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Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches

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NOTES

Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches

ABSTRACT

Even though many countries still permit husbands to rape their wives with little or no consequence, there is a growing trend that marital exemption is unjust and has no place in a civilized society. Recognition of the inappropriateness of marital exemption is, however, only the first step towards its elimination. To effectively equalize treatment of marital and non-marital rape, legislatures and judiciaries must take action. Several countries have already been host to the abolition of marital immunity, but their approaches may not be the most effective. This Note examines the experiences of England and Canada as examples of judicial and legislative abolition of marital exemption, respectively. The Author explores several factors that would lead to effective change, including timely alignment with societal morals, thorough and thoughtful consideration of the issues, and legitimacy in the eyes of citizens. After reviewing the effectiveness of approaches such as those employed in England and Canada, the Author argues that an even better method would rely on equal protection provisions found in state constitutions and international treaties.

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I. INTRODUCTION

For centuries, husbands around the world have been granted marital exemption¹ to the crime of rape. It was not until the last half of the twentieth century that marital rape was even recognized as a legal problem.² Prior to that time, most believed that it was impossible for a husband to rape his wife.³ This conclusion was

1. Throughout this Note, the terms "marital exemption," "marital immunity," "spousal exemption," and "spousal immunity" are used interchangeably. All phrases mean that a spouse cannot be convicted of raping his or her spouse (although there have not been any cases in which a husband has pressed rape charges against his wife).

2. Melisa J. Anderson, Note, *Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 GA. J. INT'L & COMP. L. 139, 139 (1998).

3. *Id.*

justified under three separate theories: the implied consent theory, the unities of person theory, and the property theory.⁴

The most common theory behind the impossibility of marital rape is the implied consent theory, which is structured around contract law.⁵ Stated succinctly by Sir Matthew Hale in the seventeenth century, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and the contract the wife hath given up herself in this kind unto her husband, which she cannot retract."⁶ Hale believed that "matrimonial consent" was irrevocable.⁷ Variations on Hale's strict irrevocability principle allow for a wife to revoke her implied sexual consent only in times when "ordinary relations" in the marriage are suspended.⁸ For example, a woman can revoke her implied consent when she and her husband are separated.⁹ Until recently, this view was widely accepted.¹⁰

The unity of person theory, on the other hand, does not even recognize the wife as a separate being capable of being raped.¹¹ This theory stems from the belief that when two people marry, they become one.¹² The being of the woman is incorporated into that of the husband such that the existence of the woman is effectively suspended during marriage.¹³ Marital rape is thus impossible because a husband is not capable of raping himself.¹⁴

From unity of person theory, it is not a far reach to the property theory. Under property theory, by marriage a woman becomes the property or chattel of her husband.¹⁵ The goal behind this theory is to "inspire and perpetuate marital harmony."¹⁶ Under this view, sexual intercourse can never be rape because the husband is merely "making appropriate use of his property."¹⁷

4. E.g., Sonya A. Adamo, Note, *The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries*, 4 AM. U. J. INT'L L. & POL'Y 555, 557-60 (1989).

5. *Id.* at 557-58; Constance Backhouse & Lorna Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 7 CAN.-US L.J. 173, 174 (1984).

6. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (Lawbook Exch. 2003) (1736).

7. Adamo, *supra* note 4, at 558.

8. Backhouse & Schoenroth, *supra* note 5, at 174-75.

9. See e.g., *R. v. Clark*, [1949] 2 All E.R. 448, 449 (Assizes 1949) (where an English court held that a separation order had revoked the wife's implied consent to sexual relations and the husband could be found guilty of rape).

10. Backhouse & Schoenroth, *supra* note 5, at 174.

11. See Adamo, *supra* note 4, at 560; Anderson, *supra* note 2, at 147; Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1984) [hereinafter *To Have and to Hold*].

12. Adamo, *supra* note 4, at 560.

13. *To Have and to Hold*, *supra* note 11, at 1256.

14. Adamo, *supra* note 4, at 560.

15. *Id.* at 560; Anderson, *supra* note 2, at 146-47.

16. Anderson, *supra* note 2, at 147.

17. Adamo, *supra* note 4, at 560.

In addition to these three main rationales, there are many secondary reasons for the perpetuation of marital exemption,¹⁸ the first of which is evidentiary difficulty.¹⁹ When a couple is married and regularly engages in sexual activity, it can be quite difficult to prove that one particular instance out of many was without consent.²⁰ Another concern is a vengeful wife that claims rape to blackmail her innocent husband to get a more favorable divorce settlement.²¹ A third argument holds that permitting allegations of rape would cause unrest and discord in the marriage and prevent reconciliation.²² Finally, recognizing crimes within the marriage would allow for state intrusion into the privacy of marriage, which is largely disfavored.²³ While there are undoubtedly other rationales for marital exemption, these several are the most prominent and most frequently referenced.

Together these theories created a belief that marital exemption was an appropriate legal doctrine.²⁴ As late as the mid-twentieth century, there was no country that viewed a husband's having forcible sex with his wife as a crime.²⁵ Over time, the movement for equal rights of women extended into criminal law, and marital exemption faded away in many countries around the world. While the majority of countries still have marital exemption on the books in some form or another,²⁶ dozens of leading nations have completely eliminated the exemption.²⁷ Of these latter countries, it has

18. While some of these concepts are unique to rape within marriage, most are not unique to marital rape and are also concerns for rape outside of marriage.

19. Adamo, *supra* note 4, at 561.

20. *Id.* at 561 (citing Michael D.A. Freeman, "But If You Can't Rape Your Wife, Who[m] Can You Rape?": *The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 9 (1981)).

21. Adamo, *supra* note 4, at 561; Anderson, *supra* note 2, at 148.

22. Adamo, *supra* note 4, at 561.

23. Anderson, *supra* note 2, at 148.

24. *See, e.g., id.* at 139.

25. *Id.*

26. *See, e.g.,* Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U. J. GENDER SOC. POL'Y & L. 369 (1998) (listing Albania, Bulgaria, Croatia, Czech Republic, Hungary, Kosovo, Poland, Romania, Russia, Serbia, and Ukraine as still providing a marital exemption); Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 278 (2004) (listing India, Malaysia, Papua New Guinea, and Yugoslavia as still proving a marital exemption).

27. For example, Australia, Canada, England, Germany, Spain, and Sweden have all eliminated marital immunity. About.com, *Is Marital Rape a Crime?*, <http://marriage.about.com/cs/maritalrape/f/maritalrape10.htm> (citing U.S. State Department, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights Practices) (last visited Jan. 9, 2006) [hereinafter *Is Marital Rape a Crime?*]. In some of the countries that have eliminated marital exemption, however, marital rape is still treated less harshly than non-marital rape. For example, husbands that rape their wives may receive a lower sentence than a man who rapes a stranger. *See, e.g.,* Kate Warner, *Sentencing in Cases of Marital Rape: Towards*

primarily been the judiciary that has made the change, with the legislature following behind at a later point, if at all.²⁸ In a few countries, however, it has been the legislature that made the change and the judiciary was forced to follow.²⁹

This Note explores the judicial and legislative methods of eliminating marital exemption and the successes and failures of each. Part II traces England's elimination of marital exemption, which will serve as a model of the judicial method. Part III then examines the legal reformation of marital rape in Canada, which serves as a model of the legislative approach. Part IV discusses the strengths and weaknesses of each of the two approaches using the English and Canadian systems as models. Finally, Part V proposes a model for future criminalization of marital rape in other countries around the globe.

II. ENGLAND: A MODEL OF THE JUDICIAL APPROACH

A. *Chipping Away at Common Law: The Path Leading to Abolition of Marital Immunity*

When Sir Matthew Hale made his now infamous assertion that a man cannot rape his wife, he did so without citing any supporting authority.³⁰ Despite this legal deficiency, his contention became the common law of England.³¹ In 1889, Justice Field, in a dissenting opinion, brought the deficiency to light and stated that he believed there were cases in which a wife *could* refuse intercourse and in which a husband *could* be guilty of rape.³² Justice Field's commentary went unnoticed and marital exemption carried on, unmodified, for over 150 more years.

The assault on marital immunity began with the case of *R. v. Clarke*.³³ After being married for eleven years, the wife obtained a judicial separation order which contained a clause stating that she was no longer bound to live with her husband.³⁴ Within two weeks of

Changing the Male Imagination, 20 LEGAL STUD. 592 (2000). Despite this inequity, eliminating the exemption shows progression toward complete equality.

28. See, e.g., Ogletree & de Silva-de Alwis, *supra* note 26, 277–78 (discussing how Nepal eliminated marital immunity judicially).

29. See, e.g., Anderson, *supra* note 2, 160–65 (discussing how the Republic of Ireland eliminated marital immunity); Lauren Snider, *Legal Reform and Social Control: The Dangers of Abolishing Rape*, 13 INT'L J. SOC. L. 337, 339 (1985) (discussing the process by which Canada eliminated marital immunity).

30. Anderson, *supra* note 2, at 149.

31. *Id.* at 149.

32. *R. v. Clarence*, (1888) 22 Q.B.D. 23, 57 (U.K.).

33. [1949] 2 All E.R. 448 (Assizes 1949).

34. *Id.* at 449.

obtaining the separation order, the wife was allegedly raped by her husband.³⁵ Justice Byrne, the presiding judge, recognized that a husband cannot generally be guilty of raping his wife but held that when a wife has been granted a legal separation her implied consent to marital intercourse is revoked.³⁶ The decision emphasized that it was the legal instrument of separation that served to revoke consent.³⁷ In a similar ruling shortly thereafter, Judge Lynskey went one step further and found that not only was legal separation sufficient to revoke consent, but previous judicial statements about an absolute marital exemption were mere dicta.³⁸

Twenty years later in *R. v. O'Brien*, Justice Park extended the legal separation theory by holding that a decree nisi effectively terminates marriage and concurrently revokes consent to marital intercourse.³⁹ A decree *nisi* is “[a] court's decree that will become absolute *unless* the adversely affected party shows the court, within a specified time, why it should be set aside.”⁴⁰ The significant difference between legal separation and a decree *nisi* is that a separation under a decree *nisi* is not yet final. By holding that a decree *nisi* is sufficient to revoke consent, Justice Park lowered the threshold for revocation. During the same juncture in time, Lord Lane in *R. v. Steele* found that an injunction preventing the husband from molesting the wife was sufficient to revoke consent, but merely seeking a protective order was not.⁴¹ Lord Lane did not want the threshold to be lowered any further.

