Marital Rape: A Higher Standard Is in Order

Linda Jackson
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Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.¹ ... [H]owever brutal a tyrant she may be unfortunately chained to ... [her husband] can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.²

John Stuart Mill

It is very little to me to have the right to vote, to own property, etc., if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now.³

Lucy Stone

Women, particularly married women, have advanced a great deal since the time of John Stuart Mill and Lucy Stone.⁴ Mill and Stone's concerns regarding marital rape, however, are justified even today. Through the late 1970s, husbands enjoyed a virtually absolute right to rape their wives at will and without fear of legal recourse.⁵ Although our society is moving forward in this regard, it still has quite a road to travel.⁶

Marital rape, although not often discussed or confronted, is the most common form of rape.⁷ A recent poll found that fourteen

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¹ J.D. 1994, College of William & Mary. B.A. 1987, Amherst College. The author would like to thank Mark Maguire for his support and assistance.


³ Id. at 32.


⁵ Since the mid-nineteenth century, women have earned the right to vote, U.S. CONST. amend. XIX, and have witnessed the adoption of Married Women’s Property Acts, see infra note 29 and accompanying text, as well as the evolution of no-fault divorce laws that make it easier for either party to “escape” a marriage if desired or necessary, HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 1-5 (1988).

⁶ In 1980 only Oregon, Nebraska, and New Jersey did not have marital rape exemptions, RUSSELL, supra note 3, at 21, whereas at least 10 states still had absolute exemptions when the parties were legally married. Id. at app. II.

⁷ Today 17 states have no marital rape exemption. Most remaining jurisdictions have adopted some form of the exemption, but others remain silent on the issue. See infra part I.C. Only the Model Penal Code has retained the absolute marital exemption. MODEL PENAL CODE §§ 213.0(3), 213.1, 213.3, 213.4 (1962).

⁸ RUSSELL, supra note 3, at xxiii; David Finkelhor & Kersti Yllo, Rape in Marriage:
percent of women polled who have ever been married have been raped by their husbands, and of those women, eighty-five percent have been raped by their husbands on more than one occasion. Additionally, between thirty-four and thirty-seven percent of women in physically abusive marriages are sexually assaulted by their husbands.

Public perception of marital rape lends some insight into why, in light of these statistics, most jurisdictions maintain some form of exemption for spousal rape. One 1982 survey indicated that only thirty-five percent of the population favors eliminating the marital rape exemption. In a separate survey conducted in 1986, when asked “What should happen to men who force their wives to have sex?”, only twenty percent of the respondents thought incarceration was appropriate whereas twenty-six percent believed the husband should not be treated criminally at all.

Consider, from this data, just what we expect from the women in our society and why. Consider also that just as our reasons for supporting or accepting marital exemptions have changed over time, so have our reasons for opposing a woman’s right to reproductive freedom. Are these evolutions in legal and social reasoning concerning women related? That is, do we truly believe these rationales or are we searching for rationalizations in which
we can anchor a fixed social goal or perhaps a preferred social order.

This Note first explores the historical and modern justifications for marital rape exemptions as well as the status of state law regarding these exemptions. Part II discusses a recent Illinois appellate court decision which struck down Illinois' statutory marital rape exemptions on constitutional grounds. Part III applies the rational basis test used by the Illinois appellate court to other states' exemptions to demonstrate that this standard does not compel every court to reach Illinois' result. Finally, Part IV asserts that, despite courts' consistent application of the rational basis test in this area, strict scrutiny is the appropriate standard of review because of the exemptions' infringement on fundamental rights. The Note concludes that marital exemptions, unable to survive the necessary standards of strict scrutiny, are unconstitutional.

I. Justifications for Marital Exemptions from Rape

A. Historical Justifications

The acceptance and development of marital rape exemptions are rooted in three theories: the theory of "implied consent," the "unity" and "women as marital property" theories, and the "narrow constructionist" theory. Although the implied consent theory was the initial rationale for American courts' recognition of marital exemptions, the unity/property and constructionist theories provided additional justification for the exemptions' widespread acceptance.

1. The "Implied Consent" Theory

The most frequently cited basis for marital rape exemptions, both legislatively and judicially, is the common law doctrine of irrevocable implied consent. The theory of implied consent originated with a seventeenth century statement by Sir Matthew Hale that a "husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial

14. See infra note 17 and accompanying text.
15. Sir Matthew Hale was Chief Justice of the Court of King's Bench from 1671 to 1676. SIR WILLIAM HOLDSWORTH, SOME MAKERS OF ENGLISH LAW 135 (Cambridge Univ. Press 1938).
consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”

A woman, upon entering marriage, impliedly and irrevocably consents to sex on demand with her husband, at any time and under any circumstances.

Hale's legally unsubstantiated theory, previously offered only in treatise form and never in case law, was first adopted in the United States, without question or reservation, by the Massachusetts courts in 1857. Ironically, the English courts failed to adopt the theory of implied consent until 1949. In fact, several justices in the first recorded English opinion to discuss Hale's theory expressed reluctance to adopt the concept precisely because there was insufficient authority for the proposition. One justice stated that "[t]here may be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime." Adding to the irony of continued reliance on English common law for marital exemptions is the 1991 unanimous House of Lords decision that marital rape exemptions "no longer form part of the law of England since a husband and wife are now regarded as equal partners in marriage." Reasoning similar to that of the House of Lords is offered by modern American critics who suggest that even if implied consent was at one point a valid theory, that time has passed both socially and logically. Additionally, the advent of no-fault di-

17. Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489 (1857). Defendants argued on appeal that because the state failed to allege in the indictment that the victim was not the wife of one of the defendants, their conviction for rape should be overturned. Id. at 490-91. The question before the court was not whether being married to the defendant in fact provided a defense, but whether the state should have included in the indictment that defendant and victim were unmarried. Id.
18. R. v. Clarke, 2 All E.R. 448 (Assizes 1949) (holding that as a general proposition of law, a husband cannot be guilty of raping his wife unless a court stated that the wife was no longer bound to cohabit with her husband).
20. Id. at 33 (Wills, J.).
21. Id. at 57 (Field, J.).
23. "Hale's implied consent theory was created at a time when marriages were irrevocable[,] ... [w]ives were subservient to their husbands, her identity was merged into his, her property became his property, and she took his name for her own." Warren v. State, 338 S.E.2d 221, 224 (Ga. 1985) (footnote omitted).
24. The New York Court of Appeals, in one of the most widely cited cases declaring marital rape exemptions unconstitutional, stated that "[r]ape is not simply a sexual act
orce laws, and the inherent recognition that either spouse can unilaterally withdraw from the marriage contract, ensures that either spouse can unilaterally withdraw consent to marital sex. If the victim truly has "revoked" a term of the marriage contract by refusing sexual intercourse, the proper remedy for the harmed spouse is in the matrimonial courts, not in "violent or forceful self-help."

2. The "Unity" and "Women as Marital Property" Theories

Blackstone best articulated the unity theory when he wrote that "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into [her] husband." Once the couple is married they become one, with the one being the man. The unity theory stands for the proposition that because the husband and wife are one, the husband is incapable of raping his wife because he is incapable of raping himself.

The unity doctrine is a basis for the historical view of women as the property of marriage. Women are their husbands' chattels to be "deprived of all civil identity." Early rape laws, which either explicitly exempted wives from the laws' protection or were interpreted by their silence to include the English common law exemption, reflect this notion of women as property and to which one party does not consent. Rather, it is a degrading, violent act.... To ever imply consent to such an act is irrational and absurd." People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984), cert. denied, 471 U.S. 1020 (1985).

25. See JACOB, supra note 4.

26. See State v. Smith, 426 A.2d 38, 45 (N.J. 1981); see also Weishaupt v. Commonwealth, 315 S.E.2d 847, 854 (Va. 1984) (recognizing a wife's unilateral authority to withdraw the implied consent to marital sex). Consent was revocable in the English common law through either a separation agreement or a court order of separation or limited contact. Id. at 852.

