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CRIMINAL LAW—THE HUSBAND'S RAPE EXCEPTION: AN EQUAL PROTECTION ALTERNATIVE—*State v. Smith*, 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977)

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CRIMINAL LAW—THE HUSBAND'S RAPE EXEMPTION: AN EQUAL PROTECTION ALTERNATIVE—*State v. Smith*, 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977).

I. INTRODUCTION

Albert Smith defied a court order and went to his wife's apartment, broke down the door, and beat and raped her in the presence of their children.¹ He was charged with raping and assaulting his wife. In dismissing the rape charge, the New Jersey trial court rejected the state's contention that the rape statute² should be interpreted to allow prosecution of a husband for raping his wife when he engages in forcible intercourse without her consent. Instead, the court followed the common law rule that a husband cannot rape his wife, even though it disagreed with the policies and rationales behind the rule. This decision adds to the New Jersey rape statute a provision not included on the face of the statute. The added provision denies married women who are raped by their husbands equal protection under the law.

The husband's exemption from criminal liability for raping his wife can be traced back to the reasoning of England's Sir Matthew Hale that the wife, by entering into the marriage contract, gave irrevocable consent to intercourse with her husband whenever he desired.³ With few modifications, the rule that a husband cannot be prosecuted for raping his wife remains intact in England.⁴

1. Note, *The Marital Rape Exemption*, 52 N.Y.U.L. REV. 306, 320 n.99 (1977). For purposes of this discussion, rape refers to sexual intercourse with a woman against her will and does not refer to the legal implications of the act.

2. The statute provides:

2A:138-1. Rape and carnal abuse; penalty

Any person who has carnal knowledge of a woman forcibly against her will, or while she is under the influence of any narcotic drug, or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child under the age of 12 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than 30 years, or both; or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child of the age of 12 years or over, but under the age of 16 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than 15 years, or both.

N.J. STAT. ANN. § 2A:138-1 (West 1969) (emphasis added).

3. 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (S. Emlyn ed. 1778), as cited in Note, *supra* note 1, at 307 n.12.

4. A husband can be convicted for raping his wife when there has been a judicial decree of separation, since the decree revokes the marital consent. *Rex v. Clarke*, [1949] 2 All E.R. 448. The mere filing for divorce, however, does not revoke the

United States courts have followed the basic English rule. No court has convicted a husband for raping his wife while the couple is still married and living together.⁵ Some jurisdictions have gone so far as to hold that marriage is a valid defense to rape even when the couple is no longer living together.⁶ Since a husband cannot be prosecuted for raping his wife, he cannot be prosecuted for the attempted rape of his wife.⁷ As in England, a husband can only be convicted in connection with the rape of his wife when he aids, abets, or forces another man to have intercourse with his wife against her will.⁸

Legislatures have been more willing than courts to narrow the common law exemption.⁹ Twenty-seven states include the husband's exemption in their rape statutes.¹⁰ Some states have modified the common law exemption by exempting the husband if the parties are separated by judicial decree.¹¹ Other states deny the exemption if the parties are not living together and one of the spouses has filed for divorce or separation.¹² Still others exempt

marital consent, even if the parties are not living together. *Regina v. Miller*, [1954] 2 All E.R. 529. In addition, even Hale recognized that a husband can be convicted when he forces his wife to have intercourse with another man. English, *The Husband Who Rapes His Wife*, 126 NEW L.J. 1223 (1976). In this situation, the husband is convicted for assisting in the rape, and not for the rape itself. *Id.*

5. Note, *supra* note 1, at 321. See generally Annot., 84 A.L.R.2d 1017, 1019 (1962).

6. *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489 (1857).

7. *Frazier v. State*, 48 Tex. Crim. 142, 86 S.W. 754 (1905).

8. *Elliot v. State*, 190 Ga. 803, 10 S.E.2d 843 (1940); *State v. Martin*, 17 N.C. App. 317, 194 S.E.2d 60 (1973). Even if, in addition to aiding and abetting others to do so, the husband rapes his wife, his conviction rests on the aiding and abetting and not on the actual rape which he committed. *State v. Drope*, 462 S.W.2d 677 (Mo. 1971).

9. For an extensive classification of rape statutes, see Note, *supra* note 1, at 317-19.

10. *Id.* at 308. Illinois, for example, defines rape as follows:

§ 11-1. Rape

(a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, *not his wife*, by force and against her will, commits rape. Intercourse by force and against her will includes, but is not limited to any intercourse which occurs in the following situations:

(1) where the female is unconscious; or

(2) where the female is so mentally deranged or deficient that she cannot give effective consent to intercourse.

* * * *

ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd Supp. 1977) (emphasis added).

11. *E.g.*, LA. REV. STAT. ANN. § 14:41 (West Supp. 1978); MD. ANN. CODE art. 27, § 464D (Supp. 1977); N.D. CENT. CODE § 12.1-20-01 (1976).

12. *E.g.*, MINN. STAT. ANN. § 609.349 (West Supp. 1977); NEV. REV. STAT. § 200.373 (1977).

the husband only if the couple is living together.¹³ One state, Delaware, has completely abandoned the exemption.¹⁴ Congress is also considering the marital rape exemption in the Criminal Code Reform Act,¹⁵ which was recently passed by the Senate. The Senate Committee on the Judiciary found "no legislative distinction between violent ravishment by strangers and less brutal schemes to take advantage of an initially consensual relationship."¹⁶

13. *E.g.*, COLO. REV. STAT. § 18-3-409 (Supp. 1976); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1977); N.M. STAT. ANN. § 40A-9-20 (1975).