Soon after *R. v. Steele*, the continuing erosion of marital exemption was stalled when the Sexual Offenses (Amendment) Act of 1976 was passed. The Act codified the common law of rape and included the phrase “unlawful sexual intercourse with a woman” within the definition of rape.⁴² Because the Act did not provide a definition of “unlawful,” rape continued to be defined under common law and was thus construed as meaning “outside of marriage.”⁴³ Under this definition, rape within marriage was not “unlawful” and marital immunity would thus persist.

Not long after passage of the Act of 1976, however, the English judiciary was faced with a landmark series of marital rape cases.

35. *Id.*

36. *Id.*

37. *Id.*

38. *R. v. Miller*, [1954] 2 All E.R. 529, 532 (Assizes 1953).

39. [1974] 3 All E.R. 663, 665 (Crown Court 1974).

40. BLACK'S LAW DICTIONARY 441 (8th ed. 2004) (emphasis added).

41. *R. v. Steele*, (1976) 65 Crim. App. 22, cited in *R. v. R.*, [1991] 1 All E.R. 747 (Crown Court 1990).

42. Sexual Offenses (Amendment) Act, 1976, c. 82 (Eng.), cited in Anderson, *supra* note 2, at 152.

43. PETER ROOK & ROBERT WARD, ROOK AND WARD ON SEXUAL OFFENCES 51 (Sweet & Maxwell 1997) (citing Chapman, [1959] 1 Q.B. 100).

These cases would lead to the elimination of the marital rape exemption. The first of the series was *R. v. R.*[1], decided in July 1990 by Justice Owen.⁴⁴ The couple involved had married in August 1984 and separated in October 1989, at which time the wife left their home with their child, and went to her parents' house.⁴⁵ Two days later, the husband called and told the wife that he was going to seek a divorce.⁴⁶ A few weeks later, the husband broke into the home of his wife's parents and either forced or attempted to force⁴⁷ his wife to have sex.⁴⁸ The question before the court was whether the husband's actions fell under the definition of "unlawful sexual intercourse" as codified in the Sexual Offences (Amendment) Act of 1976. Naturally, the defense rested on Hale's statement that a man cannot rape his wife and the husband's conduct therefore could not be unlawful.⁴⁹ But Justice Owen rejected Hale's statement as being made "at a time when marriage was indissoluble."⁵⁰ After reviewing the developing case law and distinguishing each prior case from the present case,⁵¹ Justice Owen made his decision:

I accept that it is not for me to make the law. However, it is for me to state the common law as I believe it to be. If that requires me to indicate a set of circumstances which have not so far been considered as sufficient to negative consent as in fact so doing, then I must do so. I cannot believe that it is a part of the common law of this country that when there has been a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that does not amount to a revocation of that implicit consent. In those circumstances, it seems to me that there is ample here . . . [that] would enable the prosecution to prove a charge of rape or attempted rape against this husband.⁵²

Despite his finding that the husband could be charged with rape and his dismissal of Hale's notorious statement, Justice Owen appeared to base his conclusion more on the amount of violence the husband used rather than a general distaste for marital exemption.⁵³

44. [1991] 1 All E.R. 747 (Crown Court 1990). Throughout this Note, I will refer to each level of appeal in the case of *R. v. R.* For the ease of the reader, I have used [1] to indicate the case at trial level, [2] to indicate the first appellate level, and [3] to indicate the appeal to the House of Lords.

45. *Id.* at 753.

46. *Id.*

47. The factual issue of rape was left to the jury. *Id.* at 754.

48. *Id.* at 753.

49. *Id.* at 748.

50. *Id.*

51. *Id.* at 748–53.

52. *Id.* at 754.

53. See *id.* at 749, 751, 753; see also Nicole Westmarland, *Rape Law Reform in England and Wales* § 4.1 (University of Bristol, School for Policy Studies Working Paper Series, Paper No. 7, 2004), available at http://www.bris.ac.uk/sps/information/working_papers.shtml (noting that Justice Owen's "dismissal of Hale appeared to

In fact, he seems to have agreed with the notion of a wife's implied consent to sexual intercourse with her husband.⁵⁴ What compelled Justice Owen to his conclusion was the violence employed to utilize the implied consent. He said he "[found] it hard . . . to believe that it ever was common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse."⁵⁵ Rather than eliminating marital exemption, Justice Owen's opinion merely carved out another exception, albeit a substantial one. A wife's implied consent could now be revoked with a legal separation, a decree *nisi*, or an injunction, and in cases of violent compulsion.

R. v. R.[1] was appealed, but before the case was heard, the Law Commission completed a paper regarding marital rape and the lower courts heard and decided two other marital rape cases. In September 1990, the Law Commission completed its working paper, *Rape within Marriage*.⁵⁶ In this paper, the Law Commission stated that, with exceptions, a husband cannot be convicted of raping his wife.⁵⁷ The Law Commission listed the exceptions as they had developed in the case law.⁵⁸ A husband lost his immunity:

- (a) where an order of the court has been made which provides that a wife should no longer be bound to cohabit with her husband (*R. v. Clarke* [1949] 33 Criminal Appeal Reports 216);
- (b) where there has been a decree of judicial separation or a decree nisi of divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (*R. v. O'Brien* [1974] 3 All England Law Reports 663);
- (c) where a court has issued an injunction restraining the husband from molesting the wife or the husband has given an undertaking to the court that he will not molest her (*R. v. Steele* [1976] 65 Criminal Appeal Reports 22);
- (d) in the case of *R. v. Roberts* ([1986] Criminal Law Reports 188), the Court of Appeal found that where a non-molestation order of two months had been made in favour of the wife her deemed consent to intercourse did not revive on expiry of the order;
- (e) Mr Justice Lynskey observed, obiter, in *R. v. Miller* ([1954] 2 Queen's Bench Division 282) that a wife's consent would be revoked by an agreement to separate, particularly if it contained a non-molestation clause;

relate more to the fact that there was physical force used . . . than lack of consent *per se*").

54. *R. v. R.*[1], [1991] 1 All E.R. 747, 753 (Crown Court 1990).

55. *Id.*

56. Law Commission, *Rape within Marriage* (Working Paper No. 116 (1990)) [hereinafter *Rape within Marriage*].

57. *Id.* ¶ 2.8, quoted in *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (Ser. A) 56, 65 (1995).

58. *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (Ser. A) at 65–66 (citing The Law Commission).

(f) Lord Justice Geoffrey Lane stated, obiter, in *R. v. Steele* that a separation agreement with a non-cohabitation clause would have that effect.⁵⁹

The Law Commission then noted that, regardless of other justifications, the law of marital immunity cannot be justified by “the nature of, or by the law governing, modern marriage.”⁶⁰ The Law Commission affirmed that common law still granted marital immunity, but proposed that “the present marital immunity be abolished in all cases.”⁶¹ The paper concluded with a request to codify abolition of spousal immunity with an Act of Parliament.⁶²

The following month, still before the appeal of *R. v. R.*[1] was heard, the second case of the landmark series, *R. v. C.*, was heard by Justice Simon Brown.⁶³ There, the husband and wife were living apart, but there was no formal separation agreement.⁶⁴ During their time apart, the husband was alleged to have participated with others in abducting and sexually assaulting his wife.⁶⁵ Writing for the court, Justice Simon Brown recognized Justice Owen’s holding in *R. v. R.*[1] as expanding the methods through which a wife could revoke her implied consent, but was not satisfied.⁶⁶ He did not like the room that *R. v. R.*[1] left for a man to legally force his wife to have sex.⁶⁷ Accordingly, Justice Simon Brown took a “radical” approach, which had already been implemented in Scotland,⁶⁸ and declared that “there is no marital exemption to the law of rape.”⁶⁹

The third and final of the landmark cases was *R. v. J.*, which was also decided before the first appeal of *R. v. R.*[1]. Faced with interpreting the word “unlawful” within the definition of rape, Justice Rougier was torn between his desire to eliminate marital exemption and his obligation to comply with the Sexual Offences (Amendment) Act of 1976.⁷⁰ If able, he was “prepared boldly to cut the Gordian knot and to . . . sweep away an out-of-date rule and to declare that

59. *Id.*

60. *Rape Within Marriage*, *supra* note 56, ¶ 4.11, *cited in* C.R. v. United Kingdom, 335 Eur. Ct. H.R. (Ser. A) at 67.

61. *Id.* ¶ 5.2, *cited in* C.R. v. United Kingdom, 335 Eur. Ct. H.R. (Ser. A) at 67.

62. SUE LEES, *RULING PASSIONS: SEXUAL VIOLENCE, REPUTATION AND THE LAW* 118 (1997).

63. *R. v. C.*, [1991] 1 All E.R. 755 (Crown Court 1990).

64. *Id.*

65. *Id.*

66. *Id.* at 757.

67. *Id.*

68. *See R. v. R.*[2], [1991] 2 All E.R. 257, 264 (C.A. 1990) (labeling the approach of the Scottish High Court of Justiciary in *S. v. HM Advocate*, which banned marital exemption in Scotland, as “[t]he radical solution”). *See also infra* text accompanying notes 86–91.

69. *R. v. C.*, 1 All E.R. at 758.