27. Smith, 426 A.2d at 44.


29. Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 HARV. L. REV. 1255, 1256 (1986). Prior to the enactment of the Married Women's Property Acts in 1839-1895, much of the English common law was adopted regarding women and their property rights. John D. Johnston, Jr., See and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality, 47 N.Y.U. L. REV. 1033, 1057 (1972). Not only was a married woman unable to control her own real property, but her tangible personalty also became her husband's. Id. at 1045-46. A married woman was also unable to contract, sue, or be sued, and her husband had claim to any and all of her earnings. Id.
were intended initially only to protect the property interests of the woman's husband, if married, or father, if single.30

Courts have largely rejected the unity and "women as marital property" theories by invoking language from *Trammel v. United States*,31 which asserts that "[n]owhere in ... modern society ... is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."32 Critics also challenge the unity theory on the basis that husbands can be charged with committing other crimes against their wives.33

3. The "Narrow Constructionist" Theory

English common law defined rape as the unlawful carnal knowledge of a woman against her will.34 In the narrow constructionist theory, the term "unlawful," as it is used in rape statutes, means "not authorized by law."35 Because marriage sanctions, or authorizes, sexual relations between husband and wife, all carnal knowledge between husband and wife is lawful, and there are no sexual relations within a marriage that are unauthorized or unlawful. Thus, no sexual relations within a marriage fall within this definition of rape.36

Supporters of this theory find it superior to Hale's theory of implied consent not only because it is less likely to become outdated,37 but also because it alleviates the need to feign consent where there is none.38 Modern legislatures have dismissed this

30. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 16-30 (1975). "Rape entered the law through the back door ... as a property crime of man against man." Id. at 18; see also Note, The Marital Rape Exemption, 52 N.Y.U. L. REV. 305, 309 n.22 (1977) (noting several male interests that rape laws originally sought to protect).

31. 445 U.S. 40 (1980) (modifying the rule in Hawkins v. United States, 358 U.S. 74 (1958), that barred the testimony of one spouse against the other if the other spouse so desired).

32. Id. at 52. For further use of this language, see Warren v. State, 336 S.E.2d 221, 225 (Ga. 1985), and People v. Liberta, 474 N.E.2d 587, 573 (N.Y. 1984).


34. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 60 (1797).

35. ROLLIN M. PERKINS, CRIMINAL LAW 156 (2d ed. 1969).

36. Id.

37. Id.; see also supra notes 22-26 and accompanying text.

argument by drafting statutes that no longer contain the "unlawful carnal knowledge" language.39

B. Modern Justifications

Today, support for marital rape exemptions is grounded in four rationales that are as a group distinctly more modern, and thus more easily accepted, than their predecessors:40 marital privacy, marital reconciliation, fear of false allegations and difficult proof requirements, and the belief that rape within marriage is less severe than rape outside marriage.

1. Marital Privacy

Marital privacy is one of the foremost modern day justifications for marital rape exemptions. Proponents of the marital privacy rationale suggest that the right to privacy within one's marriage is so fundamental that the public, and hence the legal system, should be precluded from defining or judging the activities therein. Professor Hilf analogizes marital privacy rights to "drawing a curtain" around the marriage so the "public stays out" and the "spouses stay in."41 Keeping the public out, Hilf argues, prevents voyeurism as well as the embarrassment of disclosing private lives.42

Courts have proposed numerous counterarguments to the marital privacy theory. The New York court of appeals in People v. Liberta43 rejected the marital privacy argument and stated clearly that the right recognized in Griswold v. Connecticut44 applies only

"Lord Hale's remarks are not the only, or even the best, explanation of the spousal immunity," id. at 32 (emphasis added); Hale's explanation is "out of date, and was never needed," id. at 33 (quoting PERKINS, supra note 35, at 156); "the act of [forced] intercourse is not rape . . . for a better reason," id. (quoting PERKINS, supra note 35, at 156); "the true reason why the husband . . . is not guilty of rape is that such intercourse is not unlawful," id. (quoting PERKINS, supra note 35, at 158) (emphasis added).

40. "Because the traditional justifications for the marital exemption no longer have any validity, other arguments have been advanced in its defense." People v. Liberta, 474 N.E.2d 567, 573-74 (N.Y. 1984); see also supra notes 13, 37-39 and accompanying text.
41. Hilf, supra note 38, at 34. Of course, if the sexual act is consensual, neither party would charge rape and the curtain would remain closed. If the sexual act is non-consensual, however, Hilf's curtain would create a fortress.
42. Id.
44. 381 U.S. 479 (1965) (holding that a Connecticut statute forbidding use of contraceptives violated the constitutional right of marital privacy).
to consensual acts, not to violent sexual assaults. Nor is marital privacy an absolute right. States must balance their interest in protecting marital privacy against their interest in protecting individuals' bodily integrity. Some courts maintain that the exemption itself interferes with the marital relationship because it gives the husband legal control over his wife's bodily integrity that he otherwise would not have.

2. Marital Reconciliation

The marital reconciliation rationale for marital rape exemptions is an extension of the "closed curtain" and marital privacy justifications. By keeping the spouses "in," and the law and the public "out," spouses are supposedly forced to resolve their differences independent of external interference. Reconciliation theorists maintain that this resolution process, as opposed to one which allows "access to the criminal justice system for every type of marital dispute," fosters greater mutual respect between the parties and eases their ultimate reconciliation. Inherent in this theory is the idea that if a victim of spousal rape is capable of bringing, and in fact does bring, criminal charges against her spouse, then the law will have fostered marital discord and prevented reconciliation.

Although the court in People v. Brown accepted this reasoning, most courts and critics reject the reconciliation and marital harmony theory on the basis that little exists to reconcile if the relationship has deteriorated to the level of forcible rape. Some courts and commentators have also noted that the relationship

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45. Liberta, 474 N.E.2d at 574 ("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.") (footnote omitted).
47. People v. DeStefano, 467 N.Y.S.2d 506, 517 (County Ct. 1983).
48. See supra notes 41-42 and accompanying text.
49. Hilf, supra note 38, at 34 (emphasis added).
50. Id.
51. Note, supra note 30, at 315.
52. 632 P.2d 1025 (Colo. 1981) (finding a rational basis to uphold Colorado's marital rape exemptions); see infra note 133 and accompanying text.
53. See, e.g., People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984); Note, supra note 30, at 315.
and potential for reconciliation is disrupted by the rape itself, not the rape charge.\footnote{54}

3. **Evidentiary Concerns and the Fear of Women Lying**

Evidentiary concerns are perhaps the most common basis for the partial or limited marital exemptions found in most current rape laws.\footnote{55} One primary objective of the partial exemptions is to guard against false accusations made by deceitful or vindictive women.\footnote{56}

Until recently, Lord Hale's infamous warning that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho [sic] never so innocent"\footnote{57} was used as a cautionary jury instruction.\footnote{58} To guard against falsely convicting an innocent man, Wigmore advised that

\begin{quote}
[n]o judge should ever let a sex offense ... go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician\footnote{59}....