14. The statute now provides: "A male is guilty of rape in the second degree when he intentionally engages in sexual intercourse with a female without her consent." DEL. CODE tit. 11, § 763 (Supp. 1977). The statute had formerly read: "A male is guilty of rape when he intentionally engages in sexual intercourse with a female *not his wife* without her consent, or when he intentionally engages in sexual intercourse with a male without such male's consent." DEL. CODE tit. 11, § 763 (1975) (amended 1974) (emphasis added).

South Dakota, which had eliminated the exemption, S.D. COMPILED LAWS ANN. § 22-22-1 (Supp. 1976), has reinstated it, providing: "Rape is an act of sexual penetration accomplished with any person other than the actor's spouse under any one or more of the following circumstances. . . ." S.D. COMPILED LAWS ANN. § 22-22-1 (Special Supp. 1977).

15. The Report of the Committee on the Judiciary states:

Subsection (a) of section 1641 provides that a person is guilty of an offense if he engages in a sexual act and (1) compels the other person to participate in such act (A) by force, or (B) by threatening or placing the other person in fear that any person will immediately be subjected to death, serious bodily injury, or kidnapping, or (2) with intent to engage in a sexual act, has substantially impaired the ability of the other person to approve or control conduct by administering or employing a substance that he knows is a drug or intoxicant, or by other means, without the knowledge or against the will of the other person, or (3) the other person, is, in fact, less than twelve years old.

SENATE COMMITTEE ON THE JUDICIARY, CRIMINAL CODE REFORM ACT, S. REP. NO. 1437, 95th Cong., 1st Sess. 573 (1977).

The Model Penal Code, however, includes the husband's exemption in its definition of rape:

§ 213.1. Rape and Related Offenses

(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

* * * *

MODEL PENAL CODE § 213.1 (1962).

16. SENATE COMMITTEE ON THE JUDICIARY, CRIMINAL CODE REFORM ACT, S.

Commentators have espoused various rationales both in support of and in opposition to the husband's rape exemption. The earliest rationale used to support the husband's exemption was the implied consent doctrine as stated by Hale.¹⁷ However, implied consent is a poor justification for protecting the husband from prosecution, since it is unreasonable to infer from a woman's decision to marry that she intends to make her body accessible whenever the husband wants.¹⁸

Modern commentators who support the rule point first to problems of proof. Areas where such problems could arise include the wife's inability to recollect objectively at trial¹⁹ and the difficulty presented in proving lack of consent.²⁰ However, problems of proof are easily exaggerated.²¹ Similar problems exist in any rape prosecution and should not bar prosecution when the accused and victim are married.²² Moreover, the major problem regarding rape today is the reluctance of victims to press charges, rather than problems of proof.²³

Another argument advanced in support of the exemption is that reconciliation and marital harmony are fostered by barring prosecution.²⁴ To be sure, once the wife initiates a rape prosecution, there is little chance for the couple to make amends. Reconciliation, however, is not a realistic justification unless some matrimonial harmony remains in the relationship.²⁵ If the parties are no longer concerned with the furtherance of the relationship, the wife should be protected from her husband.²⁶

An additional reason used to support the exemption is the fear that the wife will threaten her husband with rape prosecution in

REP. NO. 1437, 95th Cong., 1st Sess. 572 (1977). This is especially significant in light of the fact that only one state, Delaware, has acted so broadly. Hopefully, the future passage of this Act will encourage other states to change their law regarding the husband's exemption.

17. See note 3 *supra* and accompanying text.

18. 6 STAN. L. REV. 719, 722 (1954).

19. *Id.* at 725.

20. Note, *supra* note 1, at 314; Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 640-45 (1976).

21. Note, *supra* note 1, at 314.

22. *Id.*; English, *supra* note 4, at 1224.

23. The stigma associated with rape, the reluctance to face embarrassing insinuations at trial, and the fear of retaliation by the defendant are some of the reasons why rape is one of the most underreported crimes. Note, *supra* note 1, at 315.

24. 6 STAN. L. REV., *supra* note 18, at 725.

25. Note, *supra* note 1, at 315.

26. English, *supra* note 4, at 1225.

order to force a favorable property settlement.²⁷ This fear, however, is unfounded and is inconsistent with the state's ability to convict the husband for other violent crimes including assault and sodomy, which are equally susceptible to contrivance.²⁸

A final justification in support of the husband's exemption is that the rape laws should not apply to the husband because he does not threaten the community as much as the "ordinary" rapist.²⁹ Proponents of this argument believe that the wife is adequately protected by the assault and battery laws.³⁰ However, a woman suffers no less humiliation or fear from forcible rape by her husband than by another man.³¹ Therefore, there is no reason to insulate the husband from criminal sanctions.³² The argument that the husband is less of a threat to the community than the "ordinary" rapist also fails because it is based on the outdated view that rape laws protect the husband's property interest in his wife.³³ Under this view, the "husband-rapist" merely makes use of his own property³⁴ while the community remains unaffected. However, this theory has long since ceased to reflect the present day approach to marriage as a relationship between equals.³⁵ The rape law should reflect this change and protect the woman's peace of mind and physical integrity. It should not exist to protect an anachronistic property interest.³⁶

The problem of domestic violence furnishes another policy reason for abrogating the exemption. By allowing a husband total immunity for raping his wife, the law encourages acts of domestic violence. Considering the current magnitude of the domestic violence problem,³⁷ legal policies regarding the marital relationship

27. 6 STAN. L. REV., *supra* note 18, at 725.

28. Note, *supra* note 1, at 314.

29. 6 STAN. L. REV., *supra* note 18, at 725.