70. *R. v. J.*, [1991] 1 All E.R. 759, 765 (Crown Court 1990).

marital exemption no longer existed."⁷¹ But instead he heeded what he felt was his judicial duty and interpreted "unlawful" as he thought it meant at the time the Act was passed.⁷² The husband was thus held immune to charges of rape of his wife.⁷³ Justice Rougier wrote:

Once Parliament has transferred the offence from the realm of common law to that of statute . . . then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallized as at the making of the [Sexual Offences] Act and only Parliament can alter it.⁷⁴

Justice Rougier concluded with a plea to Parliament to abolish marital exemption in England.⁷⁵

It is in this setting that the appeal of *R. v. R.*[1] was finally heard in March 1991 in the Court of Appeal, Criminal Division.⁷⁶ Again grappling with the meaning of "unlawful," the appellate court summarized the opinions of Justices Owen, Simon Brown, and Rougier as exemplifying each of three possible solutions.⁷⁷ The first possible solution, utilized by Justice Rougier in *R. v. J.*, was termed the "literal approach."⁷⁸ This approach gave heavy weight to the language of the 1976 Act and preserved the husband's immunity.⁷⁹ Rape could only occur where there was "unlawful" sexual intercourse which meant "outside the bounds of matrimony."⁸⁰ The drawback of this approach would be that it would overrule all those cases that created an exception to marital immunity.⁸¹

The second approach, employed by Justice Owen in *R. v. R.*[1], was labeled the "compromise solution."⁸² Under this solution, "unlawful" would be interpreted so as to leave marital exemption intact, but would also recognize all of the exceptions that had already been carved out.⁸³ It would also be construed to allow for additional future potential exceptions.⁸⁴ The shortcoming of this method would be the continuing difficulty of defining and interpreting "unlawful" in each individual case.⁸⁵

- 71. *Id.*
- 72. *Id.* at 767.
- 73. *Id.* at 768.
- 74. *Id.* at 767.
- 75. *Id.* at 768.
- 76. *R. v. R.*[2], [1991] 2 All E.R. 257 (C.A. 1990).
- 77. *Id.* at 263-64.
- 78. *Id.*
- 79. *Id.* at 263.
- 80. *Id.* (internal quotation marks omitted).
- 81. *Id.* at 264.
- 82. *Id.*
- 83. *Id.*
- 84. *Id.*
- 85. *Id.*

The final alternative, applied by Justice Brown in *R. v. C.*, was referred to as the “radical solution.”⁸⁶ This solution regarded Sir Matthew Hale’s proclamation as based in “fiction” and inconsistent with the modern view of the marital relationship.⁸⁷ It held that punishing a husband for violence used in the course of rape, but not for the rape itself, is “repugnant and illogical.”⁸⁸ Accordingly, marital immunity should be altogether abolished.⁸⁹ The main criticism of this approach was that it required the court to disregard the statutory provision of the 1976 Act.⁹⁰ Even if the court did not disregard it altogether, it would be venturing beyond the “bounds of judge-made law and trespass[ing] on the province of Parliament.”⁹¹

Despite its awareness of encroachment upon the realm of Parliament, the appellate court adopted the radical solution, dismissed the husband’s appeal, and abolished marital immunity.⁹² The court concluded that “the time [had] arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.”⁹³ The appellate court granted leave to appeal the case to the House of Lords.⁹⁴

In October 1991, the House of Lords delivered its decision in *R. v. R.*[3].⁹⁵ As did Justice Owen and the appellate court, the House of Lords began with a review of England’s case law and an examination of Scotland’s decision to eliminate marital exemption.⁹⁶ Following its review, the court turned to the 1976 Act. The court found that if the word “unlawful” meant “outside of marriage,” it would effectively eliminate the exceptions that had already been carved out (which took place while still within marriage).⁹⁷ The court doubted that this was the intent of Parliament because if it were, the statute would have been more clear.⁹⁸ But because Parliament did not make clear this intent, the House of Lords concluded that the word “unlawful” in the definition of rape must have been “mere surplusage.”⁹⁹ The House of Lords unanimously declared that marital exemption had no place in modern law and abolished it; marital immunity in England was no more.¹⁰⁰

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 265–66.

93. *Id.*

94. *Id.* at 266.

95. *R. v. R.*[3], [1991] 4 All E.R. 481 (H.L. 1991).

96. *Id.* at 483–89.

97. *Id.* at 489.

98. *Id.*

99. *Id.*

100. *Id.*

Concerned with his conviction, the husband in *R. v. R.* sought appeal to the European Court of Human Rights.¹⁰¹ Prior to his claim reaching the European Court of Human Rights, however, Parliament enacted the Criminal Justice and Public Order Act of 1994.¹⁰² Parliament had followed the advice the Law Commission gave in its paper *Rape within Marriage*¹⁰³ and eliminated marital exemption altogether.¹⁰⁴ It did this by removing the word “unlawful” from the definition of rape.¹⁰⁵ There was now no doubt that marital immunity ceased to exist in England.

Despite the abolition of marital exemption by Parliament, the husband in *R. v. R.* continued his appeal to the European Court of Human Rights, arguing that to convict him would amount to an ex post facto conviction in violation of Article 7 of the European Convention on Human Rights.¹⁰⁶ Article 7 of the Convention provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article (art. 7) shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.¹⁰⁷

In October 1995, the European Court of Human Rights released its ruling on the matter. The court stated that under Article 7 of the Convention, a crime must be clearly defined in the law, and a change in said law cannot be retrospectively applied to an accused's disadvantage.¹⁰⁸ The court then noted that even once a law has been drafted, it is subject to an “inevitable element of judicial interpretation.”¹⁰⁹ Applying these concepts to the facts of *R. v. R.*, the court found:

[t]he decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon

101. Anderson, *supra* note 2, at 157.

102. Criminal Justice and Public Order Act, 1994 (Eng.).

103. See *supra* notes 56–62 and accompanying text.

104. The general notes to the statute state that the purpose of the change in definition is to eliminate marital exemption. *Current Law Statutes 1994*, Vol. 3, at p. 33–159.

105. *Compare* Sexual Offenses (Amendment) Act, 1976, c. 82 (Eng.) with Criminal Justice and Public Order Act, 1994, § 168(3), sch. 11 (Eng.).

106. Anderson, *supra* note 2, at 157.

107. European Convention on Human Rights, cited in *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (Ser. A) 56, 68 (1995).

108. *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (Ser. A) at 68–69.

109. *Id.* at 69.

his wife There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law¹¹⁰

The court held that there was no violation of Article 7(1) of the Convention.¹¹¹

In summary, the elimination of marital exemption in England was spearheaded by a judiciary that was sensitive to the changing views of society. As cases of marital rape were presented, the courts slowly chipped away at the spousal immunity doctrine. After several exceptions had been carved out, it became clear that the doctrine as a whole had become exceedingly outdated, and, as a result, the House of Lords ended its reign. It was not until years later that Parliament codified what had long since become the common law of England.¹¹²

B. Public Response to Judicial Criminalization of Marital Rape

The steady transition leading to the abolition of spousal immunity was not without criticism. The first solid criticism came from Richard White in late 1990 in response to the Law Commission's *Rape Within Marriage*.¹¹³ White essentially argued that eliminating marital immunity would have adverse effects on the family. He said that the point is not whether "a wife should . . . be permitted to put her own interests before those of her family," but rather what would be the effect on marriage.¹¹⁴ "Given the alleged reluctance of many women to consent to intercourse without some degree of persuasion, what would be the effect on the attitude of men of the threat of rape?"¹¹⁵

Two months later, Professor Glanville Williams wrote an even sharper attack against *Rape Within Marriage*.¹¹⁶ In his first paragraph, Williams declared that the authors of the "heavily slanted" working paper had given into "feminist pressure-groups."¹¹⁷ While Williams conceded that marital rape laws needed to be modified, he felt that "charge of rape [was too] powerful (and even

110. *Id.* at 71–72.

111. *Id.* at 72.

112. Criminal Justice and Public Order Act, 1994 (Eng.).

113. Richard White, *Marital Rape*, 140 NEW L.J. 1727 (1990).

114. *Id.* at 1727–28.

115. *Id.* at 1728.

116. Glanville Williams, *The Problem of Domestic Rape* (pts. 1–2), 141 NEW L.J. 205, 246 (1991).

117. *Id.* at 205.

self-destructive) a weapon to put in the wife's hands."¹¹⁸ Williams preferred that a violent rape between spouses be governed by assault laws.¹¹⁹ He also suggested that law governing rape between partners should track cohabitation.¹²⁰ If cohabiting, a man should be immune from being convicted of raping his partner.¹²¹ But if not cohabiting, a man would be subject to the full force of rape laws.¹²² Williams also had a strong objection to the word "rape" because, in his opinion, it stigmatizes the defendant and encourages harsher sentences than necessary.¹²³

As would be expected, there was strong negative public reaction to Williams's article.¹²⁴ Implicitly, Parliament rejected Williams's ideas through the abolition of marital exemption. Interestingly though, the judiciary did, and still does, embrace large portions of his rhetoric. For instance, even following the criminalization of marital rape, husbands convicted of raping their wives have received lower sentences than their non-married counterparts.¹²⁵ Another indication that the judiciary supported some of Williams's rhetoric was the position of Sir Frederick Lawton, former Lord Justice who chaired the Criminal Law Revision Committee in 1984.¹²⁶ Two years prior to the ruling in *R. v. R.* [3], Sir Frederic agreed that marital rape should not be criminalized.¹²⁷ He argued that floods of women would go running to police stations with complaints of rape.¹²⁸ Five years after abolition of marital immunity and when only twelve cases of an alleged rape by a cohabiting husband had been brought, Sir Frederick was again asked his view on the subject.¹²⁹ Despite the low number of complaints, he said he had not changed his mind.¹³⁰

Sir Frederic, however, was not the only one concerned about a "wave of prosecutions."¹³¹ On October 24, 1991, an article in the London Times claimed that a "flurry of prosecutions [was] expected to follow [the] House of Lords ruling . . . that men can be found guilty of

118. *Id.* at 206.

119. *Id.* at 247.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 246.

124. Anderson, *supra* note 2, at 159.

125. *Id.*; see generally Philip N.S. Rumney, *When Rape Isn't Rape: Court of Appeals Sentencing Practice in Cases of Marital and Relationship Rape*, 19 OXFORD J. LEG. STUD. 243 (1999).

