with a man on January 1 and be raped by him on
December 30, and the man will have a defense to first degree
rape. According to the comments to the Hawaii Penal Code, a
person "who resorts to sexual aggression against a female who
has permitted previous sexual intercourse, and who has
thereby furnished to some extent an incentive to further amor-
rous advances, presents less of a social danger . . . ." 167 Fort-
unately, that thought is not shared by all of the states.

II. Conclusion

The foregoing should be illustrative of what prospects a
wife faces when her husband decides to have sex with her by
force. The courts, with few exceptions, are not sympathetic, 168
and even if some sympathy does surface, the court may defer
to the legislature 169 — a body which, for the most part, retains
archaic rape laws that sanction brutal conduct by the
husband. 170

163. Id. at § 709.4.
165. HAWAII REV. STAT. § 707-730 (Supp. 1980).
166. DEL. CODE ANN. tit. 11, § 763 (1979); HAWAII REV. STAT. § 707-731 (Supp.
1980).
167. HAWAII REV. STAT. § 731, Comment (Supp. 1980).
168. See discussion, § I, C supra.
170. See discussion, § I, D supra.
The raped wife has few options. She can protest to her husband, yet he is armed with the law. If she is fortunate enough to live in a jurisdiction that eliminates the exemption when the parties live apart, she can move out.\textsuperscript{171} If not, she must file for separation or divorce, and even then, in some jurisdictions, the husband can continue to rape her without fear of prosecution.\textsuperscript{172} Some legislatures would have the wife produce a judicial decree of divorce or separation or a serious injury to be protected.\textsuperscript{173}

That this situation can exist in allegedly enlightened judicial and legislative systems is truly incredible. This approach to marital sex should long ago have been abandoned, yet it lingers today, denying a wife the protection inside her home that she would have against any stranger out on the street. Lip service is paid to ancient notions of contract and consent and marital stability;\textsuperscript{174} wives are insulted by those who insist that an end to the spousal exemption would lead to false charges,\textsuperscript{175} and the legal system is insulted by charges that it could not cope with such a change.\textsuperscript{176} A tested, true and adaptable legal system will not be sabotaged by a measure that provides fundamental justice to a significant number of people.

Rape is a heinous crime, even if it is accomplished behind the veil of a marriage license. It involves a special kind of harm, different from that in other violent crimes.\textsuperscript{177} It leaves revolting aftereffects.\textsuperscript{178} It is time for American legislatures and courts to reject the reasons for allowing this crime the sanction it receives in marriage. A wife should be allowed to say, "I won't."

\textbf{MICHAEL J. GONRING III}

\textsuperscript{171} However, it is not always easy for a battered wife to leave her home, for economic and psychological reasons. Barry, \textit{supra} note 14, at 1091.
\textsuperscript{172} \textit{See} discussion, § I, \textit{D supra}.
\textsuperscript{173} \textit{Id}.
\textsuperscript{174} \textit{See} discussion, § I, \textit{B supra}.
\textsuperscript{175} \textit{Id}.
\textsuperscript{176} \textit{Id}.
\textsuperscript{177} \textit{Marital Exception to Rape, supra} note 18, at 275-76.
\textsuperscript{178} State v. Smith, 148 N.J. Super. at ----, 372 A.2d at 390.