30. *Id.* at 726.

31. Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 926 (1973).

32. *Id.* Assault and battery law protection for the wife is inadequate. See also Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135 (1977). In our system of law, the label and punishment for a crime should be appropriate and correspond to the actual crime committed. English, *supra* note 4, at 1225.

33. Note, *Rape Reform Legislation: Is It the Solution?*, 24 CLEV. ST. L. REV. 463, 472 (1975).

34. Note, *supra* note 1, at 309.

35. Note, *supra* note 33, at 472.

36. Comment, *supra* note 31, at 924-25.

37. Violence among all family members is widespread and increasing. Such violence is commonly inflicted by the husband on the wife. Owens, *Battered Wives*:

should discourage, not foster, domestic violence.³⁸ The husband's exemption illustrates the failure of the legal system to provide adequate recourse for the injured spouse.³⁹ The law is in effect condoning acts of marital violence.

II. THE SMITH DECISION

The court in *State v. Smith* distinguished itself from many courts by examining some of the policy considerations behind the husband's rape exemption.⁴⁰ The court recognized that Hale's implied consent rationale arose at a time when women were considered the property of the husband⁴¹ and when the role of the

Some Social and Legal Problems, 2 BRIT. J.L. SOC'Y 201 (1975). See generally 81 DICK. L. REV. 815, 815 n.2 (1977).

38. There have been various attempts to deal with domestic violence. In Hammond City, Indiana, an experimental program places convicted violence-prone husbands on probation to their battered wives. The wives are sworn in as deputy probation officers. If the husbands cause any problems, probation is revoked and the husbands are incarcerated. In addition, husbands can serve their prison sentence on weekends to avoid losing their jobs. [1975-1976] 2 FAM. L. REP. (BNA) 2831. England has enacted the Domestic Violence and Matrimonial Proceedings Act (1976). This Act gives the court injunctive power to restrain violent spouses from additional acts of violence or to exclude the violent spouse from the home. A power of arrest can also be attached to the injunction. [1976-1977] 3 FAM. L. REP. (BNA) 3031.

These solutions might also be appropriate as alternatives to the husband's rape exemption in the situation where the parties are still living together and want to continue the relationship without the violent episodes. In this situation, recourse to the rape law is not an adequate remedy for the wife. If the husband is convicted, he will go to prison. This will disrupt the marital relationship at a time when the parties wish it to continue. However, under the alternatives discussed above, the couple is allowed to continue their relationship, if so desired, under the stipulation that the husband refrain from further acts of violence. See also Note, *supra* note 32. For a discussion of Massachusetts' approach to the problem of domestic violence, see McLellan, *Massachusetts Divorce Practice and Procedure*, 1 W. NEW ENG. L. REV. 277, 321-24 n.191 (1978).

39. Violence is not usually limited to one episode, but continues during the marital relationship. Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259 (1971). Victims of domestic violence often have no legal recourse because police often fail to intervene in family disputes. [1976-1977] 3 FAM. L. REP. (BNA) 2527. Accessibility to the courts is also a problem. [1976-1977] 3 FAM. L. REP. (BNA) 2528. In Detroit, 4,900 women filed complaints of domestic violence against their husbands, but only 300 actually went to court. Will, Brigham, & Ottenberg, *Panel Workshop: violence, crime, sexual abuse and addiction*, 5 CONTEMP. DRUG PROB. 385, 394 (1976). See also note 24 *supra*.

40. 148 N.J. Super. at 226-27, 372 A.2d at 390. Most courts apply the common law rule without exploring any rationales behind it. See, e.g., *Commonwealth v. Landis*, 129 Ky. 445, 112 S.W. 581 (1908); *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489 (1857); *State v. Faas*, 39 N.J. Super. 306, 121 A.2d 69 (Essex County Ct. 1956), *cert. denied*, 353 U.S. 940 (1957); *State v. Williamson*, 22 Utah 248, 62 P. 1022 (1900).

41. 148 N.J. Super. at 229, 372 A.2d at 391.

husband was supreme in the marital relationship.⁴² The court observed that because rape is a crime which has a unique impact on the victim,⁴³ a woman's right to sexual privacy should not be lost because of the legal fiction of consent arising from the marriage contract.⁴⁴ The court noted that women's social status has changed over the years and that other areas of the law have reflected this change.⁴⁵ It also recognized that while an unmarried woman can withdraw consent to sexual intercourse after having previously consented, a married woman, under the traditional view, cannot withdraw the consent she has given by marriage.⁴⁶ This results in discrimination against the wife rape victim.⁴⁷ Based on these considerations, the court concluded that giving the husband a legally protected right to rape his wife ignores the reality of marital relationships in the twentieth century.⁴⁸

Despite its strong reaction to this issue, the court felt compelled to follow the common law rule. This decision was based primarily on certain rules of statutory construction. The court stated that since the rape statute⁴⁹ originated from the common law, it must be construed strictly to avoid any asserted change.⁵⁰ Additionally, since the statute makes no mention of the husband's exemption, the court relied on the axiom of construction that a penal statute must be construed strictly to prevent its application to persons or conduct beyond the contemplation of the legislature.⁵¹ The court also took note of the proposed New Jersey Model

42. *Id.*

43. "Because of their uniquely personal and oftentimes violent nature, sex crimes, especially rape, are of great concern to our society. Whether young or old, the woman may suffer permanent emotional repercussions, and the psychological consequences for the victim are impossible to calculate." *Id.* at 226, 372 A.2d at 390.