The[\ldots] psychic complexes [of women] are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.\footnote{60}
\end{quote}

Although these archaic procedural requirements no longer exist in the realm of stranger or non-stranger rape, the prejudicial

\begin{footnotes}
\footnotetext{54.}{Liberta, 474 N.E.2d at 574; Weishaupt v. Commonwealth, 315 S.E.2d 847, 855 (Va. 1984).}
\footnotetext{55.}{See infra notes 78-84 and accompanying text.}
\footnotetext{56.}{Id.; see infra note 57.}
\footnotetext{57.}{Cynthia A. Wicktom, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 GEO. WASH. L. REV. 399, 401 n.18 (1988).}
\footnotetext{58.}{Id. The judge instructed the jury to approach the rape victim's testimony with caution. Id. at 411 n.79. Some jurisdictions still assess the alleged victim's credibility by her degree of resistance to the attack. See In re M.T.S., 609 A.2d 1266, 1271 (N.J. 1992); see also Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. Super. Ct. 1994) (holding that resistance is necessary to prove rape). The measure of credibility noted in Berkowitz is ironic considering that victims who resist their rapists are more likely to incur physical injury beyond the rape than victims who do not resist. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 271 tbl. 3.30 (1991).}
\footnotetext{59.}{3A JOHN H. WIGMORE, EVIDENCE \S 924a, at 737 (James H. Chadbourne ed., rev. ed. 1970) (1904) (footnote omitted) (emphasis added).}
\footnotetext{60.}{Id. at 736 (emphasis added).}
\end{footnotes}
notions supporting them do remain when victims are married to their assailants.61

Opponents of this "fear based" justification offer three arguments. First, other crimes exist that are equally difficult to prove yet they are not decriminalized.62 Our society instead relies on a criminal justice system that is sufficiently sophisticated to ensure that innocent individuals are not frivolously prosecuted or wrongly convicted.63 Next is the jurisprudential view that convictions are not the sole reason for enacting laws. In addition to convicting criminals, laws serve as deterrents and educational tools, announcing to society what is morally right and morally wrong, what is socially acceptable behavior and what is not.64 Finally,

61. For instance, Virginia's current marital rape law requires "serious physical injury" to corroborate the victim's complaint if the spouses were living together at the time of the rape. VA. CODE ANN. § 18.2-61.B (Michie 1988). Virginia's statute is mainly a response to legislators' fear that married women will otherwise bring false rape charges against their husbands, motivated either by spite or leverage in divorce proceedings, that would not only be difficult to disprove but would destroy the husband's reputation in the process. Interview with Walter S. Felton, Jr., Administrator of the [Virginia] Commonwealth's Attorneys Council and Assistant Professor of Law, College of William and Mary, Marshall-Wythe School of Law, in Williamsburg, Va. (Oct. 21, 1992) [hereinafter Felton]. Professor Felton points out that much of this fear is attributable to the period before no-fault divorce laws, see Jacob, supra note 4, when individuals falsely created fault grounds to procure a divorce. Felton, supra.

62. "There is no other crime ... in which all of the victims are denied protection simply because someone might fabricate a charge; there is no evidence that wives have flooded the district attorneys with revenge filled trumped-up charges." Warren v. State, 335 S.E.2d 221, 225 (Ga. 1985). The court in Liberta noted that if fear of fabrication determined whether certain behavior is a crime then all but homicides would go unpunished. People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984).

63. Liberta, 474 N.E.2d at 574.

64. Schwartz, supra note 7, at 50-51. It is not unheard of for assailants to inquire about the status of the law prior to committing an act. In Kizer v. Commonwealth, 321 S.E.2d 391 (Va. 1984), the defendant and a friend discussed the Virginia law regarding marital rape one day before the defendant assaulted his wife. Id. at 293. At the time of the rape the parties were not formally separated but were living apart due to marital difficulties. Id. at 292. Although the victim refused defendant's request to enter her apartment that evening, defendant forced his entry by kicking the frame off the door. Id. at 293. Defendant then carried the victim to the bedroom, ripped off her clothing, and forcibly raped her, despite her screams, kicks, and scratchs. Id. The court held that because the victim failed to convey to the defendant, in a manifestly objective fashion, her subjective intent to end the marriage, the victim's implied consent to sexual relations was not sufficiently revoked and defendant could not be convicted of raping his wife. Id. at 292-94.

Interestingly, the outcome of Kizer ultimately depended on how well the male perpetrator understood the female victim's intent to end the marriage. Id. at 294 ("We cannot say that [the victim's] subjective intent [to end the marriage] was manifested objectively to the husband .... "). Similar difficulties arise regarding consent when even the most progressive states ask not whether actual consent was given but whether the
Rape is recognized as a vastly underreported crime. Reasons offered for this phenomenon include the social stigma attached to victims of rape, fear of retaliation, and a reluctance to endure the double victimization of the judicial system. Fabrications of rape charges are unlikely not only for the reasons stated above, but also because “rape prosecutions are often more shameful for the victim than the defendant.”

4. Marital Rape is Less Harmful than Non-Marital Rape

There is a perception that rape by a known individual, particularly an individual with whom the victim has had past voluntary defendant’s belief regarding consent was reasonable. See In re M.T.S., 609 A.2d 1266, 1279 (N.J. 1992). The process of determining consent/intent is particularly problematic considering the inherent gender differences in communication style. Deborah Tannen, Professor of Linguistics at Georgetown University, states that “[p]retending ... women and men [communicate] the same hurts women, because the ways they are treated are based on the norms for men.” Deborah Tannen, You Just Don’t Understand: Women and Men in Conversation 16 (1990).

A 1990 study entitled “Rape In America: A Report to the Nation,” conducted by the National Victim Center and the Crime Victims Research and Treatment Center at the Medical University of South Carolina, revealed that only 16% of rapes are reported to the police. Robert A. Rogers, Study: Rape Numbers Much Higher than Reported, UPI, May 3, 1992, available in LEXIS, Nexis Library, UPI File. Directors of the Rape in America study say their numbers differ significantly from those of the Justice Department because the Justice Department’s National Crime Survey is outmoded. Id. The Department of Justice concludes that 54% of rapes are reported to the police. Bureau of Justice Statistics, U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics—1991, at 266 tbl. 3.11 (1992).

While men ... convinced each other and [women] that women cry rape with ease and glee, the reality of rape is that victimized women have always been reluctant to report the crime ... because of the shame of public exposure, because of that complex double standard that makes a female feel culpable, even responsible, for any act of sexual aggression committed against her, because of possible retribution from the assailant ... and because women[s] ... accounts are received with a harsh cynicism that forms the first line of male defense. Brownmiller, supra note 30, at 387.

The Rape in America study attributes underreporting to the fact that 69% of rape victims “fear being blamed by others for ... causing the rape.” Bob Dart, Study Finds One in Eight Women Raped: Estimated Yearly Toll Put at 685,000 Cases, Atlanta Const., Apr. 24, 1992, at A1. Sixty-seven percent of the victims said they would be more likely to report the rape if news media were prohibited from disclosing their identity. Id.

Twenty-two percent of women raped by nonstrangers and 14% of women raped by strangers indicated that fear of reprisal was a factor in not reporting the crime. Bureau of Justice Statistics, supra note 58, at 271 tbl. 3.31.

Note, supra note 30, at 315 (describing arguments for and against the evidentiary problems rationale).

Id. at 314-15.
sexual intercourse, is less severe than rape by an unknown individual. 70 This perception supports both broad marital rape exemptions and the treatment of marital rape as a lesser sexual offense.

Contrary to this "less harmful than" theory, victims of spousal rape suffer greater harm than victims of stranger rape. Data demonstrates that rape in marriage is actually more emotionally traumatic than any other kind of rape and carries with it longer lasting emotional effects. 71 Victims of marital rape also tend to suffer greater physical harm than victims of non-marital rape 72 and are in fact often victims of the most brutal and life-threatening rapes. 73 Critics of the "less harmful than" theory also argue that the very existence of rape laws indicates a recognition that harm caused by rape, any rape, is more severe than harm caused by assault and should be treated as such. 74 In the words of Dr. David Finkelhor, "[r]ape is traumatic not because it is with someone you don't know, but because it is with someone you don't want." 75

C. The Current State of Marital Rape Exemptions

Seventeen states, through a combination of judicial and legislative means, have completely rejected marital rape exemptions, 76

70. Hill reasons that because a married person maintains a lesser expectation of personal autonomy than an unmarried person, the affront to one's personal autonomy is by definition less in the case of marital rape than non-marital rape. Hill, supra note 38, at 41.