126. LEES, *supra* note 62, at 119.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. LEES, *supra* note 62, at 118 (citing Frances Gibb, *Marital Rape Ruled Illegal by Law Lords*, TIMES (London), 24 October 1991, at 1, available at LEXIS, News Library, Times and Sunday Times (London) File).

raping their wives.”¹³² Other critics said that while they agreed with the change in law, they felt that it was for Parliament to make the change, not the judiciary.¹³³ “The law was ripe for change, but it was not for the law lords to do it.”¹³⁴

Many who opposed elimination of the spousal exemption were women. Days after the ruling of *R. v. R.*, Barbara Amiel, a columnist for the London Times, wrote:

I do not know of a single successful case in those countries that allow charges of marital rape. Juries see how ludicrous it is to be faced with husbands and wives living together who had lovely sexual intercourse on Monday, an OK time on Tuesday, but on Wednesday the husband raped the wife. Sexual intercourse can be a moment of ecstasy or a nightmare of utter humiliation, depending on such intangibles as mood, timing and one's subjective appreciation of the partner's characteristics. The law cannot protect us from intercourse that is simply inconvenient, untimely or a weapon within a marriage.¹³⁵

Thus far, a grim picture has been painted of the public reaction to the abolition of marital rape. But there were also many who celebrated the event. Claire Glasman, spokeswoman for Women Against Rape, said:

This is a fantastic day for women everywhere. The law lords have finally nailed a legal lie which has somehow survived for nearly three centuries. This is really a step towards making it clear legally that women have the right to say 'no' to sex, even if they are married. It overturns 250 years of legal sexual slavery based not on a court case but on an 18th century judge's decision that a husband could not rape his wife.¹³⁶

John Patten, the Home Office minister, also rejoiced in the ruling.¹³⁷ He commented that rape is rape, regardless of the relationship of the parties.¹³⁸ He felt that the law was in need of clarification in this area and that the ruling in *R. v. R.* provided that clarification.¹³⁹ Another citizen said that she was very happy with the ruling, but wanted it to be followed up with a law passed by

132. Frances Gibb, *Marital Rape Ruled Illegal by Law Lords*, TIMES (London), October 24, 1991, at front page, available at LEXIS, News Library, Times and Sunday Times (London) File.

133. See e.g., *id.*

134. *Id.* (quoting Lord Denning, former Master of the Rolls).

135. Barbara Amiel, *Why Law Lords got it Wrong on Marital Rape*, TIMES (London), October 27, 1991, at front page, available at LEXIS, News Library, Times and Sunday Times (London) File.

136. Gibb, *supra* note 132, at 2.

137. *Id.*

138. *Id.*

139. *Id.*

Parliament.¹⁴⁰ She was concerned only by the ability of the courts to revert back to spousal immunity.¹⁴¹

In 1994, when Parliament enacted the Criminal Justice and Public Order Act of 1994,¹⁴² eliminating spousal immunity for good, most concerns were assuaged. Skeptics could no longer complain of judicial lawmaking—the decision in *R. v. R.* was now codified by Parliament. And those who worried that the courts would reinstate marital immunity could rest easy because they were now bound by statute. Until Parliament gave its stamp of approval, criminalization of marital rape suffered from a split in public endorsement.

III. CANADA: A MODEL OF THE LEGISLATIVE APPROACH

A. *Feminist Activism and Parliamentary Notice of a Problem - Leading to a Change in Marital Rape Law*

Canada's history of marital exemption began in England, as Canada did not gain independence from England until July 1, 1867.¹⁴³ Like England, Canada's history is rooted in Lord Hale's famous statement and the notion that a man was incapable of raping his wife because marriage created an irrevocable implied consent to sexual relations.¹⁴⁴ In 1892, this position was first codified in Canada in the 1892 Criminal Code.¹⁴⁵ The code defined rape as "the act of a man having carnal knowledge of a woman *who is not his wife* without her consent, or with consent, which has been extorted by threats or fear of bodily harm"¹⁴⁶ The Criminal Code reflected both the common law of Canada and England at the time.¹⁴⁷

Just over fifty years later, England began carving out exceptions to its marital immunity doctrine.¹⁴⁸ Canada's rape laws, however, remained unaffected by the progression of England's laws.¹⁴⁹ From Canada's beginning, no rape cases were heard in the Canadian judiciary in which the complainant and the accused were married.¹⁵⁰

140. *Id.* (quoting Jo Richardson, Labour's spokeswoman on women's affairs).

141. *Id.*

142. Criminal Justice and Public Order Act, 1994 (Eng.).

143. Canada did not gain independence from England until July 1, 1867. See Canada, *Ceremonial and Canadian Symbols Promotion: Canada Day*, at http://www.pch.gc.ca/progs/cpsc-ccsp/jfa-ha/canada_e.cfm (last visited Feb. 3, 2006).

144. Backhouse & Schoenroth, *supra* note 5, at 174.

145. Criminal Code, 1982, ch. 29, § 266, 1892–1893 Can. Stat. 107, 208, cited in Backhouse & Schoenroth, *supra* note 5, at 175 n.17.

146. *Id.* (emphasis added).

147. Backhouse & Schoenroth, *supra* note 5, at 175.

148. See *supra* notes 33–36 and accompanying text (discussing *R. v. Clarke*).

149. Backhouse & Schoenroth, *supra* note 5, at 175.

150. *Id.* at 176.

The only mention of rape during marriage was in *King v. Faulkner*, where the trial court convicted the accused of raping a young girl.¹⁵¹ On appeal, the defense argued that the case should have been withdrawn from the jury because the government had failed to prove that the girl was not *married* to the accused.¹⁵² The court of appeal rejected this argument because it felt that there was plenty of evidence available to show that the young girl was not married to the accused.¹⁵³ Because the court gave credence to the defense's argument, this case illustrates that the status of being married would have probably served as an affirmative defense to rape charges.

In 1970, Canada again codified spousal immunity.¹⁵⁴ Section 143 of the 1970 Criminal Code replaced the 1892 provision and provided that "[a] male person commits rape when he has sexual intercourse with a female person *who is not his wife . . .*"¹⁵⁵ Again, no cases of marital rape were reported.¹⁵⁶ "The total absence of reported Canadian cases concerning a charge of rape brought by a wife against her husband suggest[ed] that the language in section 143 [of the 1970 Criminal Code] ha[d] been given a strict interpretation by prosecutors."¹⁵⁷ Because marital rape cases were never reported, the Canadian judiciary had its hands tied when it came to the elimination of marital exemption. The only mechanism capable of changing rape law was statutory amendment.¹⁵⁸

During the ten years following the enactment of the 1970 Criminal Code, a feminist movement arose with an aim, among many, of amending rape laws and eliminating spousal immunity.¹⁵⁹ The main focus of the feminist movement was the way in which the legal system handled rape—with male perspectives and interests in mind.¹⁶⁰ Feminists believed that rape provisions exemplified gender inequalities.¹⁶¹ They asserted that rape laws "embodied the

151. 19 C.C.C. 47 (Court of Appeal for British Columbia, 1911), *available at* 1911 C.C.C. LEXIS 349.

152. *Id.* at 50 (emphasis added).

153. *Id.*

154. An Act Respecting the Criminal Law, R.S.C., ch. C 34, § 143 (1970), *cited in* Backhouse & Schoenroth, *supra* note 5, at 176 n.20 [hereinafter 1970 Criminal Code].

155. *Id.* (emphasis added).

156. See Joanna McFayden, *Inter-Spousal Rape: The Need for Law Reform*, in *FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY* 193, 198 n.3 (John M. Eekelaar & Sanford N. Katz eds., 1978).

157. *Id.*

158. Backhouse & Schoenroth, *supra* note 5, at 176.

159. See Lorenne M.G. Clark, *Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service, and Criminal Justice Concerns*, 3 *CAN. J. WOMEN & L.* 420, 421 (1989–1990).

160. Danette C. Cashman, *Negotiating Gender: A Comparison of Rape Laws in Canada, Finland, and Pakistan*, 9 *DALHOUSIE J. LEGAL STUD.* 120, 125 (2000).

161. *Id.*

prejudices and fears of the dominant male group.”¹⁶² The world that women faced in Canada in the 1970s consisted of laws that allowed a husband to rape his wife, evidentiary rules that required a woman’s testimony to be corroborated (showing male distrust of women), a police force that dismissed more than 50% of reported sexual attacks as unfounded, and relatively short sentences for men actually convicted of rape.¹⁶³ In response, feminists argued that the woman’s perspective and experience of rape should shape rape laws.¹⁶⁴

Marital immunity was a prime target of the feminist movement in Canada.¹⁶⁵ Many members of the feminist movement stated that they were gravely concerned “that the subordination of women as wives to their husband’s sexual demands [was] a perpetuation of sex-role dependency relationships.”¹⁶⁶ Marital immunity, they contended, perpetuated the myth that women were subordinate to men and desired to be dominated by them.¹⁶⁷ The idea of sexual submission, in turn, affirmed perceptions that women lacked the “need, capacity or right to exercise free will.”¹⁶⁸ Women further argued that allowing a husband to rape his wife without legal consequence was an attack on a woman’s physical integrity.¹⁶⁹ They strongly objected to the doctrine of implied consent.¹⁷⁰ As a solution, feminists advocated a generic sexual assault provision that treated men, women, spouses and non-spouses equally.¹⁷¹

In an effort to achieve this goal, the early approach of feminists was to attack traditional ideas of gender roles which viewed the “man as . . . sexually aggressive and [the] woman as . . . sexually passive.”¹⁷² They argued that not only were these stereotypes inaccurate and harmful to women, but they were harmful to men as well.¹⁷³ The stereotypes put pressure on men and women to fulfill their predetermined roles which in turn prevented people from “inter-relating through their full potential.”¹⁷⁴

The strategy then turned to emphasizing the violent nature of rape.¹⁷⁵ The new “rape-as-violence” approach attempted to divorce

162. Snider, *supra* note 29, at 339.

163. *Id.* at 339–40.

164. Cashman, *supra* note 160, at 185.

165. *Id.* at 125.

166. McFayden, *supra* note 156, at 194.

167. *Id.*

168. *Id.*

169. Cashman, *supra* note 160, at 125.

170. *Id.*

171. *Id.* at 128–29. Feminists not only sought modification of the definition of rape, but also change in the rules of evidence. *Id.* at 126. I have confined my discussion to the elimination of marital exemption specifically.

172. *Id.* at 128–29.

173. McFayden, *supra* note 156, at 194.

174. *Id.*

175. Cashman, *supra* note 160, at 132.

rape from its sexual qualities.¹⁷⁶ This was a natural extension of the already prevailing notion of self-integrity and protection of one's body.¹⁷⁷ Because of its relation to already prevailing ideologies, this strategy was successful in initiating legislative reform.¹⁷⁸

In 1971, the federal government set up the Law Reform Commission to review the entire Criminal Code.¹⁷⁹ Low conviction rates, patriarchal attitudes in old rape laws, and the increasing feminist literature all spurred the government response.¹⁸⁰ In 1978, the Law Reform Commission completed its analysis of the Criminal Code and published it in Report Number 10.¹⁸¹ The Report effectively legitimized feminist objections to the current rape laws and suggested solutions.¹⁸² The Commission stated that current rape laws did in fact embody outdated and incorrect perceptions of women.¹⁸³ As a solution, the Commission suggested that rape laws be amended to reflect a more modern view of the crime of rape.¹⁸⁴ This included amending the Criminal Code to make rape "a crime of violence rather than of passion."¹⁸⁵ The Commission stated that rape had nothing to do with sexuality, but rather was an expression of dominance and power.¹⁸⁶ Section 143 of the 1970 Criminal Code (defining rape), they urged, should be eliminated, and in its place the crime of "sexual interference" should be implemented. "Sexual interference" was basically defined as touching another for sexual purposes without consent.¹⁸⁷

In 1981, shortly after publication of Report Number 10, Bill C-52 was introduced to Parliament by the government.¹⁸⁸ Bill C-52, aimed at amending the Criminal Code, died before gaining force, and Bill C-53 was considered in its place.¹⁸⁹ Bill C-53 sought to re-label non-consensual sexual relations as "assaults" rather than "crimes of

176. *Id.* at 185.

