

**Marital Immunity, Intimate Relationships, and Improper Inferences:
A New Law on Sexual Offenses by Intimates
(a longer, footnoted version of this paper is forthcoming in the HASTINGS L. J.)**

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Abstract

Today, to one degree or another, marital immunity for sexual offenses persists in over half the states. Underlying the marital rape immunity has been the assumption that when a woman enters into a marriage, she is giving her ongoing consent to sexual intercourse. Professor Michelle Anderson argues that states must abolish this immunity to make the law formally neutral on the marital status of the parties. However, Professor Anderson argues, such formal neutrality is insufficient. The ideology of ongoing consent underlying the marital rape immunity has infected the way the legal system treats sexual offenses among intimates who are not married. The legal system often assumes that ongoing consent also exists between non-married intimates. Professor Anderson argues against the ideology of ongoing consent in both settings and proposes a new, single rule: evidence of a past or continuing sexual relationship between the complainant and the defendant is not itself a defense to a criminal sexual offense and, by itself, does not prove consent to the sexual act.

Introduction

At least since the seventeenth century, rape law has included a formal marital rape exemption. This exemption meant that men could not be charged with raping their wives and, if they were, marriage provided them with a complete defense. Beginning in the 1970s, feminist reformers set their sights on this antiquated rape doctrine (as well as others that were similarly unfair to women) and worked to eliminate it from the law. As a result, the marital rape exemption has been subjected to about three decades of scholarly criticism. Legal academics argued that the marital rape exemption was unconstitutional under the equal protection clause of the Fourteenth Amendment. They called for the elimination of marital immunity, either by deleting provisions in sexual offense statutes that referred to the marital status of the parties or by inserting new provisions in those statutes that authorized the prosecution of spouses for rape.

Many people believe that reformers won the battle against the marital rape exemption. This belief is, unfortunately, incorrect. The good news is that twenty-four states and the District

of Columbia have abolished marital immunity for sexual offenses. The bad news is that twenty-six states retain marital immunity in one form or another. Although in some of these twenty-six states marital immunity for the specific crime of forcible rape is dead, immunity for other sexual offenses thrives. For example, twenty states grant marital immunity for sex with a wife who is incapacitated or unconscious and cannot consent. Fifteen states grant marital immunity for sexual offenses unless requirements such as prompt complaint, extra force, separation, or divorce are met. The law in more than half the states today makes it harder to convict men of sexual offenses committed against their wives. In so doing, the law in these jurisdictions degrades married women and affords men who sexually assault their wives an unwarranted status preference.

In this Article, I assess the law on marital immunity in state sexual offense statutes today and advocate much needed reform. Structurally and doctrinally, I make two arguments. First: It is past time for all states to eliminate marital immunity that continues to contaminate their sexual offense statutes. Because discrimination against married women who are sexually assaulted by their husbands is indefensible, state law should provide no favorable treatment to men who sexually assault their wives. Formal neutrality in rape law on the marital status of the complainant and the defendant—affording no preference to married men who rape their wives—is the minimum a state must have to claim fairness to women.

Second: Formal neutrality is not enough. Formal neutrality fails to solve a deeper and more intractable problem spawned by the marital rape exemption. The exemption did more than just protect men from being prosecuted for raping their wives. It presaged the devastating impact that a prior sexual relationship between a defendant and a complainant has on a claim of rape today. Substantial bias against sexually active women who are raped by their intimates takes the

form of a common but improper inference of consent to the sex alleged to have been rape based solely on the existence of a prior intimate relationship between the parties. The improper inference of ongoing consent in sexual relationships is a doctrinal problem that affects all intimate rape, regardless of the marital status of the parties.

I propose that states adopt a new law on sexual offenses by intimates to correct the improper inference of ongoing consent. This new law would cover sexual conduct between the defendant and the complainant in marriage, cohabitation, dating, or other circumstances. It would declare that the complainant's consent on the instance in question may not be inferred based solely on her consent to the same or different acts with the defendant on other occasions.

I. Development of the Marital Rape Exemption

This Part begins by analyzing the history of the marital rape exemption under English common law. It then turns to the current marital immunities that continue to exist in state statutes. This Part then turns to the modern justifications that the drafters of the Model Penal Code and others have advanced for both the ancient and modern versions of marital immunity for sexual offenses.