71. Russell refers to marital rape as "the most dreadful form of rape," as terrifying and life threatening as stranger rape, yet carrying with it powerful senses of betrayal, disillusionment, isolation and self-blame. RUSSELL, supra note 3, at 198. Russell's study finds that 34% of marital rape victims experienced "extreme trauma" whereas 30% experienced "considerable trauma." Id. Fifty-two percent of the women raped by their husbands found the assault to have a "great effect" on their lives as compared with 39% of the women raped by strangers. Id. at 193.

72. Rape crisis centers report that victims of spousal rape are some of the most seriously injured women they encounter. Schwartz, supra note 7, at 46. Women raped by strangers have less chance of escaping without further injury than women raped by strangers. BUREAU OF JUSTICE STATISTICS, supra note 58, at 271 tbl. 3.31.

73. See generally RUSSELL, supra note 3, at 273-85 (describing the fact patterns of prominent marital rape cases).


75. David Finkelhor, Ph.D., Address to the New York County Lawyer's Association 3 (May 3, 1984) (transcript on file with the WM. & MARY J. WOMEN & L.).

whereas one state and the District of Columbia are still silent on the issue.

The remaining states have varying forms of exemptions, which for purposes of further analysis are split into two main categories: “limited exemptions” and “full exemptions unless spouses are living separate and apart.”

1. The Limited Marital Rape Exemption

“Limited exemptions” are perhaps the least restrictive category of marital exemptions. These exemptions treat sexual assault between cohabiting married individuals differently than sexual assault between non-married individuals, but they at least recognize that rape can occur between individuals living together as husband and wife.

Limited exemptions from sexual assault statutes include immunizing spouses from certain types, or degrees, of sexual


The following jurisdictions' statutes are silent on marital rape exemptions: District of Columbia, D.C. CODE ANN. § 22-2801 (1989); Oregon, OR. REV. STAT. § 163.305 (1990). At least one source, however, indicates that spouses are prosecutable for rape in the District of Columbia. Letter from the District of Columbia Corporation Counsel to the National Center on Women and Family Law (June 4, 1984) (on file with National Center on Women and Family Law).

Although some argue that statutes that are silent regarding marital rape carry with them a common law exemption, this position has been rejected by several state courts. See, e.g., State v. Rider, 449 So. 2d 903 (Fla. Dist. Ct. App. 1984); Warren v. State, 336 S.E.2d 221 (Ga. 1985); State v. Smith, 426 A.2d 38 (N.J. 1981); see also Dennis Drucker, The Common Law Does Not Support a Marital Rape Exemption for Forcible Rape, 5 WOMEN'S RTS. L. REP. 181 (1979) (maintaining that the common law no longer supports, and may never have supported, a marital rape exemption).

Delaware, which no longer specifically exempts spouses from first and second degree rape, does exempt “voluntary social companions.” DEL. CODE ANN. tit. 11, §§ 774-775 (1987 & Supp. 1992). The rationale for this provision is that if a victim is a voluntary social companion, it “reduces confidence in the conclusion of aggression and non-consent, and seems relevant as well to the degree of injury inflicted and the general dangerousness of the actor.” State v. Hamilton, 601 A.2d 778, 780 (Del. Super. Ct. 1985) (quoting MODEL PENAL CODE § 213.1 (1962)).

Many states still have gender specific rape laws that protect, and penalize, males only. See, e.g., Ala. CODE § 13A-6-61 (1994).
assault offenses, legislating lighter sentences and/or judicial discretion to impose substantially lighter sentences and setting restrictive reporting requirements. Some states limit the conditions under which a marital assault will be defined as rape, and others require that the victim sustain serious physical injury. Many states exempt individuals from prosecution for all or some sexual assault charges if they assault a spouse who is mentally or physically incapacitated.


For example, if a defendant in Virginia is found guilty in a bench trial of raping his spouse, the judge may refrain from entering a judgment of guilty, defer all further proceedings, and place the defendant on probation pending the completion of counseling. When the defendant completes the counseling, the judge may then dismiss all proceedings against the defendant. While the court may defer the sentence pending counseling after a jury has returned a guilty verdict, the judge may not dismiss the criminal charge. VA. CODE ANN. § 18.2-61.C to -D (Michie 1988 & Supp. 1994). Professor Felton believes that besides providing an "out" for the defendant, this provision may be constitutionally suspect because it unduly encourages a defendant to waive his Sixth Amendment right to a jury trial. Felton, supra note 61.


For instance, although "stranger" rape law requires force or threat of force, marital rape law requires the use of force. See, e.g., MD. ANN. CODE art. 27, § 464D(e) (1957).


Virginia considered requiring "physical injury" instead of "serious physical injury," but the legislature wanted to ensure that if a husband was charged, it was "real" rape. "[T]he legislature] didn't want someone with just a bruise claiming rape. After all, this isn't a misdemeanor, it's a felony." Felton, supra note 61.

84. ALASKA STAT. § 11.41.432(a)(2) (1989); CAL. PENAL CODE §§ 261(a)(1), 262(a) (West...
2. Full Marital Exemptions Unless Living Separate and Apart

The "full exemption unless living separate and apart" category is the broadest category of marital rape exemptions because it does not recognize sexual assault between married individuals unless the parties are living separate and apart. States that require this condition, or offer "living separate and apart" as one method of allowing the sexual assault charge, differ in terms of how the condition is met. Some states simply require that the parties do not reside together. Other states require commencement of divorce or separation proceedings, a written separation agreement, or a minimum separation period. Most states, however, decline to define what constitutes living separate and apart and leave the question open to the courts.

II. A CONSTITUTIONAL CHALLENGE: People v. M.D.

People v. M.D. is the most recent case ruling on the constitutionality of a statutory marital rape exemption. At issue was...
Illinois' scheme of sexual assault statutes which exempts spouses from prosecution for two of its four categories of assault. The defendant was convicted of a non-exempted sexual assault on his spouse. He contended that the statutory scheme was unconstitutional because it exempted spouses from certain sex offenses but not others.

A. Facts

At the time of the offense, the parties were married and living together. When the defendant, M.D., arrived home the evening of the attack, his wife, L.D., was already in bed. When L.D. failed to respond to his inquiry for sex, the defendant accused L.D. of having an affair. He declared that he would wait no longer for sex and proceeded to punch and choke L.D. M.D. held L.D. down with his forearm, removed her pants and pried her legs apart. M.D. then inserted his penis into L.D.'s vagina. L.D. was able to push M.D. away after ten minutes of forced

93. Illinois had a four tier statute regarding sexual assault:

1) Criminal Sexual Assault: an act of sexual penetration by use of threat or force. ILL. ANN. STAT. ch. 38, para. 12-13(a)(1) (Smith-Hurd Supp. 1990) (amended 1992). Sexual penetration was defined as "any contact ... between the sex organ of one person and the sex organ, mouth or anus of another person, or any intrusion ... of any part of the body of one ... person or object into the sex organ or anus of another person." Para. 12-12(f).

2) Aggravated Criminal Sexual Assault: sexual assault with one or more aggravating circumstances, para. 12-14(a), i.e.: the accused caused bodily harm to victim, para. 12-14(a)(2).

3) Criminal Sexual Abuse: an act of sexual conduct by use of threat or force. Para. 12-15(a)(1). Sexual conduct is defined as "any intentional or knowing touching or fondling by the victim or the accused ... of the sex organs, anus or breast of the victim or the accused ... for the purpose of sexual gratification or arousal." Para. 12-12(e).

4) Aggravated Criminal Sexual Abuse: sexual abuse with one or more aggravating circumstances. Para. 12-16(a).

Paragraph 12-18(c) stated that an individual may not be charged by his or her spouse with the offenses of criminal sexual abuse, para. 12-15(a)(1), or aggravated criminal sexual abuse, para. 12-16(a). The marital exemption did not apply to criminal sexual assault or aggravated criminal sexual assault, although spousal victims were required to report the offense within 30 days. Para. 12-18(c).

94. M.D., 595 N.E.2d at 704.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id. at 705.
100. Id.
penetration. M.D. followed L.D. into the bathroom and living room and, angered by L.D.'s response when asked how often they should have sex, M.D. dragged her back to the bedroom.