177. *Id.* at 132.

178. *Id.*

179. Snider, *supra* note 29, at 337.

180. *Id.* at 339.

181. *Id.* at 338 (citing LAW REFORM COMMISSION OF CANADA, REPORT 10: SEXUAL OFFENCES (1978)).

182. *Id.* at 340. Because the Law Reform Commission was set up to examine an entire section of the Criminal Code, it also suggested several other alterations pertaining to other activities, such as the age of consent and incest. *Id.* The Author, however, has confined this Note's review to only those suggestions that pertained to marital exemption.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 340.

189. *Id.*

passion.”¹⁹⁰ It also proposed the elimination of rape, indecent assault, and attempted rape. In the place of these crimes, the law would recognize simple sexual assault and aggravated sexual assault.¹⁹¹

For three and a half months, the Standing Committee on Justice and Legal Affairs considered Bill C-53.¹⁹² The Committee received 150 submissions and heard from seventeen different groups and three individuals.¹⁹³ The majority of the groups advocated an expansion of the proposed two-tier sexual assault provision (simple and aggravated) to a three-tiered provision (also to include sexual assault with a weapon).¹⁹⁴ Overall, there was general support for the idea behind Bill-53, but there was disagreement over the details.¹⁹⁵

After all representatives had been heard, negotiations commenced. The negotiations began on June 15, 1982, with the Committee tabling forty-two pages of amendments proposed by the government.¹⁹⁶ Eight more amendments were proposed on July 8, 1982, and a third set of amendments were proposed the following day.¹⁹⁷ On July 29, 1982, after eleven negotiation meetings with relevant officials, Bill C-127 was introduced.¹⁹⁸

Bill C-127, which was eventually voted into law, included portions of the Law Reform Commission's Report, Bill C-52, and Bill C-53. Regarding marital rape, Bill C-127 proposed replacing the current definition of rape¹⁹⁹ with a three-tiered sexual assault offense.²⁰⁰ Nowhere did marital immunity appear in the proposed bill. Indeed, the Minister of Justice spoke of “ending the ‘inequity of the present law’ which placed an ‘unfair burden on female victims of sexual assault’”²⁰¹ The Minister also strongly rejected any proposed changes that would not allow a wife to charge her husband with rape.²⁰² He said that such changes would damage the

190. *Id.* This change was also proposed by the Law Reform Commission in its report.

191. *Id.* at 340-41.

192. *Id.* at 343.

193. *Id.*

194. *Id.*

195. A group of defense lawyers did, however, dislike the bill in its entirety. They claimed that it was “poorly written, absurd, carelessly conceived, and much too severely flawed to be fixed up.” *Id.*

196. *Id.* at 345.

197. *Id.*

198. *Id.*

199. “A male person commits rape when he has sexual intercourse with a female person *who is not his wife*” 1970 Criminal Code, *supra* note 154 (emphasis added).

200. Snider, *supra* note 29, at 340-41.

201. *Id.* at 347 (quoting *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs Respecting Bill C-53*, House of Commons, Issues §77-106, at 77:29 (1982)).

202. *Id.*

institution of the family.²⁰³ Bill C-127 was passed into law August 4, 1982, and went into effect January 1, 1983.²⁰⁴ The new law repealed § 143 of the old code and replace it with §§ 246.1–246.8.²⁰⁵ Sections 246.1–246.3 present the three-tiered sexual assault offenses: sexual assault, sexual assault with a weapon, and aggravated sexual assault.²⁰⁶ Sections 246.4–246.8 lay out evidentiary rules for these sexual offenses.²⁰⁷

For Canada, the elimination of spousal immunity can be almost entirely attributed to the feminist movement. During Parliamentary debates surrounding Bill C-127, one Member of Parliament stated:

Individual women and groups of women all across the country have been pushing for changes to the rape laws. It was apparent that this section of the Criminal Code cried out for reform. . . . I believe this piece of legislation will mark a new beginning in the way society views coercive sexual acts. This legislation makes clear a statement. It calls a spade a spade. It says that sexual assault is primarily an act of violence, not of passion; an assault with sex as a weapon.²⁰⁸

In summary, the elimination of marital exemption in Canada occurred legislatively to reflect the changes in the views of society. Parliament responded, *ex post facto*, to the cries of its citizens.

B. *Reactions to the Passage of Bill C-127*

The response to marital rape and other forms of domestic violence in Canada did not stop with the passage of Bill C-127. At the same time changes were made to the criminal laws themselves, changes were also made to the rules of evidence that were favorable to victims of rape in general.²⁰⁹ Rape victims were no longer required to have their testimony corroborated, the doctrine of recent complaint was revoked, and cross-examination on past sexual behavior was severely restricted.²¹⁰

Also at the same time, federal and provincial Attorneys General and Solicitors General were developing policy changes of their own. One such policy mandate required police to lay criminal charges

203. *Id.*

204. *Id.* at 338.

205. An Act to Amend the Criminal Code (Sexual Offences), S.C., c. 125, ss. 6 and 19 (1982) (Can.).

206. *Id.*

207. *Id.*

208. Hon. Flora MacDonald, reported in *House of Commons Debates* (4 Aug. 1992) at 20041, cited in Renu Mandhane, *Efficiency or Autonomy?: Economic and Feminist Legal Theory in the Context of Sexual Assault*, 59 U.T. FAC. L. REV. 173, 181 (2001).

209. Hon. Bertha Wilson, *Family Violence*, 5 CAN. J. WOMEN & L. 137, 138 (1992).

210. *Id.*

where it was reasonable and probable that domestic violence occurred.²¹¹ Once the charges were laid, the Crown Attorney would then usually handle the case.²¹² This policy was “established in response to public concern over the victimization of women and involve[d] specialized [Royal Canadian Mounted Police] training on the laying of charges in cases of spousal assault.”²¹³ The most notable effect of the policy change was to remove from women the responsibility and blame associated with laying charges.²¹⁴

The year 1989, seven years after Bill C-127 was enacted, signaled a change in the attitude of courts towards the sentencing of domestic violence defendants.²¹⁵ In *R. v. Inwood*, the Ontario Court of Appeal imposed a thirty-day jail sentence on a first time domestic violence offender.²¹⁶ The court wrote: “[d]omestic assaults are not private matters, and spouses are entitled to protection from violence just as strangers are.”²¹⁷ Another amendment to the Criminal Code in 1997 made it clear that Parliament wanted the offender’s status of being in a position of trust in relation to the victim, such as in a spousal relationship, to be an aggravating circumstance.²¹⁸

Beginning in the 1990s, several provinces established domestic violence courts.²¹⁹ These courts were designed to allow a special focus on the nature of domestic violence cases.²²⁰ The courts, still operating today, operate under components such as “zero-tolerance” pro-arrest policy,²²¹ enhanced investigative procedures for police,²²² and specialized processing to expedite the cases.²²³

Despite all of these changes, however, it is still quite rare for a husband to be charged with sexual assault of his wife.²²⁴ Marital rape is inherently difficult to research because victims are likely to deny or minimize the extent of the abuse and are reluctant to

211. Press Release, Canadian Government, Justice Minister and Solicitor General Take Steps Against Spousal Assault (Dec. 21, 1983), *found in* Spousal Abuse Policies and Legislation: Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation, *available at* <http://canada.justice.gc.ca/en/ps/fm/fpta.html> [hereinafter Against Spousal Assault].

212. *Id.* at 101.

213. *Id.* (quoting Solicitor General Bob Kaplan).

214. *Id.*

215. Nicholas Bala, *Legal Responses to Domestic Violence*, Joel Miller’s Family Law Center (Nov. 7, 1999), *at* <http://www.familylawcentre.com/05cases-n-comments/cnc08-misc.htm> (last visited Feb. 3, 2006).

216. *Id.* (citing O.J. NO. 428 (Ont. C.A. 1989)).

217. *Id.*

218. *Id.*

219. Against Spousal Assault, *supra* note 211, at 40–48.

220. *Id.* at 40.

221. *Id.*

222. *Id.* at 43.

223. *Id.* at 44.

224. Bala, *supra* note 215. This observation was made in 1999. It is possible that there has been an increase since that time.

complain.²²⁵ A survey in 1994 revealed that only one-quarter of victims of domestic violence reported the abuse to the police; between 1994 and 1999 the number of reported cases increased to 37%,²²⁷ but that still leaves nearly two-thirds of the cases unreported.

IV. SHORTCOMINGS AND SUCCESSES: THOROUGH AND TIMELY REVIEW VERSUS LEGITIMACY

The strengths of the judicial and legislative approaches largely mirror the other approach's weaknesses. The judicial approach excels in the process *leading up to the change*, but struggles with legitimacy in the eyes of citizens. Conversely, the legislative approach excels in public endorsement *once the change has been made*, but struggles with making the change actually happen. Some of the weaknesses and strengths discussed below are specific to the problem of marital rape, but some are the same critical features that are common to any discussion of the roles of legislatures and judiciaries.²²⁸ For instance, the argument against "judicial law-making" is an argument common to any discussion on judicial activism, not just a discussion of marital rape.

A. *The Judicial Approach*

1. Advantages: Holistic Review of an Historical Concept

The primary advantage of the judicial method is its ability to reflect a change in the attitude of the general population in a timely manner. In England, for instance, the judiciary abolished marital exemption in 1991²²⁹ whereas Parliament did not codify the change until 1994.²³⁰ Throughout the transition period, judges hearing marital rape cases repeatedly stated that they were bringing common

225. *Id.*

227. STATUS OF WOMEN CANADA, FACT SHEET: STATISTICS ON VIOLENCE AGAINST WOMEN IN CANADA 3, at http://www.swc-cfc.gc.ca/dates/dec6/facts_e.pdf (last visited Jan. 9, 2006) (citing STATISTICS CANADA, FAMILY VIOLENCE IN CANADA: A STATISTICAL PROFILE 2000 (2000)).