44. *Id.*

45. A close examination of the historical origins of [the husband's rape exemption] reveal[s] that it is rooted in the ancient concepts of a wife as a chattel and the inviolability of the husband's supreme role in a marriage relationship. While such concepts standing alone have long since disappeared, American courts in their mechanistic application of this principle have failed to come to grips with the changes that have occurred in the status of a wife since the 17th century. In other areas modern jurisprudence has consistently refused to permit such male dominated concepts to stand in the way. . . . *Id.* at 229, 372 A.2d at 391.

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* note 2 *supra*.

50. 148 N.J. Super. at 230-31, 372 A.2d at 392.

51. *Id.*

Penal Code provision⁵² which would apply the exemption except when rape is committed between spouses "living apart in a state of separation."⁵³

The *Smith* decision is commendable because the court examined the policies behind the exemption. However, while its choice of rules of construction was clearly correct, all of the rules relied on can give way in appropriate circumstances. Regarding the rule of construing statutes to avoid the asserted change,⁵⁴ at least one court has said that old common law doctrines can hardly give reliable guidance today in the interpretation of a statute promulgated at a time when individual and social values were vastly different.⁵⁵ That court construed a mayhem statute to be more inclusive than it had been at common law. Under this analysis, the *Smith* court could have included the husband within the class of persons punishable under the rape statute.⁵⁶

The *Smith* court's reliance on the rule of construing statutes narrowly and in favor of the defendant must be analyzed in light of the reason for the rule. This rule of construction is grounded in the constitutionally-created vagueness doctrine⁵⁷ and is based on the

52. *Id.* at 232, 372 A.2d at 392-93.

53. *Id.* The Senate Judiciary Committee is debating the New Jersey Penal Code provision regarding the rape of one's spouse. It appears that the present state of the law on this issue will prevail. Letter received from John DeCicco, 1st Assistant, Appellate Section, State of New Jersey Department of Law and Public Safety Division of Criminal Justice by author (12/18/77). This letter is on file in the Western New England Law Review office.

54. For a discussion of this rule of construction, see 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 50.01 (4th ed. 1973).

55. *United States v. Cook*, 462 F.2d 301, 303 (D.C. Cir. 1972). The defendant threw lye into Pelzer's eyes. He was charged with and convicted of mayhem under D.C. CODE § 22-506 (1967). The defendant contended that since he didn't totally destroy Pelzer's eyesight and no permanent injury was caused, he had not committed the offense charged. The court refused to interpret the statute solely in light of the common law which focused on the reduction of the victim's combat ability. The court stated that the focus of the statute is on the integrity of the person.

56. An additional policy consideration for disregarding the exemption urges that when the reason for any common law rule ceases, the rule should be discarded. 27 U. FLA. L. REV. 266, 270 (1974). This rule comports with the notion that courts should not function mechanically, but rather should apply the statute in an intelligent, reasoned manner that makes sense as a part of the whole body of law. Kernochan, *Statutory Interpretation: An Outline Method*, 3 DALHOUSIE L.J. 333, 345 (1976). The *Smith* court applied the exemption in too mechanistic a fashion. Indeed, the court itself stated that the rule makes no sense in today's society.

57. The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he

idea that the legislature owes a duty to its citizens to give fair warning of prohibited acts⁵⁸ by making unmistakably clear those acts for which a citizen may lose life or liberty.⁵⁹ It protects the individual against the arbitrary discretion of officials and judges.⁶⁰ However, the argument that a prosecution of the husband fails to give the defendant adequate warning as to punishable conduct is not persuasive here because the statute⁶¹ clearly indicates the type of conduct proscribed, without reference to marital status. A husband who rapes his wife knows he is having intercourse with a woman against her will, and cannot rely on the language of the statute to claim that his conduct is not forbidden. The statute clearly states what constitutes the crime of rape and makes plain to all persons that such conduct will be punished.⁶²

Additionally, this rule of construction is not the only factor to consider when interpreting a statute⁶³ and is not mandatory in its application.⁶⁴ New Jersey courts have recognized that this rule does not prevent a court from reading a penal statute in relation to the evil to be suppressed.⁶⁵ The rape statute seeks to prevent or punish the violation of a woman's sexual privacy by any person.⁶⁶ Accordingly, the *Smith* court could have properly construed the statute to exclude the husband's exemption.

could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1953) (footnote omitted).

58. "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1951).

59. "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties. . . ." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). See 3 C. SANDS, *supra* note 54, § 59.03 (1974).

60. *State v. Woodruff*, 68 N.J.L. 89, 52 A. 294 (1902); 3 C. SANDS, *supra* note 54, § 59.03 (1974).

61. See note 2 *supra*.

62. No more than a reasonable degree of certainty is demanded of a criminal statute. One whose acts are deliberately close to the area of proscribed conduct risks crossing the line. *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

63. 3 C. SANDS, *supra* note 54, § 59.06 (1974).

64. Kernochan, *supra* note 56, at 357.

65. "The rule of strict construction does not prevent a court from reading the statute in relation to the evil or mischief to be suppressed, . . . or prevent a court from giving effect to the terms of a statute in accordance with their fair and natural acceptation." *State v. Oneida Motor Freight*, 27 N.J. Super. 125, 129, 98 A.2d 594, 596 (Super. Ct. Law Div. 1953) (quoting *State v. Gratale Bros.*, 26 N.J. Super. 581, 98 A.2d 591 (1953) (Goldman, J.)).

66. Comment, *supra* note 31; Comment, *Washington's Attempt to View Sexual Assault as More than a "Violation" of the Moral Woman—The Revision of the Rape Laws*, 11 GONZ. L. REV. 145, 146-47 (1975).