Once in bed, the defendant grabbed a bedpost and threatened to kill his wife. After instructing her to perform oral sex on him, the defendant once again pried L.D.'s legs apart and inserted his penis into her vagina. Upon withdrawal, M.D. placed his weight on top of L.D. and twice jammed his fist and an egg into her vagina. The defendant then pulled L.D. into the shower, began masturbating, and instructed her to perform oral sex.

L.D. called the police while M.D. remained in the bathroom. She was bleeding heavily and was later diagnosed with permanent physical injuries. A jury convicted M.D. of battery and aggravated criminal sexual assault. M.D. appealed his conviction for aggravated sexual assault on the grounds that applying the marital exemption to only two of the four sexual assault categories violated the equal protection and due process clauses of both the United States and Illinois Constitutions.

101. Id.
102. L.D. replied that sex once a week was adequate whereas M.D. felt four times a week was adequate. Id.
103. Id.
104. Id.
105. Id.
106. Id.
107. M.D. testified that he intended to stimulate L.D. with the egg, a technique he witnessed in pornographic films. Id. at 707.
108. Id. at 705.
109. Id.
110. Id.
111. Id. at 708. M.D. was convicted of the aggravated criminal sexual assault count which alleged that he jammed his fist in L.D.'s vagina. Id. M.D. was acquitted, however, of the criminal sexual assault counts involving forced intercourse and the aggravated criminal sexual assault count involving the jamming of his fist and egg into L.D.'s vagina. Id. at 708-09.
112. Id. at 708. The court found that M.D. had standing to challenge the constitutionality of the statutory exemption because the statutory scheme potentially burdened him more than others who were similarly situated. Id. at 709. M.D. contended it was irrational to prosecute him for sexual conduct involving penetration of his spouse when individuals committing acts of sexual conduct against their spouse involving no penetration were not prosecuted. Id.

To date, defendants have made all the constitutional challenges to marital rape exemptions. See Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986); see also Liberta v. People, 474 N.E.2d 567 (N.Y. 1984) (challenging a statute on equal protection grounds); Commonwealth v. Shoemaker, 518 A.2d 591 (Pa. Super. 1986) (challenging a statute on privacy and equal protection grounds). Victims of marital rape are unlikely to gain
B. The Court's Analysis

The Illinois Court of Appeals announced early in its decision that it would only address the constitutionality of the marital exemption as it applied to forcible sexual assaults. The court also announced that it would apply a rational basis standard of review to the statutory scheme.

1. The Rational Basis Test

The rational basis test, or traditional test, is applied to statutory classifications that bring into question neither suspect classes nor fundamental rights. As the Illinois court recognized, states have the power to enact legislation that results in different treatment for different classes of individuals. The rational basis test, which affords legislatures great deference in their legislative efforts and presumes the validity of the classification, requires only that the statutory classification be rationally related to a legitimate, or constitutionally permissible, state interest.
2. The Rational Basis Test and the Illinois Statute

The first step in a rational basis analysis is to identify the state's interest, or objective, in the statutory classification. Once the objective is defined, through either legislative history or judicial precedent, the court must determine whether the enacted statute is rationally linked to the defined goal. As stated by the court in *M.D.*, the goal of the Illinois sexual assault statutes is to "protect individuals from the physical and emotional harm resulting from sexual assaults and to preserve their personal bodily integrity." Although Illinois suggested no rationale for the marital exemptions or their relationship to the overall goal of the sexual assault statutes, the court analyzed the justifications most commonly offered for maintaining the marital rape exemptions.

First, the court considered the historic exemption justifications of implied consent, unity, and women as marital property, and found that none "ha[d] any place in modern society" and that none provided a rational basis for marital exemptions in sexual assault statutes. The court reasoned that American society is moving away from doctrines "employed to justify the subjugation of women in ... law and society," and is instead recognizing the rights of women, including legal equality. Specifically, the court adopted the argument in *People v. Liberta* that it is irrational to imply consent to a sexual assault, that a marriage license is not a license to forcibly assault one's spouse, and that married individuals enjoy the same control over their bodily integrity as do unmarried individuals.

Next, the court rejected the modern notion that respect for marital privacy and furtherance of spousal reconciliation demands the preservation of marital exemptions. Although the court agreed that marital privacy, first recognized as a fundamental

120. *M.D.*, 595 N.E.2d at 709-10.
121. *See supra* part I.A.
122. *M.D.*, 595 N.E.2d at 710.
123. *Id.* at 711.
124. *Id.*
125. *Id.*
126. 474 N.E.2d 567 (N.Y. 1984) (severing the marital rape exemptions from New York's rape and sodomy statutes). *Liberta* is frequently cited for its thorough discussion of marital rape exemptions and its finding that marital exemptions violate the Equal Protection Clauses of both the United States and New York State Constitutions.
right in *Griswold v. Connecticut*, 129 is a legitimate state interest, the court adopted *Liberta*'s reasoning and refused to apply *Griswold*'s privacy right to nonconsensual marital acts. 130 In doing so, the court held that there is no rational relationship between protecting the right of marital privacy and permitting an individual to commit a forcible sexual assault on his or her spouse. 131

The court renounced the Colorado Supreme Court’s determination in *People v. Brown* 132 that spousal reconciliation and the preservation of family relationships provide a sufficient rational basis for marital exemptions. 133 The Illinois court declared that it is not the rape charge but the rape itself that destroys the marital relationship and chance of reconciliation. 134

Equally untenable, the Illinois court contended, is the notion that marital rape is less severe than rape outside of marriage and that marital rape should therefore be treated as a less serious offense. 135 Relying once more on *Liberta*, the court asserted that a sexual assault victim is more severely traumatized when the

129. 381 U.S. 479 (1965).
130. *M.D.*, 595 N.E.2d at 711. The court drew a parallel between marital rape and the Connecticut statute in *Griswold* which bans contraception by stating that both achieve their goals “by means having a maximum destructive impact” on the marital relationship. *Id.*; see supra notes 43-45 and accompanying text.
131. *Id.*
133. *Brown* is the only case to date that has upheld the marital exemptions when faced with the question of their constitutionality. Although the defendant was convicted for sexually assaulting a woman who was not his wife, his appeal was based on the argument that the marital exemption, by arbitrarily and irrationally distinguishing between individuals committing identical acts, violated his due process and equal protection rights. *Brown*, 632 P.2d at 1026. Despite the court’s conclusion that the defendant lacked standing, the merits of his claim were addressed using the rational basis standard of review. The Colorado Supreme Court’s reasoning and holding, as it pertains to the constitutionality of marital rape exemptions, is as follows:

> “[T]he marital exception may remove a substantial obstacle to the resumption of normal marital relations… The legitimate state interest in encouraging the preservation of family relationships supports the distinction between assailants who are married to and living with their victims from those who are not.

> … [T]he marital exception averts difficult emotional issues and problems of proof inherent in this sensitive area. Otherwise juries would be expected to fathom the intimate sexual feelings, frustrations, habits, and understandings unique to particular marital relationships.

> In light of these considerations, we conclude that the marital exception… is neither arbitrary nor irrational.”

*Brown*, 632 P.2d at 1027 (relying solely on Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719 (1954)).
134. *M.D.*, 595 N.E.2d at 711.
assailant is a spouse rather than a stranger, precisely because of their once intimate and loving relationship. Furthermore, the fact that rape is recognized as a separate and more severe crime than ordinary assault confirms its traumatic impact. The devastating impact of rape should be recognized as equally affecting all victims, married or unmarried.

Finally, the court rejected the evidentiary and fabricated complaint bases for marital exemptions. The court asserted that most sexual assault cases in which the victim and assailant have previously engaged in consensual sex share the same difficulty concerning the issue of consent. Accordingly, there is no rational reason for treating married victims of these crimes differently than unmarried victims. The court also rejected the argument that a vindictive spouse is more likely than a vindictive lover to bring false charges of sexual assault and concluded that neither of these rationales provided a rational basis for the marital rape exemptions.