228. For instance, the argument that it is not the job of the judiciary to make law is an argument common to any discussion on judicial activism, not just a discussion of marital rape.

229. *R. v. R.*[3], [1991] 4 All E.R. 481, 489 (H.L. 1991).

230. Criminal Justice and Public Order Act, 1994 (Eng.).

law into line with the current values of society.²³¹ As stated in *R v. C.*, “Common law must advance and change with changing attitudes and mores of society.”²³² They also spoke of Lord Hale’s famous statement as an “age-old understanding,”²³³ “anachronistic,”²³⁴ and an “archaism.”²³⁵

The judicial approach also allows for a more gradual change that can take into account precise facts. In England, courts began to review spousal immunity in 1949.²³⁶ Over the next forty-two years, the courts were able to consider different occurrences of marital rape and determine the appropriateness of spousal immunity. Through their judgments and dicta, judges were able to signal to other judges and citizens the direction of the courts and address such issues as the appropriate cases for the exemption and the effects of the exemption. One by one, situations could be examined; it was not an all-or-nothing proposition. In fact, the courts were not comfortable with eliminating the exemption altogether until they had reviewed nearly twenty different situations. This approach ensures that all angles are considered.

Similarly, the judicial method allows for several different arguments to be made to several different judges, and under several different circumstances. In England, various attorneys made various arguments before various judges. In each case, the defense attorney argued in favor of spousal immunity while the prosecution argued for either an exception to the exemption or its complete abolition. Arguments for maintaining the spousal immunity ranged from “that’s the way it’s always been”²³⁷ to statutory construction arguments about the 1976 Act. Arguments for eliminating the exemption ranged from claims that the exemption started as a fiction (referring to the lack of legal support for Lord Hale’s statement)²³⁸ to arguing that the word “unlawful” in the 1976 Act means more than merely “outside marriage.”²³⁹

Finally, by examining marital rape in a judicial setting, the voices of a cross-section of society are heard. Cases are brought by victims who have chosen to speak up, regardless of their position in society. On the other hand, only a relatively small group of citizens is usually even aware of proposed legislation. The legislative process is

231. See, e.g., *R. v. R.*[2], [1991] 2 All E.R. 257, 264, 265 (C.A. 1990) (“changing social attitudes”) (“now as the law has developed and arrived in late twentieth century”); *R. v. C.*, [1991] 1 All E.R. 755, 758 (Crown Court 1990).

232. *R. v. C.*, [1991] 1 All E.R. at 760.

233. *Id.* at 758.

234. *R. v. R.*[2], [1991] 2 All E.R. at 266.

235. *R. v. C.*, [1991] 1 All E.R. at 760.

236. *R. v. Clarke*, [1949] 2 All E.R. 448 (Assizes 1949).

237. *R. v. C.*, [1991] 1 All E.R. at 756–57.

238. *R. v. J.*, [1991] 1 All E.R. 759, 760 (Crown Court 1990).

239. See, e.g., *R. v. J.*, [1991] 1 All E.R. at 763.

most often influenced principally by interest groups. Those who are responsible for making legislative decisions are not likely to have experienced marital rape or even heard about it secondhand. In a judicial setting, however, those who have firsthand experience have a chance to have their voices heard. In the case of marital rape, because it is so personal, this may be a more effective and adaptive form of legal reform.

2. Disadvantages: Legitimacy, Retrospectivity, and Case Dependency

The judicial approach as implemented in England is not, however, without faults. Three primary, and seemingly insurmountable, shortcomings plague the judicial method. The first weakness is the argument most often employed against "judicial law-making"²⁴⁰: it is not the judiciary's job to make law.²⁴¹ It is not for the court to make the law but rather to state common law as it is.²⁴² If the court abolishes marital immunity, it has gone "beyond the legitimate bounds of judge-made law."²⁴³ This concern is not unique to the issue of marital rape and plagues many judicial opinions in all areas of the law.²⁴⁴ It suffices to say that this is a valid criticism of judicial elimination of spousal immunity that should be taken into account when analyzing the approach.

Another shortcoming, common among all judicial modifications to criminal law, is the concern of retrospective application of the

240. The Author has chosen to put this term in quotations because it is not a settled issue. Some would hold that when the courts eliminate marital immunity, they are effectively making law. See, e.g., P.R. Gandhi & J.A. James, *Marital Rape and Retrospectivity—the Human Rights Dimensions at Strasbourg*, 9 CHILD FAM. L.Q. 17, 28 (1997). But others would say that the courts are not at all making law, but rather interpreting the common law and bringing it in line with modern times. See, e.g., *R. v. R.*[2], [1991] 2 All E.R. 257, 266 (C.A. 1990).

241. See, e.g., *R. v. R.*[1], [1991] 1 All E.R. 747, 754 (Crown Court 1990) ("I accept that it is not for me to make the law."); *R. v. J.*, [1991] 1 All E.R. at 767.

Once Parliament has transferred the offence from the realm of common law to that of statute . . . then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallized as at the making of the Act and only Parliament can alter it.

Gibb, *supra* note 132 ("The law was ripe for change, but it was not for the law lords to do it." (quoting Lord Denning, former Master of the Rolls)).

242. See, e.g., *R. v. R.*[1], [1991] 1 All E.R. at 754.

243. *R. v. R.*[2], [1991] 2 All E.R. at 264.

244. This issue could easily have an entire article devoted to its discussion. For the purposes of this Note, however, the Author prefers to stay focused on marital immunity. For more on the relationship between judge-made law and legislatures, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

law.²⁴⁵ “[T]he law must be adequately accessible—an individual must have an indication of the legal rules applicable in a given case—and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of criminal law.”²⁴⁶ Under this principle, a court cannot fundamentally alter the elements of an offense to the detriment of the accused.²⁴⁷ A court can, however, clarify or adapt the common law to reflect new circumstances or developments in society.²⁴⁸

Application of this principle to marital exemption leads to a discourse similar to that in which the European Court of Human Rights engaged in *C.R. v. United Kingdom*.²⁴⁹ On the one hand, prior to a case that completely abolishes the marital immunity doctrine, the law allowed for one to rape his wife.²⁵⁰ By eliminating the exemption, the courts are creating a new criminal offense.²⁵¹ The key is that *at the time of the rape*, the man knew it to be legal to force sex upon his wife.²⁵² Permitting this sort of retroactive application of law allows for arbitrariness. It is arbitrary for the courts, rather than the legislature, to change the law.

On the other hand, it is arguably unreasonable to say that retrospectivity should have barred the abolition of marital exemption for two reasons. For one, once the series of exceptions that had been carved out were accounted for, nothing was really left of the spousal immunity doctrine.²⁵³ A man had available to him the various exceptions to spousal immunity and should have been cautious if relying on the exemption.²⁵⁴ Eliminating the immunity, therefore, had little actual effect. Secondly, Lord Hale’s proposition was based on legal fiction, and arguably, was never good law in the first place.²⁵⁵ Eliminating the exemption is merely removing a legal fiction.²⁵⁶

The final weakness of the judicial method is simply stated and is unique to marital rape—cases must be prosecuted. If instances of

245. See, e.g., European Convention on Human Rights, art. 7 (prohibiting retrospective application of criminal law); Robert G. Natelson, *Statutory Retroactivity: The Founders’ View*, 39 IDAHO L. REV. 489 (2003) (discussing retrospective laws and the U.S. Constitution); Daniel James White, *Ex Post Facto Excepted: Rogers v. Tennessee And The Permissible Retroactive Application of Judge Made Law*, 71 U. CIN. L. REV. 1141 (2003).

246. *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) 56, 68 (1995), at 390.

247. *Id.* at 390.

248. *Id.*

249. *Id.*

250. *Id.* at 391.

251. See Ghandhi & James, *supra* note 240, at 28.

252. *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) at 395.

253. See *id.* at 392.

254. This assumes that a man actually plots to rape his wife and considers the legal consequences before committing the act.

255. *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) at 391.

256. See Ghandhi & James, *supra* note 240, at 19.

marital rape are not being prosecuted, the courts will have no opportunity to hear arguments, examine facts, or make judgments on the current state of the law. The cause of this failure to prosecute can be either the victim's unwillingness to press charges²⁵⁷ or the unwillingness of prosecutors to proceed.

In a situation of prosecutorial opposition, it is very difficult for the judiciary to make inroads toward the abolition of marital immunity. The prosecutors may be refusing cases because they feel that the law does not permit marital rape cases to be brought.²⁵⁸ Or they may be refusing to prosecute because they personally feel that it is not appropriate for a wife to charge her husband with rape. In countries where marital immunity has been a longstanding practice, it would not be surprising for prosecutors to refuse prosecution. To maneuver around such instances of prosecutor opposition is very difficult without the legislature stepping in to require prosecution of marital rape.

The situation of victim reluctance is less obstructive to the judicial method and can be managed. In Canada, even after the abolition of spousal immunity, victims were not pressing charges for marital rape.²⁵⁹ In response, the Attorneys General and Solicitors General, without legislative or judicial mandate, began requiring police to lay criminal charges and for Crown Attorneys to handle the case.²⁶⁰ Various provinces also began establishing domestic violence courts, showing a willingness to prosecute, also without judicial or legislative mandate.²⁶¹

B. *The Legislative Method*

1. Advantages: Legitimacy and Prosecutorial Independence

As previously mentioned, the advantages and disadvantages of each method largely mirror each other. With respect to the legislative approach, its advantages are all counterparts to the disadvantages of the judicial approach. First and foremost, the legislative approach is praised for not allowing the courts to do what the legislature is charged with doing—make law.²⁶² When the legislature is in fact the branch responsible for eliminating marital

257. See Bala, *supra* note 215 (stating the unwillingness of a victim to press charges can be the result of a number of factors including intimidation, humiliation, and fear).

258. See, e.g., McFayden, *supra* note 156, at 198 n.3.

259. Bala, *supra* note 215.

260. Press Release, Government of Canada, Justice Minister and Solicitor General Take Steps Against Spousal Assault (Dec. 21, 1983), *found in* Against Spousal Assault, *supra* note 211, at 100–01.