A. History of the Marital Rape Exemption

The traditional definition of rape under English common law was unlawful sexual intercourse with a female without her consent. In his leading treatise on criminal law, Rollin Perkins explained that the marital rape exemption was built into the definition of the crime through the word *unlawful*. Any sexual intercourse, even forced, between a husband and his wife was *lawful*, and thus excluded under the definition of rape. Perkins wrote, “the true reason why the husband, who has sexual intercourse with his wife against her will, is not guilty of rape

is that such intercourse is not unlawful. ... Sexual intercourse between husband and wife is sanctioned by law; all other sexual intercourse is unlawful.”

In the late 1600s, the Chief Justice in England, Lord Matthew Hale, articulated what would become the most popular justification in modern jurisprudence for the marital rape exemption.¹ Hale understood marriage as granting a wife’s ongoing consent to sexual intercourse. He wrote, “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”² A man could not, however, force his wife to have sex with a third party: “for tho she hath given her body to her husband, she is not to be prostituted by him to another.”³ By giving “her body” sexually to her husband, a woman thereby gave her ongoing contractual consent to conjugal relations with him in the future. This ongoing consent ideology permeates rape law even today.

From the seventeenth century throughout the nineteenth century, the marital rape exemption was not questioned. Hale’s ongoing consent theory of marital sexual relations remained the judicially recognized foundation for the doctrine throughout this time.

[...historical discussion omitted...] Until the mid-1970s in this country, there were no serious legal challenges to the marital rape exemption, and Hale’s ongoing consent theory continued to justify the doctrine.

B. Current Marital Immunity for Sexual Offenses

In the mid-1970s, feminist reformers began to challenge the marital rape exemption in courts and in state legislatures. Over the next three decades, they were successful in twenty-four

¹ 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (Robert H. Small ed., 1st Am. ed. 1847) (1736).

² *Id.*

³ *Id.* at 628.

states and the District of Columbia, in which marital immunity was abolished for sexual offenses. In the remaining twenty-six states, marital immunity remains in one form or another.

Many legal scholars who have researched and commented upon the marital immunity have focused on state provisions regarding forcible rape. They have ignored or given short shrift to provisions on sexual assault, criminal sexual contact, aggravated sexual abuse, and other sexual offenses. To fully understand the way that marital immunity works in a state, however, it is necessary to examine all of the states' sexual offense provisions. For example, the Model Penal Code includes six separate marital immunities for sexual offenses: for forcible rape, gross sexual imposition, forcible deviate sexual intercourse, corruption of minors, sexual assault, and indecent exposure.

1. Marital Immunity for Certain Sexual Offenses

Twenty states exempt men from sexual offense charges when their wives are mentally incapacitated or physically helpless.⁴ Mentally incapacitated is usually defined as so drugged or

⁴ ALASKA STAT. § 11.41.420(a)(3) (Michie 2001) (marriage is defense to second degree sexual assault if the victim is incapacitated or unaware the sexual act is being committed); ARIZ.REV. STAT. ANN. § 13-1407 (West 2002) (implied marital immunity when victim is mentally incapacitated because statute requires force for spousal conviction of sexual assault); CONN. GEN. STAT. ANN. § 53a-67 (West 2002) (spouses or cohabitants are exempt from sexual assault in fourth degree, which occurs when person intentionally subjects another to sexual contact who is mentally defective, mentally incapacitated or physically helpless); § 53a-71 (spouses and cohabitants are immune from sexual assault in the second degree when the victim is physically helpless); HAW. REV. STAT. § 707-732(d) (2001) *note in* 2002 HAW. LAWS ACT 36 (H.B. 2560) (West 2002) (spouses and cohabitants are exempt from sexual assault in third degree, Class C felony, if victim is mentally defective, mentally incapacitated, or physically helpless); IDAHO CODE § 18-6107 (Michie 1948-2002) (husband cannot be prosecuted for rape if wife is incapable of giving consent or unconscious at time of act); IOWA CODE ANN. § 709.4 (West 2002) (marriage is defense to sexual abuse in third degree if victim is suffering from mental defect or incapacity which precludes giving consent; Class C felony); LA. REV. STAT. ANN. § 43 (West 2002) (express exemption from simple rape which includes situation where victim is incapable of resisting due to an intoxicating substance); MD. CRIM. LAW. § 3-318 (West 2002)(express exemption from rape in second degree and sexual offense in third degree when victim is mentally incapacitated or physically helpless); MICH. COMP. LAWS ANN. § 750.5201 (West 2002) (spouse cannot be prosecuted for criminal sexual conduct in first through fourth degrees based solely on his or her spouse being under age 16, mentally incapable or mentally incapacitated); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 MINN. SESS. LAW. SERV. CH. 381 (S.B. 2433) (West) (spouse does not commit criminal sexual conduct in third or fourth degree if actor knows or has reason to know that complainant is mentally impaired, mentally incapacitated, or physically helpless); MISS. CODE ANN. § 97-3-99 (2002) (implied marital immunity when victim is mentally incapacitated or physically helpless, as