3. Illinois' Marital Rape Exemptions Fail the Rational Basis Test

The Illinois Second District Appellate Court found no legitimacy in any of the commonly offered rationales for marital rape exemptions, and rejected the state's suggestion that the legislature can tailor statutes without any rational reason for doing so. Thus, the court found that the marital exemptions are completely contrary to the statutory objectives of the sexual assault statutes. The court declared marital rape exemptions violative of the Equal Protection and Due Process Clauses of the United States and Illinois Constitutions because they do not contribute to the "protect[ion] [of] people from the physical and emotional harm resulting from forcible sexual assaults and [the] preserv[ation] [of] their personal bodily integrity."
4. Severing the Marital Exemptions from the Statutory Scheme

The defendant argued that his conviction must be reversed because the statutory scheme under which he was convicted was unconstitutional. The court rejected this argument and explained that a statute is not unconstitutional in its entirety simply because it contains an unconstitutional provision. A court must instead look to the legislative intent of the statutory scheme when determining whether the remaining portion of the enactment is severable from the unconstitutional portion of the enactment. Given the significant public interest served by the sexual assault statutes, the court reasoned that the legislature would prefer to have the statutes without the marital exemptions than to have no sexual assault statutes at all. The court, accordingly, "conclude[d] that the invalidity of the marital exemptions ... does not affect the validity" of the remaining sexual assault statutes.

Although the ruling expanded the scope of the statutory scheme, the court maintained that the defendant's due process rights were not violated by its refusal to reverse the conviction. Because the defendant did not fall within one of the originally allowable exemptions, the court held that the defendant had adequate notice that his actions were legally prohibited. was important for striking marital rape exemptions on constitutional grounds, but the court's failure to recognize that marital exemptions deserve more than a rational basis standard of review may cause other courts to retain marital exemptions. Marital exemptions infringe on an individual's fundamental right to privacy and bodily integrity and therefore require a strict scrutiny standard of review.

III. Is the M.D. Analysis the "Right" Analysis?

Although the Illinois appellate court reached what many would consider the "right" decision when it applied the rational basis standard of review to marital rape exemptions, the Colorado
court’s application of the standard in *People v. Brown* demonstrates that the result need not always be the same. The rational basis test is the lowest, or most deferential, standard of review courts use when addressing the constitutionality of statutory schemes. Each of today’s marital exemptions, depending on the court, could quite possibly survive the rational basis standard of review.

The rational basis standard of review, the standard applied in *M.D.*, affords great deference to the legislatures and their statutory schemes. As demonstrated in *People v. Brown*, it is

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156. See supra note 133.
157. See supra part II.B. Generally, courts apply one of three levels of scrutiny for Equal Protection Clause questions: rational basis, intermediate scrutiny, or strict scrutiny. Distinct from the rational basis test discussed above, courts apply intermediate scrutiny when the statutory classification is based on gender. Intermediate scrutiny requires that intentional discrimination against members of the class be substantially, not simply rationally, related to important, not merely legitimate, government objectives. See *Craig v. Boren*, 429 U.S. 190 (1976). Strict scrutiny, a standard so high that most statutes subjected to it are struck down as unconstitutional, is reserved for statutory classifications affecting either suspect classes of individuals or fundamental constitutional rights. See supra notes 115-16. Strict scrutiny requires the intentional discrimination against the suspect class, or infringement on the fundamental right, be necessary to the promotion of a compelling state interest. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).
158. Or, more accurately, “depending on the judge.” As of 1991, only 10% of state supreme court justices were women; as of 1988, slightly fewer than 10% of judges on state intermediate courts of appeal were women; and in 1985, approximately 3% of state trial court judges and judges for courts of limited jurisdiction were women. Telephone Interview with Rae Lovko, National Center for State Courts, Williamsburg, Va. (Feb. 4, 1993). Although the number of women on the lower courts has in all likelihood increased dramatically since 1985, it is unlikely that the ratio has surpassed 10%. Id.
159. See supra notes 113, 118-19 and accompanying text.
wholly conceivable for a court to find a rational basis for the most severe marital rape exemptions and the most severe marital rapes.\textsuperscript{161} The defendant’s rational basis burden, restated by the court in Brown, “is not to persuade th[e] Court that the marital exception is unwise, but that it is totally lacking in reason.”\textsuperscript{162} This is extremely difficult to do and the results can be extremely court-specific.\textsuperscript{163}

To demonstrate that the \textit{M.D.} analysis will not always find marital exemptions unconstitutional, this section applies the standard used in \textit{M.D.} to certain categories of exemptions.\textsuperscript{164} Because Brown demonstrates that certain exemptions can withstand the rational basis test,\textsuperscript{165} the standard will be applied only to those categories that are “more severe” than, or go beyond, the exemption upheld in Brown. By definition, these include only the exemptions that require, in addition to the parties living separate and apart, written separation agreements or “in process” divorce proceedings.\textsuperscript{166}

\textit{Brown} found a legitimate state interest in the preservation of family relationships.\textsuperscript{167} A court similar to that in Brown, then, could also accept the argument that the requirement of written separation agreements or divorce proceedings, in addition to the base requirement of living separate and apart, is merely an extension of Colorado’s effort to achieve the same legitimate goal. The additional requirements merely reflect the state’s desire to expand the base of its reconciliation goals.

Using Brown’s language, the exemptions would have to be arbitrary, irrational, and completely lacking in reason to be declared unconstitutional.\textsuperscript{168} If an accepted state goal is the preservation of family relationships, and legally tolerating all rapes within a marriage up to the point when the parties are intentionally living separate and apart is a rational means of achieving

\textsuperscript{161} See supra note 133. The statute at issue in Brown allowed the prosecution of spouses for rape only if the parties were “living apart with the intent to live apart, whether or not under a decree of judicial separation.” Brown, 632 P.2d at 1026. This ruling essentially approves of, or legally permits, any and all rapes within a marriage up until the point at which the parties have signalled their intent to live separate and apart.

\textsuperscript{162} Id. at 1027.

\textsuperscript{163} See supra note 158 and accompanying text.

\textsuperscript{164} See supra part I.C.

\textsuperscript{165} See supra notes 133, 161.

\textsuperscript{166} Id.


\textsuperscript{168} Id.
that goal, then requiring tangible evidence of the parties' intent to live separate and apart is hardly arbitrary or irrational. Although other state interests could be presented in support of the exemptions and other arguments could be made to explain how the exemptions promote those interests, the point here is simply to illustrate that all of today's marital exemptions are indeed capable of withstanding the rational basis standard of review.

IV. MARITAL RAPE EXEMPTIONS WARRANT STRICT SCRUTINY

Although every court that has ruled on the constitutionality of a statutory marital rape exemption has applied the rational basis test, strict scrutiny is the necessary standard of review for such exemptions. Strict scrutiny is warranted not simply because the rational basis standard yields potentially unjust results, but because the standards of constitutional analysis require it.

A. M.D.'s Failure to Find a Basis for Strict Scrutiny

If a statutory classification affects either a suspect class or infringes on an explicit or implicit fundamental right, the standard of review required is strict scrutiny. The Illinois court must have found neither of these conditions to exist because the court found no grounds for a higher standard of review than rational basis. Although one could take issue with the court's finding that the Illinois marital exemptions do not involve a suspect class, one must take issue with the finding that the

169. Id. at 1026-27.
170. See supra parts I.A., B.
171. See Merton v. State, 500 So. 2d 1301, 1303 (Ala. Crim. App. 1986); see also Brown, 632 P.2d at 1027 (stating that a classification needs only a rational basis when the legislation does not involve a suspect class or a fundamental right); People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984), cert. denied, 471 U.S. 1020 (1985) (stating that a statute that makes a classification based on marital status must be rational).
172. See supra notes 155-56 and accompanying text. The Pennsylvania Superior Court has applied strict scrutiny to the constitutional analysis of a marital rape statute. Commonwealth v. Shoemaker, 518 A.2d 591 (Pa. Super. 1986) Ironically, however, the defendant in Shoemaker did not challenge an exemption but instead challenged a statute that criminalized spousal sexual assault. Id. at 593.
173. See supra note 157.
175. Although marital rape exemptions specifically affect married women, married women themselves are not a suspect class. The argument could be made, however, that
exemptions do not infringe upon a fundamental constitutional right.