261. Bala, *supra* note 211, at 1.

262. See *supra* text accompanying notes 133–34, 240–44.

exemption, the change is less susceptible to criticism of judicial lawmaking.²⁶³ Because eliminating marital immunity can be a controversial issue, avoiding criticism and gaining legitimacy is an important consideration.

In England, where the courts abolished marital exemption, legislation was passed several years later confirming the abolition.²⁶⁴ One can speculate that Parliament was aware that its laws may have been held in higher esteem than a court ruling that so markedly changed the law. And if there was any doubt of the legitimacy of the ruling of the House of Lords, Parliament cleared it up with codification of its ruling. Speaking on the subject in 1994, Home Office minister Earl Ferrers commented:

This simply confirms in statute what is already in law But it is an important declaration of Parliament's belief that a man who rapes his wife can expect no special treatment under the law The amendment won't change the law's practical effect, but will represent an unequivocal statement of the value Parliament places on a woman's right to be protected against the dreadful crime of rape.²⁶⁵

The legislative approach also avoids criticism of retrospective application. By its very nature, legislation is applied prospectively.²⁶⁶ Along with the respect given to legislation generally, this characteristic helps foster legitimacy as compared to the judicial method. Where legislation serves to eliminate marital rape, claims such as the one in *C.R. v. United Kingdom* cannot be brought.²⁶⁷ A man always knows where he stands (or at least has the ability to find out).

Finally, the legislative approach does not depend on prosecution of marital rape cases. Problems such as prosecutorial opposition and victim reluctance do not prevent the passage of legislation.²⁶⁸ A legislature is free to eliminate marital exemption even though very few, if any, cases involving marital rape are prosecuted.²⁶⁹ This lack of dependence on prosecution can be particularly powerful in countries where marital exemption has a long history and victim reluctance is high. In fact, Canada faced exactly this situation. Canadian courts had no opportunity to hear cases of marital rape,²⁷⁰

263. *Id.* See generally *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) 56 (1995).

264. Criminal Justice and Public Order Act, 1994, vol. 3, 33-259 (Eng.).

265. Andrew Evans, *Peers Decide Rape in Marriage is a Crime*, PRESS ASSOCIATION, June 14, 1994, at Parliamentary News, available at LEXIS, News Library, UK News Stories File (internal quotation marks omitted).

266. It is possible to pass legislation that applies retrospectively, but this is rare and was not the case in England.

267. 335 Eur. Ct. H.R. (ser. A) 56 (1995).

268. See discussion *supra* note 257 and accompanying text.

269. See, e.g., discussion *supra* Part III.a.

270. *Supra* text accompanying notes 156-58.

yet Parliament responded to startling statistics and the voices of interest groups.²⁷¹

This independence from prosecution allows a legislature to guide society in the direction it thinks society should be moving, as illustrated by Canada during the nineties.²⁷² When Canada passed its legislation removing marital immunity, one Member of Parliament stated, "I believe this piece of legislation will mark a new beginning in the way society views coercive sexual acts."²⁷³ It was not long afterward that society did follow Parliament's example and provinces began establishing their own domestic violence programs.²⁷⁴

2. Disadvantages: Legislative Delay and Abstract Review

Just as the judicial method has its weaknesses, so does the legislative method. The first big hurdle in employing the legislative method is just getting the legislature to realize that marital rape is a problem. Legislatures do not benefit, as judiciaries do, from regular presentation of cases and controversies; they rely on others to bring issues to their attention. In Canada, for instance, Parliament did not have cases to draw its attention to the issue of marital rape.²⁷⁵ Rather, it took notice of increasing feminist literature and low conviction rates.²⁷⁶ The change was largely due to the efforts of individual women and groups of women across Canada.²⁷⁷ Starting the clock running at commencement of aggressive efforts by activists, it took twelve years for Canadian Parliament to pass necessary legislation.²⁷⁸

In England, where cases "were" in fact being brought to the attention of the courts, it took over forty years for Parliament to recognize the problem of marital rape.²⁷⁹ The first case that chipped away at marital exemption took place in 1949.²⁸⁰ Yet the first response from the legislature did not come until 1990 when the English Law Commission began its paper, *Rape within Marriage*.²⁸¹ Even after the judiciary had abolished marital immunity, the

271. Snider, *supra* note 29, at 339.

272. See discussion *supra* Part III.b. There is no guarantee, however, that society will follow the lead of its legislature. Victims of marital rape may still refuse to come forward even after legislation has been passed. See *supra* text accompanying notes 221–24, 224–27.

273. MacDonald, *supra* note 208, at 181.

274. See *supra* text accompanying notes 211–14, 219–23.

275. See *supra* text accompanying notes 156–58.

276. See *supra* text accompanying notes 180–87.

277. Against Spousal Assault, *supra* note 211, at 101.

278. See *supra* Part III.A.

279. See discussion *supra* Part II.a.

280. R. v. Clarke, [1949] 2 All E.R. 448 (Assizes 1949).

281. See *supra* notes 56–62 and accompanying text.

legislature still lagged behind by three years.²⁸² By the time marital rape was criminalized in England, it was already illegal in Scotland, eighteen American states, three Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, the Soviet Union, Poland, and Czechoslovakia.²⁸³ Hopefully, as more and more countries criminalize marital rape, legislatures will have increased awareness and will respond more quickly.²⁸⁴

Even where a legislature is aware of the problem, the next hurdle is convincing the legislature that complete elimination of marital immunity is the correct solution. When Canada's Parliament first set up the Law Reform Commission in 1971 to review the criminal code, removing marital immunity was not the first response.²⁸⁵ Parliament reviewed hundreds of submissions, listened to dozens of advocacy groups, and drafted forty-two pages of amendments before Bill C-127 was adopted and marital immunity was abolished.²⁸⁶

The process of determining the correct legislative response to marital rape is done in the abstract. Unless individuals come forth to tell their stories, members of the legislature are left to their own devices to fully understand the problem of marital rape. Without victims coming forward to share their views, it is more likely that legislators will fail to realize all of the dynamics of the problem. One can appreciate how this may make their job more difficult and may slow the process of criminalizing marital rape.

V. PROPOSED SOLUTION: EQUAL PROTECTION CLAUSES AS A TOOL FOR CRIMINALIZING MARITAL RAPE

Because the judicial method excels in guiding the process leading up to the change and the legislative method excels in gaining legitimacy, a method that combines the strengths of both is desirable. An improved approach would provide for timely recognition of a change in societal morals, consideration of a wide variety of arguments, and review of real instances of marital rape. The method should not, however, compromise legitimacy. Taking all of these characteristics into consideration, a better method for advocates seeking to criminalize marital rape is to argue that it violates equal protection provisions. Equal protection provisions can be found in

282. See *supra* notes 102–05 and accompanying text.

283. Francis Gibb, *Lords Say Rape is Rape in or out of Marriage*, *TIMES* (London), Oct. 24, 1991, available at 1991 LEXIS, News Library, UK News Stories File.

284. At least thirty-nine countries now consider marital rape a criminal offense. *Is Marital Rape a Crime?*, *supra* note 27.

285. See *Supra* text accompanying notes 179–87.

286. See *Supra* text accompanying notes 192–98.

state constitutions and international treaties alike. The validity of state constitutions can hardly be questioned, but the authority of international treaties is a more controversial issue. Equal protection arguments made, however, are the same whether the provision appears in a state constitution or an international treaty to which a particular state is a party. Due to their controversial nature, a brief discussion follows on the influence of international treaties.

For decades, international treaties have been gaining influence in the global community. “[H]uman rights is today the single, paramount virtue to which vice pays homage, that governments today do not feel free to preach what they may persist in practicing.’ In other words, international human rights law is real, effective, and an obligatory regime of global civilization today.”²⁸⁷ Today there are dozens of international bodies, treaties, and non-governmental organizations shaping international law. The European Court of Human Rights, for one, has achieved unimagined success.²⁸⁸ Latin America has seen a shift toward the use of international judicial processes for individual violations of human rights.²⁸⁹ Even the United States, which has resisted ratifying most human rights treaties, has seen its Supreme Court recently use international law in its decisions.²⁹⁰ International law has become a more useful tool than ever before.

All equal protection provisions provide essentially the same protection and even use similar phrasing.²⁹¹ For instance, the

287. Makau Matua, Book Review, 95 AM. J. INT’L L. 255, 255 (2001) (quoting LOUIS HENKIN, *THE AGE OF RIGHTS*, at ix-x (1990)). *Contra* J. SHAND WATSON, *THEORY AND REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1991).

288. See Richard S. Kay, *Human Rights in Theory and Practice: A Time of Change and Development in Central and Eastern Europe: The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT’L L. 217, 217 (1993); Rene Provost, Book Note, 47 MCGILL L.J. 693, 696 (2002).

289. See Ellen Lutz & Kathryn Sikkink, *International Human Rights Law in Practice: The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT’L L. 1 (2001).

290. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (acknowledging “the overwhelming weight of international opinion against the juvenile death penalty”).

291. See, e.g., International Covenant on Civil and Political Rights [ICCPR] art. 26, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] (“All persons are equal before the law and are entitled without discrimination to the equal protection of the law.”); Universal Declaration of Human Rights, art. 7, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”); Organization of American States, American Convention on Human Rights art. 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“All persons are equal before the law.”); African [Banjul] Charter on Human and Peoples’ Rights art. 3(2), June 27, 1981, 21 I.L.M. 58 (“Every individual shall be entitled to equal protection of the law.”). In addition to international treaties, most countries also have similar provisions in their constitutions.

International Covenant on Civil and Political Rights (ICCPR) provides:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁹²

Unlike other non-discrimination provisions found among constitutions and treaties,²⁹³ equal protection provisions serve as an autonomous right.²⁹⁴ If legislation that is illegitimately discriminatory is adopted by a state that has either an equal protection provision in its constitution or is party to a human rights treaty, it is in violation of those equal protection provisions.²⁹⁵

For a particular discriminatory practice to be found in violation of an equal protection provision, one must be able to show that it qualifies as one of the enumerated characteristics of the provision, if they are listed. Under the ICCPR, this would mean that it must discriminate on the basis of race, color, sex, etc.²⁹⁶ According to international doctrine, if the practice does not discriminate on the basis of one of these enumerated characteristics, one must show that the differentiation of treatment is not reasonable or objective and is not for the purpose of obtaining a legitimate goal.²⁹⁷ Because marital immunity does not fall in one of the enumerated categories, it must meet this higher standard. Such an argument has been made under the U.S. Constitution and was successful in eliminating spousal immunity in New York.²⁹⁸ The case, *People v. Liberta*, is useful as a model for elimination of marital immunity under similar equal protection provisions.