More important, the *Smith* court was constitutionally mandated to make such a construction.⁶⁷ New Jersey courts have of course recognized that the judiciary must interpret and apply statutes within constitutional limits.⁶⁸ Serious constitutional infirmities result from the inclusion of the husband's exemption in any rape law because the exemption denies married women who are raped by their husbands equal protection of the law.⁶⁹

67. See generally *Hintenberger v. City of Garfield*, 49 N.J. Super. 175, 179, 139 A.2d 328, 331 (Super. Ct. Law Div.), *aff'd*, 52 N.J. Super. 526, 146 A.2d 123 (Super. Ct. App. Div. 1958); Gaylord, *An Approach to Statutory Construction*, 5 SW. U.L. REV. 349, 375 (1974).

68. *Hintenberger v. City of Garfield*, 49 N.J. Super. 175, 179, 139 A.2d 328, 331 (Super. Ct. Law Div.), *aff'd*, 52 N.J. Super. 526, 146 A.2d 123 (Super. Ct. App. Div. 1958).

69. While equal protection challenges to criminal statutes are usually made by the defendant, the marital rape exemption is a situation where equal protection considerations should be viewed from the victim's perspective. Nearly half of the jurisdictions in the United States have recognized victim's rights through state-funded programs to compensate victims of violent crimes. Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203, 204 (1978). See, e.g., N.J. STAT. ANN. §§ 52:4B-10 to 4B-11 (West Supp. 1978) which reads as follows:

52:4B-10. Persons entitled to compensation; order

In any case in which a person is injured or killed by any act or omission of any other person which is within the description of the offenses listed in section 11 of this act, the board may, upon application and the concurrence of a majority of the members thereof, order the payment of compensation in accordance with the provisions of this act:

- a. to or on behalf of the victim,
- b. in the case of the personal injury of the victim, where the compensation is for pecuniary loss suffered or expenses incurred by any person responsible for the maintenance of the victim, to that person, or
- c. in the case of the death of the victim, to or for the benefit of the dependents of the deceased victim, or any one or more of such dependents.

* * * *

52:4B-11. Causes of personal injury or death

The board may order the payment of compensation in accordance with the provisions of this act for personal injury or death which resulted from:

- (a) an attempt to prevent the commission of crime or to arrest a suspected criminal or in aiding or attempting to aid a police officer so to do, or
- (b) the commission or attempt to commit any of the following offenses:
 1. assault constituting a high misdemeanor;
 2. mayhem;
 3. threats to do bodily harm;
 4. lewd, indecent, or obscene acts;
 5. indecent act with children;
 6. kidnapping;
 7. murder;
 8. manslaughter;
 9. rape;
 10. any other crime involving violence.

Equal protection infirmities regarding the husband's rape exemption have been suggested elsewhere. For example, prior to the passage of the Michigan Sexual Assault Act,⁷⁰ the state legislature discussed the equal protection ramifications of the husband's rape exemption. The proposed act differentiated between married couples living apart and those living together. Opponents of this differentiation claimed that it resulted in a denial of equal protection because only married couples who are living apart are protected under the law.⁷¹ A recent note on the marital rape exemption⁷² also suggested constitutional problems with the rule by stating that "it deprives an entire class of women the protection of rape statutes."⁷³

The *Smith* court itself hinted at the constitutional deficiency of the exemption when it stated that "the law discriminates against the wife rape victim."⁷⁴ In discussing why the exemption should be eliminated, the court added, "In other areas modern jurisprudence has consistently refused to permit such male dominated concepts to

(Footnote omitted). The purpose of this statute is to provide some measure of compensation to innocent victims of crimes in certain cases. *In re Carr*, 136 N.J. Super. 344, 346, 346 A.2d 406, 407 (1975).

These statutes attempt to fulfill the state's duty to protect its citizens. Since the victim has been injured, the state has failed in this duty and should compensate the victim. McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 11 URB. LAW. 346, 349 (1976). Another rationale views compensation as a right of the victim. Harland, *supra* at 206.

Most jurisdictions, however, deny recovery to victims whose injuries were inflicted by family members because of the ease of fabrication. McAdam, *supra* at 361. See, e.g., N.J. STAT. ANN. § 52:4B-18 (West Supp. 1978) which provides that "[n]o compensation shall be awarded if the victim . . . is a relative of the offender. . . ." Therefore, a wife who is victimized by her husband's violent outburst is denied any compensation. If raped, she is also denied the enforcement of the rape statute. Equal protection analysis is an alternative which affords the victim the enforcement of the criminal statute. Construing a criminal statute from the victim's perspective furthers the modern trend of recognizing victims' rights.

70. MICH. COMP. LAWS ANN. § 750.520a-1 (1978).

71. Note, *Michigan's Criminal Sexual Assault Law*, 8 U. MICH. J.L. REF. 217, 233 (1974). Despite the opposition to the distinction, it was upheld.

The Michigan exemption was also attacked in the case of *People v. Hartwell*, No. 75-091591-FM (Cir. Ct. Wayne County, Mich. Mar. 16, 1976). Here, the defendant was acquitted of murdering her husband by claiming self defense from a sexual attack. The defense contended that the husband's exemption for couples living together was a denial of equal protection. Note, *supra* note 1, at 321. The court, however, did not rule on the constitutionality of the statute. *Id.*

72. *Id.*

73. *Id.* at 323.