B. Fundamental Privacy Rights Require Strict Scrutiny

Privacy rights, although not specifically enumerated in the Constitution, have long been recognized as fundamental rights by the Supreme Court. The roots of this privacy right have at one time or another been found by members of the Court in the First Amendment, the Fourth and Fifth Amendments, the Ninth Amendment, the penumbras of the Bill of Rights, and in the Liberty Clause of the Fourteenth Amendment. Although the Court has yet to explicitly recognize an individual's fundamental privacy right to grant or deny sexual access to one's body, this right flows naturally from, and is indeed demanded by, the recognition and reasoning of existing privacy rights.

marital exemptions almost exclusively impact women. This argument, in conjunction with the Illinois Constitution's express recognition that women are a suspect class, could in itself warrant heightened scrutiny. See People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974) (holding that gender is a suspect classification that requires strict scrutiny).

176. The right of privacy, or the guaranteed zones of privacy, includes activities related to: procreation, Skinner v. Oklahoma, 316 U.S. 535, 540-41 (1942) (procreation is one of the basic civil rights of humanity); marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967) (the freedom to marry resides with the individual and cannot be infringed by the state); individual autonomy, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (the constitutionally protected right in the individual); and abortion, Roe v. Wade, 410 U.S. 113, 153 (1973) (the right of personal privacy includes a woman's right to terminate her pregnancy).


180. Id. at 484-85.


182. In Bowers v. Hardwick, the Court refused to extend the protection afforded fundamental privacy rights to individuals engaging in consensual homosexual acts. 478 U.S. 186, 190 (1986). The right to privacy involved in marital rape exemptions is distinct from the right sought in Bowers, however, in that it does not claim the unrestricted right to engage in any chosen sexual activity with any chosen partner. Instead the right asserted is the freedom to choose not to engage in any sexual activity with any given partner.

183. Significant to this analysis is history's suggestion that courts read the Constitution broadly when defining the rights of the people. See Board of Regents v. Roth, 408 U.S. 564, 572 (1972) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."). The Ninth Amendment, which states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," was in fact introduced by James Madison to ensure that the fundamental rights of the people were
The Court's analysis and philosophy in *Thornburgh v. American College of Obstetricians and Gynecologists*, a case involving legislative restrictions on abortion rights, is applicable to the right to be free from unwanted sexual activity. The Court struck down the anti-abortion provisions as unconstitutionally restrictive and concluded by stating that

the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

The fundamental privacy rights associated with the "bodily integrity" choices to bear children, conceive, or terminate pregnancies are not on a higher plane than the right to choose whether to engage in sexual intercourse. The decision to engage or not engage in sexual activity is one of those few decisions that is at least as personal and intimate, properly private, and basic to

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not narrowly limited to those specifically enumerated in the first eight amendments. Madison stated:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment].


> 185. *Id.* at 771-72 (citations omitted). Justice Stevens, in his concurring opinion, stated that cases concerning childbearing matters

> deal ... with the individual's right to make certain unusually important decisions that will affect his own ... destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable.

*Id.* at 781 n.11.
individual dignity and autonomy as the decision to end a pregnancy.\footnote{186}

The right to refuse sexual intercourse, in addition to its abortion rights parallels, draws strength from the constitutional protection afforded by the Court regarding individual decisions in matters of childbearing.\footnote{187} As stated eloquently by the Court in \textit{Eisenstadt v. Baird},\footnote{188} "[i]f the right of privacy means anything, it is the right of the individual ... to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\footnote{189} The Court elaborated by saying that "in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive."\footnote{190} Matters of childbearing and decisions about whether to accomplish or prevent conception plainly include the decision to engage in sexual intercourse, for without that primary function all other points are moot at best. It therefore necessarily follows that the decision to engage in sexual intercourse is one of the several decisions concerning procreation that are protected by the Constitution as a fundamental privacy right.

Finally, the right to refuse involvement in sexual activity is implicit in an individual's right regarding freedom of association. In \textit{Roberts v. United States Jaycees},\footnote{191} the Court held that the choice to enter into and maintain certain intimate relationships is an individual freedom central to our constitutional scheme and

\begin{footnotes}
\footnote{186}{If anything, the right to be free from nonconsensual sexual activity is on a higher plane than the right to terminate a pregnancy. Unlike abortion, the privacy right involved in the freedom from nonconsensual sexual activity involves no competing right comparable to that of a fetus.}
\footnote{188}{405 U.S. 438 (1972).}
\footnote{189}{Id. at 453-54 (citations omitted). In support of this statement, the Court quoted Justice Brandeis: The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. Id. at 453-54 n.10 (emphasis added) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).}
\footnote{190}{Carey, 431 U.S. at 685.}
\footnote{191}{468 U.S. 609 (1984).}
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protected as a fundamental element of personal liberty. The Court assigned the Bill of Rights, which was designed to secure individual liberty, the task of affording certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State: "Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships ... safeguards the ability independently to define one's identity that is central to any concept of liberty." Relationships that reflect intrinsic elements of personal liberty are generally distinguished by their relative smallness in size, their high degree of selectivity in decisions to begin and maintain the affiliation, and their seclusion from others in critical aspects of the relationship. The Court offered the selection of one's spouse as an example of such an intimate association. Presuming, of course, that the freedom of association includes the freedom not to associate, the choice not to associate sexually with an individual must, by definition, fall into the same recognized category of associations as the selection of one's spouse.

The fundamental privacy right to grant or deny sexual access to one's body does not expand existing privacy right doctrine into new territory. Rather, it is an essential element of currently recognized rights regarding procreation and freedom of association. Although some argue that the concerns surrounding marital rape charges, such as evidentiary standards and false accusations, preclude the recognition of a married woman's right to privacy in this area, the question of whether a married woman is protected by this constitutional right to privacy must be answered absent consideration of these external concerns. These external concerns are more appropriately discussed, once the right is recognized as a fundamental privacy right, in the context of strict scrutiny analysis.

C. Can the Marital Rape Exemptions Survive Strict Scrutiny?

Strict scrutiny, the standard of review applied to statutory classifications affecting fundamental rights, is the most demand-

192. Id. at 617-18.
193. Id. at 618-19 (citations omitted).
194. Id. at 620.
195. Id. at 619.
ing standard of review employed by the courts. This standard of review requires that the state’s infringement on the constitutional right be necessary, or narrowly tailored, to the promotion of a compelling state interest.

1. **Prong 1: Is There a Compelling State Interest in Marital Rape Exemptions?**

A compelling state interest generally is defined as one that the state is forced or obliged to protect. For the sake of argument, this analysis assumes that, of the current justifications offered to support marital rape exemptions, two categories reflect compelling state interests: 1) the evidentiary interest concerning false claims and convictions; and 2) the safeguarding of the fundamental right to marital privacy.

2. **Prong 2: Is the Exemption Necessary, or Narrowly Tailored, to Promoting the State’s Compelling Interest?**

Limited exemptions essentially allow states to narrow the application of their sexual assault laws. From an evidentiary perspective, this narrowed application serves to limit the opportunity and incentive to file false or questionable charges.