intoxicated that one cannot give valid consent. Physically helpless is usually defined as unconscious, which includes unconsciousness due to drugging or a coma, for example. In these twenty states, then, penetrating a woman who cannot consent because she is drugged or unconscious is a crime if the man is not married to the victim. However, it is not a crime if the man is married to the victim.

In three of these states—Ohio, Oklahoma, and South Carolina—men are even immune from charges when they *themselves* administer the drugs, intoxicants, or controlled substances to render their wives mentally incapacitated. In eight other states, men are immune from charges when their wives are rendered incapable of consenting due to drugs or intoxicants administered *without consent*, which may include when a husband administers intoxicants without his wife’s consent. Additionally, twelve states grant men immunity when they commit various nonconsensual sexual offenses against their wives, including gross sexual imposition, sexual abuse, sexual assault, sexual battery, sexual contact, and sexual misconduct.

2. Separate Statutes for Marital Sexual Offenses

spouses are immune from prosecution for sexual battery unless husband uses force); NEV. REV. STAT. § 200.373 (2002)(implied marital immunity when victim is mentally or physically incapable as spouses are immune unless husband uses force); OHIO REV. CODE ANN. § 2907.02 (West 2002) *amended by* 2002 OHIO SESS. LAW. SERV. FILE 156 (H.B. 485) (West) (spousal immunity if victim is mentally or physically incapable of consent); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) (marital immunity for rape where the victim is incapable of consent through mental illness, unsoundness of mind, intoxicated or unconscious); R.I. GEN. LAWS 1956 § 11-37-2 (1953-2001) (spouses exempt from first degree sexual assault if victim is mentally incapacitated, mentally disabled, or physically helpless); S.C. CODE ANN. 1976 § 16-3-652 (LAW. CO-OP. 2002)(implied marital immunity when the actor causes the victim to become mentally incapacitated or physically helpless by administering a controlled substance); S.D. CODIFIED LAWS § 22-22-7.2 (Michie 1968-2002) (spouses exempt from sexual contact when person is incapable of consenting, Class 4 felony); TENN. CODE ANN. § 39-13-507 (West 2002)(Implied marital immunity when victim is mentally incapacitated or physically helpless because spouses are general exempt from prosecution unless weapon is used or there is bodily injury); VA. CODE ANN. § 18.2-61(A)(ii) (West 2002) (marital immunity when the victim suffers from a mental incapacity or physical helplessness); WASH. REV. CODE ANN. § 9A.44.100(1)(b) (West 2002) (marital immunity for indecent liberties when the victim is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless, Class A or B felony).

Six states have statutes that separate rape or sexual assault by spouses from rape or sexual assault committed by others.⁵ Arizona, South Carolina, Tennessee, and Virginia mandate lesser penalties for spousal rape than for other rapes regardless of the force used or injury caused. These states downgrade the severity of the crime by statute. In Arizona, sexual assault is a Class 2 felony, receiving from 5.25 to 14 years, while spousal sexual assault is a Class 6 felony, which judges have the discretion to treat as a *misdemeanor* for punishment purposes. In Tennessee, aggravated rape is a Class A felony, but aggravated spousal rape is a Class B felony; rape is a Class B felony, but spousal rape is a Class C felony.

3. Extra Requirements for Marital Sexual Offenses

A number of states require the victim and the prosecutor to satisfy additional criteria in order to pursue instances of marital sexual assault. While these states allow for the prosecution of spousal sexual assault, statutes make the prosecutions more difficult to pursue. There are three types of non-mutually exclusive criteria that states have imposed: reporting requirements, the separation or divorce of the couple at the time of the assault, and additional requirements of force or violence.