74. 148 N.J. Super. at 228, 372 A.2d at 391.

stand in the way of equal protection of the laws. The instant case should be no exception."⁷⁵

III. AN EQUAL PROTECTION ALTERNATIVE

The first step in examining the constitutional infirmities of the husband's rape exemption is to determine whether the state has the power under the constitution to punish the husband for a sexual act within the marital relationship. One reading of the cases of *Griswold v. Connecticut*⁷⁶ and *Eisenstadt v. Baird*⁷⁷ would forbid the state from interfering with the private sexual behavior of married adults.⁷⁸ However, the privacy of marital sex is not immune from governmental interference where there is a compelling state interest.⁷⁹ At least one court has stated that a state has a compelling interest in protecting its citizens from violence, including non-consensual sexual conduct, even if the parties are married to each other.⁸⁰ Since marital rape is clearly nonconsensual sexual conduct, there was an available analysis enabling the *Smith* court to hold that the Constitution permits a state to prosecute a husband for raping his wife. Additionally, *Eisenstadt* indicated that the right of privacy attaches to the individual.⁸¹ Therefore, the fact that a marriage exists does not automatically bar any government intervention.

Equal protection requires that state legislation which places persons in different classes for disparate treatment be based on criteria reasonably related to a legitimate objective of the legislation.⁸² In order to determine the standard of review that a court should apply in determining whether a statute violates equal pro-

75. *Id.*

76. 381 U.S. 479 (1965).

77. 405 U.S. 438 (1972).

78. Once the state authorizes marriage, it lacks power to intrude on the privacy right inherent in the marital relationship. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 186 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

79. *See generally* 381 U.S. at 485-86; *see also id.* at 497 (Goldberg, J., concurring).

80. *State v. Bateman*, 113 Ariz. 107, 110, 547 P.2d 6, 9 (1976).

81. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453.

82. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

tection, the basis of the classification must be examined. The classification formed by the husband's rape exemption is based on marital status.⁸³ Rape victims are treated differently if the rapist was the victim's husband. The husband enjoys a special immunity he did not have before the marriage; the wife is denied the protection of a law she enjoyed before her marriage. Thus, the status of both parties under the rape law changes the moment they are married. Ordinarily, only a rational basis is needed to support a classification based on marital status.⁸⁴ However, since the rape exemption infringes on the fundamental right of personal privacy, a compelling state interest must be shown to sustain the classification.⁸⁵

Cases dealing with the issue of a woman's right to an abortion illustrate that a woman has a fundamental right of personal privacy in deciding matters relating to her body. In *Roe v. Wade*,⁸⁶ the Supreme Court discussed the constitutionality of a Texas criminal abortion law⁸⁷ which proscribed the procurement of, or attempt to procure, an abortion, except on medical advice for the purpose of saving the mother's life.⁸⁸ The Court stated that the fundamental right of personal privacy exists under the Constitution⁸⁹ and that

83. The marital rape exemption is not a sex-based classification. Marital status, not sex, is the critical distinction involved in the husband's exemption. This issue is beyond the scope of this note.

84. "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973).

85. This test is used when a classification is based on race, alienage, or natural origin. *Id.* at 682. It is also used when a fundamental right is involved. Such rights may include activities relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Roe v. Wade*, 410 U.S. 113, 152-53 (1972). See notes 86-92 *infra* and accompanying text.

86. 410 U.S. 113 (1973).

87. The statute provided:

Article 1191. Abortion.

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Id. at 117 n.1.

88. *Id.* at 117-18.

89. *Id.* at 152.

state interference with this right can only be justified by a compelling state interest.⁹⁰

The same fundamental right of privacy at issue in *Roe* is at issue in the rape exemption. In abortion, the issue is whether a woman has the right to terminate an unwanted pregnancy. In rape cases, the husband's exemption focuses on the woman's right to avoid unwanted intercourse. Both cases turn on the right of a woman to control her own body.

This right was upheld in *Planned Parenthood of Central Missouri v. Danforth*⁹¹ in the context of a constitutional challenge to provisions of the Missouri abortion statute. One provision required the written consent of the spouse of a woman seeking an abortion during the first twelve weeks of pregnancy. The Court held the spousal consent provision unconstitutional, stating "the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.'"⁹² Thus, the Court defined the woman's right of privacy to be beyond her husband's control.

While these cases were decided on due process grounds, and are not directly applicable as such to the marital rape exemption,⁹³

90. *Id.* at 155. The court then balanced the state's interest in protecting potential life and safeguarding the public health with the woman's personal right of privacy. The court concluded that a state criminal abortion law which excepted from criminality only a life-saving procedure on the mother's behalf without regard to the stage of the pregnancy and other interests involved violated the due process clause of the Constitution. *Id.* at 164.

91. 428 U.S. 52 (1976).

92. *Id.* at 69 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975)).

This result is consistent with lower federal court decisions. *See, e.g., Doe v. Zimmerman*, 405 F. Supp. 534 (M.D. Pa. 1975), which involved a constitutional challenge to provisions of the Pennsylvania Abortion Control Act which required the husband's consent prior to the performance of an abortion. The court held this to be an unconstitutional deprivation of due process because the husband's consent requirement failed to give any recognition to the mother's fundamental, though qualified, right to have an abortion. The woman's right to an abortion is not absolute, because at some point during the pregnancy, the state's interest in protecting the potential life of the fetus outweighs the mother's privacy right. 410 U.S. at 154.

93. The major distinction between the abortion cases and the rape exemption is state action. While abortion statutes directly prohibit women from obtaining an abortion and, therefore, infringe on the woman's right of personal privacy, *see* note 87 *supra*, the husband's rape exemption results in an indirect infringement. The husband-rapist directly violates his wife's right of privacy. The state is prohibiting the enforcement of a law which protects this right for the class of women who are raped by someone other than their husband. Whether this action by the state is sufficient to attack the rape exemption on due process grounds is beyond the scope of this note.

they illustrate the fundamental importance of a woman's right of personal privacy. Since the husband's rape exemption vitiates this fundamental right of privacy, the state must show a compelling interest in order to sustain the exemption.