States that define marital rape differently than non-marital rape do so by including in their definition only those situations in which rape is most severe and only those procedures that guard heavily against false claims. These states believe, for instance, that requirements of increased physical injury or a restricted period of time in which to file the rape claim make

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196. See supra note 157.
198. See supra part I.B.
199. See supra part I.B.3.
200. Griswold v. Connecticut, 381 U.S. 479 (1965); see supra part I.B.1. The state’s interest in promoting marital reconciliation, see supra part I.B.2., is treated, for purposes of this analysis, as part of the state’s interest in safeguarding marital privacy rights. The state’s belief that rape within marriage is less severe than rape outside marriage, see supra part I.B.4., is discounted for the purposes of this analysis because it is more of a policy consideration than a state interest supporting the exemption.
201. This grouping combines what was described in the “limited exemption” category as those that immunize spouses from certain sexual assault offenses, those that limit the conditions under which a marital assault will be defined as rape, those that require restrictive reporting requirements, and those that require physical injury be sustained by the victim. See supra part I.C.1.
202. See supra notes 82-83 and accompanying text.
203. See supra note 81 and accompanying text.
it easier to prove that a rape actually occurred. Unfortunately, these requirements also result in victims suffering greater degrees of harm, physically and mentally, before the state will recognize they have been criminally violated.204 Although these heightened requirements may make it more obvious that a rape has occurred, the ultimate question is whether the heightened requirements are narrowly tailored to the state's stated goal.

Whether a statute is sufficiently tailored to withstand strict scrutiny depends upon whether less drastic means exist to achieve the state's otherwise legitimate goals.205 As discussed earlier, many categories of crimes are in fact difficult to prove.206 The solution, however, is not to statutorily sanction those crimes, nor is it to require that a specific group of victims suffer beyond the general definition of the offense. States are quite capable of preventing false charges and convictions by utilizing the far less drastic safeguards of our current judicial system. Prosecutors will not charge an individual without a fair degree of certainty that a crime was committed and that the person charged is responsible; fact finders will not convict an individual without finding, beyond a reasonable doubt, that the individual is responsible for the crime.

Exemptions for sexually assaulting spouses who are mentally or physically incapacitated are treated separately because, in addition to technically changing a statutory requirement for rape as applied to married people, these exemptions create another sub-class of individuals who have no legal recourse against sexual assault.207 Presumably, the impetus behind these exemptions is an attempt to heighten evidentiary requirements in situations in which consent, not the occurrence of sexual activity, is at issue. Specifically, scenarios involving victims incapable of formulating or communicating consent or nonconsent may produce inherently more difficult proof situations.

As with the limited exemptions, however, the solution is not to statutorily provide consent on the part of the incapacitated spouse. The state, by doing so, creates nothing more than a
sexual repository for the acting spouse. The solution, as with the limited exemptions, is to rely on the state's ability to achieve its goals by relying on the strengths of our current judicial system.

Awarding lighter sentences to individuals guilty of raping their spouses provides neither evidentiary benefit nor assistance in the prevention of false accusations or convictions. This practice serves only to treat marital rape as a less serious offense than stranger rape and sends a message to the abuser, the abused, and society that the physical autonomy and integrity of sexually assaulted spouses is less valuable than that of other individuals. Not only does data refute this proposition, but the practice does not warrant the deference of a compelling state interest.

As noted earlier, the “full exemption unless living apart” category is a much broader and restrictive set of exemptions than the limited exemptions. Because state evidentiary interests do not adequately support the narrower limited exemptions, they are definitionally incapable of supporting statutes that grant absolute exemptions up and until the point the parties are living apart. Evidentiary concerns are also notably lower for rapes between spouses living apart because they tend, from an evidentiary perspective, to be similar to stranger rape. Concluding, therefore, that the state’s compelling evidentiary interest concerning false claims and convictions is insufficient to subordinate an individual’s fundamental right to refuse sexual activity, the analysis turns now to an examination of the state’s interest in safeguarding marital privacy rights.

Certain rights involving the marital relationship are, in and of themselves, rights exacting strict judicial scrutiny. Although privacy rights as they pertain specifically to marital relationships have not been greatly expounded upon by the Court, some

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208. See supra note 80 and accompanying text.
211. See supra part I.C.2.
213. For example, marital rights include the right to select one's spouse, Loving v. Virginia, 388 U.S. 1 (1967), the right to be free from discrimination, Roberts v. United States Jaycees, 468 U.S. 609 (1984), and the right of a married couple to use contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965). See supra notes 43-47 and accompanying text.
214. The Court stated that although the privacy right in Griswold inhered in the marital relationship, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual ..." Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972).
argue that these rights shelter activity within the relationship from outside intrusion.\textsuperscript{215} Proponents claim that both limited and full unless living apart marital rape exemptions are necessary to promote these marital interests.

Exemptions cannot be used to further marital privacy rights for two reasons. First, as previously established, the fundamental right of individuals to control their intimate associations includes the right of a married woman to decline sexual activity with her spouse.\textsuperscript{216} To say that marital exemptions are necessary to promote marital privacy is to subordinate one fundamental right to another. When faced with a conflict between individual spousal rights and the rights of the marital relationship, the Court balances the conflict in favor of the individual.\textsuperscript{217}

Secondly, exemptions are neither necessary nor tailored to the protection of marital privacy rights. These rights apply only to consensual acts.\textsuperscript{218} If marital privacy rights truly warranted and required marital rape exemptions, then surely no other crimes between spouses would be prosecutable. Not only do rape exemptions fail to further the goals of marital privacy, but the exemptions themselves violate marital privacy by awarding to one party power he otherwise would not have.\textsuperscript{219}

Neither a state's evidentiary interest nor its interest in marital privacy is capable, under a strict scrutiny analysis, of outweighing the privacy rights of married women. This is a just result as well as a sound result. As stated in \textit{Warren v. State},\textsuperscript{220} "[s]hort of homicide, [rape] is the 'ultimate violation of self.'... It is incredible to think that any state would sanction such behavior[,] ... leav[ing] ... wives with no protection under the law."\textsuperscript{221}

V. CONCLUSION

Marital rape is a serious crime and a serious social problem. Rape within marriage is not infrequent and the data indicate that the injuries resulting from marital rapes, both physical and emotional, are often more severe than those resulting from

\textsuperscript{215} See Hilf, \textit{supra} note 38 and accompanying text.
\textsuperscript{216} See \textit{supra} part IV.B.
\textsuperscript{218} See \textit{supra} notes 43-45 and accompanying text.
\textsuperscript{219} People v. DeStefano, 467 N.Y.S.2d 506 (County Ct. 1983).
\textsuperscript{220} 336 S.E.2d 221 (Ga. 1985).
\textsuperscript{221} Id. at 155.
stranger rape. Yet more than thirty states continue to restrict the application of rape laws when the parties involved are husband and wife.

Most courts that have ruled on the constitutionality of statutory exemptions have struck them down applying the rational basis standard of review. Some courts, however, employing the same standard, have upheld the exemptions. What is most troublesome about this inconsistency is that none of the courts examining marital rape exemptions found it necessary to apply a higher standard of review.

By applying rational basis to the sexual assault laws in question, these courts failed to recognize that the rape of any individual, married or unmarried, is a violation of that individual's fundamental right to privacy and bodily integrity. Fundamental rights guaranteed by the Constitution require strict scrutiny. If this standard is applied correctly and consistently, all marital rape exemptions necessarily would be found unconstitutional.

Although striking these exemptions on constitutional grounds is essential given the current state of constitutional law, eliminating these exemptions is also necessary from a social policy perspective. Marital rape exemptions not only fail to protect married women from one of the worst injuries an individual can sustain, but the law demeans those women in the process and subordinates their entire being. Women are human beings, not the instruments of the animal functions of which John Stuart Mill speaks, nor the defective, deranged prosecutrixes against whom Wigmore cautions. Our courts need to review these exemptions with the proper constitutional standard so that no woman is made to choose between the bonds of marriage and the freedom of self.

222. See supra part I.B.4., notes 7-10 and accompanying text.
223. See supra part I.C.
224. See supra parts II.A., II.B.1.-3.
225. See supra part III.
226. See supra part IV.
227. See supra note 2.
228. See supra notes 59-60.