Under the standard commonly applied to equal protection provisions, the first step to proving violation of an equal protection provision is to show that the treatment is differential.²⁹⁹ In the case of marital rape, marital exemption doctrine classifies unmarried rape perpetrators differently from married rape perpetrators. A man who rapes his wife is not guilty of rape, while an unmarried man who commits the same act is guilty. In *People v. Liberta*, the husband would have been protected by marital immunity but for an exception

292. ICCPR, *supra* note 291, art. 26.

293. *See, e.g., id.* arts. 2(1), 3, 4(1), 14(1), 20, 23–26.

294. ALEX CONTE, ET AL., *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 162–65 (2004).

295. *Id.* at 162.

296. ICCPR, *supra* note 291, art. 26.

297. *See, e.g., id.* at 174; *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984).

298. *Liberta*, 474 N.E.2d at 567.

299. CONTE, ET AL., *supra* note 294, at 172–73.

to the immunity for separation.³⁰⁰ He was, in fact, still married, but he and his wife had recently separated. In this situation, one day a man may rape his wife without fear of criminal charges, but the next he may be convicted for the same act. The differential treatment is not difficult to argue.

The remaining question is whether this differential treatment is reasonable and objective and in furtherance of a legitimate goal.³⁰¹ As discussed earlier, there are several arguments of how marital exemption furthers legitimate goals.³⁰² One by one, each must be shown to be unreasonable and not in furtherance of a legitimate goal. Traditional justifications can be quickly dismissed. It is no longer acceptable to argue that with marriage comes an irrevocable consent to sexual intercourse or that a woman is the property of her husband. These arguments have been rejected time and again and are no longer recognized as reasonable claims.³⁰³

With the fall of the traditional arguments, more modern arguments have been made. *Liberta* provides several such arguments. The first argues that permitting criminal charges against a man who rapes his wife requires impermissible government intrusion in the privacy of marriage and hinders reconciliation.³⁰⁴ This argument seems to put forth a legitimate goal, as marital privacy and marital reconciliation are worthy goals for a state to promote. Marital immunity is not, however, a reasonable means for obtaining these goals. First, it is unthinkable to extend marital privacy to nonconsensual acts.³⁰⁵ "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."³⁰⁶ Marital reconciliation is also an unlikely benefit of marital immunity. If a woman is ready to press criminal charges against her husband, the marriage has already passed a stage of

300. *Liberta*, 474 N.E.2d at 571.

301. CONTE, ET AL., *supra* note 294, at 174.

302. *See supra* Part I.

303. *See, e.g., Liberta*, 474 N.E.2d at 573-74; *Shunn v. State*, 742 P.2d 775, 777-78 (Wyo. 1987) (referring to these theories as "legal fiction"); *Merton v. State*, 500 So.2d 1301, 1303 (Ala. Crim. App. 1986) (adopting *Liberta* decision); *State v. Smith*, 401 So.2d 1126, 1129 (Fla. Dist. Ct. App. 1981) ("the fact of marriage carries with it no implied consent to sexual battery"); *R. v. L.*, 103 A.L.R. 577 (Austl. 1991) (LEXIS, Legal (excluding US), Australia, Case Law) ("No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person."); *S. v. H.M. Advocate*, 1989 S.C.C.R. 248 (H.C.J.) (LEXIS, Legal (excluding US), Scotland, Case Law) (Scottish court finding "any supposed implied consent to intercourse is not irrevocable").

304. *Liberta*, 474 N.E.2d at 574.

305. *See, e.g., id.*

306. *Id.*

reconciliation.³⁰⁷ Pressing charges can hardly be blamed for the dissolution of the marriage.

Another allegedly legitimate interest of marital immunity is the prevention of fabricated accusations of rape.³⁰⁸ The concern of fabricated claims is heightened because marital rape is a difficult crime to prove. But difficulty of proof has never prevented codification of criminal behavior before and there is no reason for it now. One must assume that a criminal justice system can handle false claims.³⁰⁹ Furthermore, it can hardly be the case that marital rape is the only claim that is prone to being fabricated. Surely, claims of theft and arson for insurance purposes are at least as susceptible to fraudulent claims.

The final argument claims that marital rape is not as serious an offense as nonmarital rape and can be handled under assault statutes.³¹⁰ This may be one of the stronger arguments, for it is reasonable for criminal charges to align with the severity of the crime. But criminal codes already recognize that rape is a more serious violation than assault.³¹¹ If rape were no more severe than assault, criminal codes would not define rape as a distinct crime with generally longer sentences. Furthermore, there is no reason to believe that a wife who is raped by her husband is harmed any less than a woman raped by a stranger. Some jurisdictions actually support the contrary—that being raped by one's spouse is worse than being raped by a stranger because the offending spouse was in a position of trust.³¹² Recall that the Canadian Parliament amended its Criminal Code, making the offender's position of trust in relation to the victim, such as a spousal relationship, an aggravating circumstance.³¹³

Once each argument alleging reasonableness and furtherance of a legitimate goal is discredited, a court is left with a statute that treats similarly situated people differently and that is not in furtherance of a legitimate state interest.³¹⁴ After this analysis, a court should declare the statute (or doctrine if it has been created through common law) as either unconstitutional or in violation of international treaty. It is a court's responsibility to declare when a

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *See, e.g., Bala, supra* note 215 (describing how an amendment to Canada's Criminal Code advocated for the offender's status of being in a position of trust in relation to the victim, such as in a spousal relationship, to be an aggravating circumstance).

313. *Id.*

314. *See CONTE, ET AL., supra* note 294, at 172–74 (discussing the standards that a statute must meet to satisfy equal protection).

statute has fallen contrary with the principles set forth in a state's constitution.³¹⁵ Failing to declare the discriminatory statute a violation of state law, international law, or both would attack the credibility of those instruments.

Under this proposed approach, timeliness, thorough review, and legitimacy are all achieved. By utilizing provisions that are already in place, criminalization of marital rape will not be slowed by undue legislative delay. And because a provision already *does* exist, courts can review marital rape cases and chip away at spousal immunity with less hesitancy. Equal protection provisions require interpretation—some more than others. Once a state ratifies an international treaty with an equal protection provision or codifies one of its own, a court will be tasked to interpret the provision.³¹⁶ “There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.”³¹⁷ Each time marital rape is alleged to be a violation of equal protection, courts are forced to interpret the meaning of the equal protection provision. As more cases are brought, more circumstances will be considered. It is here that this proposed solution will harness the adaptive nature of the pure judicial approach. It is impossible for the representatives of a state to have thought of every application of the equal protection provision when it was ratified. And of those applications considered, it is unlikely that marital rape was one of them. The process of having cases heard by the judiciary will permit application of the equal protection provision to marital rape where it might not otherwise have been considered.

Legitimacy of this process is heightened as compared to the pure judicial approach of England because the state has already expressed its interest in equal protection. In the case of England, criminalization of marital rape did not rest upon the doctrine of equal protection, but on a change in societal values.³¹⁸ In a sense, the English court was merely updating the common law on marital rape. Conversely, under the proposed approach a state's legislature has already adopted an equal protection provision. Adoption of an equal protection provision indicates the state's interest in guiding its policy toward equality. This is the key characteristic of the equal protection approach. By interpreting an *existing* provision, a judiciary's criminalization of marital rape is less likely to be viewed as judicial

315. See, e.g., *Jones v. Scully*, 71 A.L.D. 567 (Austl. 2002) (discussing whether a provision was unconstitutional); *Taw Cheng Kong v. Public Prosecutor*, [1998] 1 SLR 943 (Singapore High Court 1998) (same); *Elf Enterprises (Caledonia) Ltd v. London Bridge Engineering, Ltd.*, (Scotland, Court of Session: Outer House (1997) Outer House Cases) (same).

316. See, e.g., *C.R. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) 56, 69 (1995).

317. *Id.*

318. *R. v. R.*[1], [1991] 1 All E.R. 747, 754 (Crown Court 1990).

lawmaking and is more likely to be viewed as legitimate in the eyes of the citizenry.

The obvious downside to this approach is that the state must have an equal protection provision in place. Additionally, wives must press charges against their husbands. If women are not pressing charges for marital rape, courts will not be given the opportunity to interpret equal protection provisions in the context of marital rape. The proposed approach will not work in either of these situations. Advocates of criminalizing marital rape that face either of these dilemmas must employ the methods used in England and Canada.

Critics of the equal protection approach may argue that retrospective application is still a problem. While this is true, claims of inappropriate retrospective application are less likely to be successful because once a state has chosen to adopt an equal protection provision, citizens are on notice that laws will (or should) soon be updated for compliance. Recall that the European Court of Human Rights rejected a claim of retrospective application in England.³¹⁹ Also recall that the abolition of spousal immunity in England did not rest upon any existing provision. If a retrospectivity claim failed under the circumstances in England, such a claim is almost certainly doomed where criminalization of marital rape rests on an existing provision.

VI. CONCLUSION

Until relatively recently, husbands around the globe have been permitted to rape their wives. But changes in the notion of equality and widespread feminist movements have led to the realization that rape is still rape, whether or not the parties are married.³²⁰ One by one, countries have begun correcting the injustice of marital immunity, subjecting husbands to the same standards as unmarried men.³²¹ In the majority of countries, judiciaries were responsible for the change, but in some countries, the legislature took the lead.³²²

When the judiciary takes the helm, concerns of legitimacy and retrospective application taint the outcome. But concerns of timeliness and thorough consideration also make legislative action unappealing. While both of these approaches have accomplished the desired goal, a better approach focuses on marital immunity as a violation of equal protection. Such an approach will maximize the strengths and minimize the weaknesses of both the pure judicial and

319. See *supra* notes 106–11 and accompanying text.

320. See, e.g., Gibb, *supra* note 132.

321. See *supra* notes 27, 283 and accompanying text.

322. See *supra* notes 28, 29 and accompanying text.

legislative models. The time has come to criminalize marital rape throughout the world, and the tools to do so are available now more than ever.

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