Cases involving marital classifications in the school environment further illustrate the difficulty in sustaining a marital classification which affects a fundamental right. In *Holt v. Shelton*,⁹⁴ a school regulation prohibited married students from participating in activities and functions except for classes in subjects for which graduation credits were given. The court held the school board's interest in discouraging high school marriages an insufficient justification for the infringement on the student's fundamental right to marry. In *Hollon v. Mathis Independent School District*,⁹⁵ the school board's concern with an increasing dropout rate was also held to be an insufficient justification to support a regulation which prohibited any married student from participating in interscholastic league athletic activities.⁹⁶

In other areas of the law, classifications based on marital status⁹⁷

94. 341 F. Supp. 821 (M.D. Tenn. 1972).

95. 358 F. Supp. 1269 (S.D. Tex. 1973), *vacated as moot*, 491 F.2d 92 (5th Cir. 1974). See also *Romans v. Crenshaw*, 354 F. Supp. 868 (S.D. Tex. 1972); *Davis v. Meek*, 344 F. Supp. 298 (N.D. Ohio 1972).

96. The denial of rights and privileges in the school context is a clear infringement of the students' rights to marry and to be educated. In the rape context, the denial is less obvious. In parallel fashion, however, the husband's rape exemption results in a denial of a right the woman would have had if she had remained single.

97. One such example where a classification based on marital status is no longer applied is the area of credit. Previously, when a single woman with credit married, her credit status was automatically shifted into the risk category. Her credit was re-evaluated and based primarily on her husband's credit criteria. Additionally, all credit information was filed under her husband's name. Thus, the wife could build no credit standing, and her husband's credit delinquency record was also attributed to her. Comment, *Women and Credit*, 12 DUQ. L. REV. 863, 866 (1974).

Congress rectified this conclusive presumption when it enacted the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (Supp. 1978). The Act provides: "(a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or *marital status*, or age (provided the applicant has the capacity to contract) . . ." *Id.* (emphasis added).

Stanley v. Illinois, 405 U.S. 645 (1972), is an example of a case in which a statute created a classification forming a conclusive presumption regarding marital status. In *Stanley*, an Illinois statute provided that children of unmarried fathers, upon death of the mother, became wards of the state, without any hearing on parental fitness. However, hearings and proof of unfitness were required before the state assumed custody of children of married or divorced parents and unmarried mothers. Thus, the statute created the irrebuttable presumption that when the mother is dead the unwed father is an unfit parent. This presumption did not apply to a married father whose wife

have been attacked on equal protection grounds. One example involves an attack on sodomy statutes. In *People v. Johnson*,⁹⁸ a sodomy statute criminalized certain sexual acts when the parties were not married to each other.⁹⁹ The court dismissed the information against the defendant, stating that, because the marital status distinction is an unsupportable basis for the classification, the statute denies equal protection of the law to citizens not married to each other.¹⁰⁰ The court acted similarly in *People v. Rice*¹⁰¹ when faced with a constitutional attack on the same sodomy statute. The court could find no rational basis for distinguishing between married and unmarried people regarding consensual sexual acts.¹⁰² The court dismissed the charge, concluding that since regulation of a married person's sexual conduct invades the right of privacy, under *Griswold*, regulation of a single person's sexual conduct equally violates the right to privacy.¹⁰³ Therefore, a statute prohibiting certain sexual conduct of only unmarried persons denies equal protection.¹⁰⁴

had died. The Supreme Court held this irrebuttable presumption of unfitness an unconstitutional deprivation of due process and equal protection. Parental fitness must be established on an individual level.

The husband's rape exemption creates an analogous situation, state action being the major point of distinction. The rape statute defines rape as "carnal knowledge of a woman forcibly against her will." See note 2 *supra*. Since the wife cannot prosecute, this creates the presumption that carnal knowledge of a wife is never forcible and against her will, without giving the wife an opportunity to show otherwise. This result brings one back to Hale's implied consent rationale, which supporters of the exemption have regarded as a poor justification for the rule. See notes 17-18 *supra* and accompanying text.

For cases involving irrebuttable presumptions in other contexts, see *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *United States Dep't of Agriculture v. Murry*, 413 U.S. 508 (1973).

98. 77 Misc. 2d 889, 355 N.Y.S.2d 266 (City Ct. Buffalo 1974).

99. The New York statute provides: "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person." N.Y. PENAL LAW § 130.38 (McKinney 1975).

"[D]eviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and anus, the mouth and penis or the mouth and vulva. . . ." *Id.* § 130.00.

100. 77 Misc. 2d at 891, 355 N.Y.S.2d at 267.

101. 80 Misc. 2d 511, 363 N.Y.S.2d 484 (Dist. Ct. Suffolk County 1975), *rev'd*, 41 N.Y.2d 1018, 395 N.Y.S.2d 626, 363 N.E.2d 1371 (1977).

102. *Id.* at 514, 363 N.Y.S.2d at 488.

103. Although the dismissal of the charge was reversed on appeal, the court did not rule that the constitutional argument was without merit. The court would not determine constitutional issues with respect to the sodomy statute from nonfinal orders. It said instead that such issues would require a review on the merits when and if the defendants were convicted. *People v. Rice*, 41 N.Y.2d 1018, 395 N.Y.S.2d 626, 363 N.E.2d 1371 (1977).

104. 80 Misc. 2d at 516, 363 N.Y.S.2d at 489. Courts elsewhere have been receptive to equal protection attacks on sodomy statutes which classified according to

This analysis applies directly to the husband's rape exemption. The sole distinction is that in the rape context the acts are not consensual, as in the sodomy statutes above. This distinction, however, lends support to the application of this analysis to the rape exemption. Since rape is nonconsensual and far more violent than consensual sodomy, there is a greater need to give all women the protection of the law. In view of the fact that the court has the power to reach both married and unmarried people engaged in nonconsensual acts,¹⁰⁵ the state's decision to criminalize one class and not the other violates the equal protection clause unless there is a sufficient state interest in maintaining the distinction. Since the rape exemption infringes the wife's fundamental right,¹⁰⁶ the state must show a compelling interest in making the attempted rape classification. There are no such compelling interests in the justifications behind the husband's exemption.

marital status. In *State v. Elliott*, 88 N.M. 187, 539 P.2d 207 (1975), *rev'd*, 89 N.M. 305, 551 P.2d 1352 (1976), the sodomy statute in question regulated the sexual relations of any adult, regardless of marital status and consent. The statute provided:

Sodomy consists of a person intentionally taking into his or her mouth or anus the sexual organ of any other person or animal or intentionally placing his or her sexual organ in the mouth or anus of any other person or animal, or coitus with an animal. Any penetration, however slight, is sufficient to complete the crime of sodomy. Both parties may be principals.

N.M. STAT. ANN. § 40A-9-6 (repealed Supp. 1975). The court realized that under *Griswold* and *Eisenstadt* married couples are constitutionally protected from governmental interference with their consensual sexual relations. 88 N.M. at 193, 539 P.2d at 213. The court then extended the marital privacy right of *Griswold* to unmarried people engaged in consensual sexual acts, stating that to apply the law otherwise would be a violation of equal protection. *Id.*

On appeal, the New Mexico Supreme Court reversed the holding that the statute was unconstitutional. The basis of this reversal was the refusal of the court to extend the *Griswold* decision beyond married couples. *State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976).

A New Jersey court has held that its sodomy statute does not violate equal protection. The statute does not prohibit certain conduct of married couples. At the same time, the statute does not recognize the right of consenting unmarried couples to practice the same consensual conduct. *State v. Lair*, 62 N.J. 388, 301 A.2d 748 (1973). The reason for this holding was the court's reluctance to extend the *Griswold* right of privacy to unmarried consenting adults. *Id.* at 396-97, 301 A.2d at 753.

These courts found that no denial of equal protection results when the right of privacy, as interpreted in *Griswold*, is limited to married couples. Therefore, the state is not applying the statute arbitrarily to different classes of people. Rather, the state has the power to regulate only one of the classes. In either case, this reversal does not affect the application of these principles to the marital rape exemption. In the rape context, there is no issue of marital privacy under *Griswold*. Therefore, the *Griswold* decision is a stumbling block only to an equal protection analysis of consensual conduct, and not to an analysis of the marital rape exemption.

105. See note 80 *supra* and accompanying text.

106. See notes 86-92 *supra* and accompanying text.

IV. CONCLUSION

The husband's rape exemption violates the equal protection clause because there is no justification sufficient to uphold the infringement on the woman's right of personal privacy. The implied consent justification has even been discounted by supporters of the exemption.¹⁰⁷ Problems of proof¹⁰⁸ and fear of coercive claims¹⁰⁹ both center on the inconvenience to the state in permitting the prosecution. However, administrative convenience should not justify an infringement of a fundamental right.¹¹⁰ Reconciliation and promotion of marital harmony¹¹¹ are certainly legitimate governmental interests, but the exemption does not operate to further these interests.¹¹² On the contrary, the enforcement of the rape law against the husband would promote marital tranquility. Spouses would be encouraged to work out their marital problems within the framework of the law, and would not be allowed to engage in conduct which is clearly illegal.¹¹³

The *Smith* court had alternative methods of statutory construction to exclude the husband's rape exemption from the New Jersey statute. On its face, the statute did not exempt the husband. The court could have given the statute its plain meaning by ignoring the common law exemption. However, the court, while feeling compelled to recognize the common law, could have eliminated the exemption by considering the equal protection ramifications of including this additional term. By subjecting the rape exemption to an equal protection analysis, the court could have brought the rape law into line with other areas of the law which have ceased to classify solely on the basis of marital status. Moreover, by adopting this approach, the court could have set the constitutional parameters for the legislature in its reformation of the rape law.¹¹⁴ Most

107. See notes 17-18 *supra* and accompanying text.

108. See notes 19-23 *supra* and accompanying text.

109. See notes 27-28 *supra* and accompanying text.

110. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

111. See note 24 *supra* and accompanying text.

112. See note 25-26 *supra* and accompanying text.

113. See Scutt, *Consent in Rape: The Problem of the Marriage Contract*, 3 MONASH L. REV. 255, 272 (1977). "[P]ublic policy . . . surely ought not to support what in effect are criminal acts committed against the person, which can hardly be calculated to inspire, maintain, or preserve a happily married relationship." *Id.*

114. See notes 55-56 *supra* and accompanying text. The court can encroach on the legislative sphere where there is a constitutional violation. *Maule v. Conduit and Foundation Corp.*, 124 N.J. Super. 488, 494, 307 A.2d 651, 655 (Super. Ct. Law Div. 1973).

important, the court could have ended the unconstitutional infringement on a married woman's right of personal privacy by granting to her the equal protection of the rape law.

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