⁵ ARIZ. REV. STAT. ANN. § 13-1406.01(A) (West 2002) (“A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another”); CAL. PENAL CODE § 262 (West 2002) (rape of spouse occurs when perpetrator accomplishes sexual intercourse against the person’s will by force or violence, or when the person is prevented from resisting by any intoxicating or controlled substance, or when the person is unconscious at the time of the act); CONN. GEN. STAT. ANN. § 53a-70b (West 2002) (“No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.”); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (“Sexual battery, when accomplished through the use of aggravated force by one spouse against the other spouse if they are living together constitutes the felony of spousal sexual battery.”); TENN. CODE ANN. § 39-13-507(d) (West 2002) (spousal sexual battery occurs when one spouse subjects the other to unlawful sexual penetration where the defendant is armed with a weapon or causes seriously bodily injury to the victim); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2:1 (West 2002) (marital sexual assault occurs when the perpetrator engages in sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with his or her spouse against the spouse’s will by force or a present threat of force).

The first criterion is a stringent reporting requirement.⁶ In California, wife rape must be reported within one year of the date of the incident, unless the wife's allegation is corroborated by independent, admissible evidence. Other rape victims in California have no similar reporting requirement. Illinois bars the prosecution of a spouse for criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, and aggravated criminal sexual abuse if the incident is not reported to law enforcement officials within 30 days. Similarly, in South Carolina, the crime of spousal sexual battery must be reported to officials within 30 days.

The second criterion is the requirement of separation or divorce.⁷ Thirteen states—Alaska, Hawaii, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Ohio, South Carolina,

⁶ CAL. PENAL CODE § 262 (West 2002) (rape of spouse must be reported within one year after date of violation; reporting requirement shall not apply if victim's allegation of offense is corroborated by independent evidence); ILL. COMP. STAT. ANN. CH. 725 § 5/12-18(c) (West 2002) (prosecution of a spouse is barred for criminal sexual assault (§ 5/12-13), aggravated criminal sexual assault (§ 5/12-14), criminal sexual abuse (§ 5/12-15), and aggravated criminal sexual abuse (§ 5/12-17), if not reported to law enforcement within 30 days after offense was committed); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (crime of spousal sexual battery must be reported within thirty days).

⁷ ALASKA STAT. § 11.41.432 (Michie 2001) (it is defense to sexual assault when victim is mentally incapable of consenting that offender is married to person and neither party has filed with the court for separation); HAW. REV. STAT. § 707-700 (2001) *note in* 2002 HAW. LAWS ACT 36 (H.B. 2560) (West 2002) (married does not include spouses living apart); KAN. STAT. ANN. § 21-3501 (2001) (person is not considered spouse if couple if living apart or either spouse has filed for separation or divorce or for relief under protection from abuse act); LA. REV. STAT. ANN. § 43 (West 2002) (person not considered spouse if judgment of separation exists or if parties are living apart and offender knows that temporary restraining order has been issued); MD. CRIM. LAW § 3-316 (West 2002) (spouse may not be prosecuted under § 3-303 [rape in first degree], § 3-304 [rape in second degree], § 3-307 [sexual offense in third degree] or § 3-308 [sexual offense in fourth degree] unless person committing crime uses force and act is without consent of spouse, or couple has lived apart under written separation agreement or for at least three months before alleged rape or sexual offense. A person may be prosecuted under these statutes if there was decree of limited divorce at time of offense); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 MINN. SESS. LAW. SERV. CH. 381 (S.F. 2433) (West) (person does not commit criminal sexual conduct under § 609.342(a) and (b) [criminal sexual conduct in first degree], § 609.343(a) and (b) [criminal sexual conduct in second degree], § 609.344(a), (b), (d), and (e) [criminal sexual conduct in third degree], and § 609.345(a), (b), (d), (e) [criminal sexual conduct in fourth degree], if actor and complainant were adults cohabiting in ongoing voluntary sexual relationship at time of alleged offense, or if complainant is actor's legal spouse, unless couple is living apart and one of them has filed for legal separation or dissolution of marriage); MISS. CODE ANN. § 97-3-99 (2002) (person is not guilty of sexual battery if alleged victim is that person's legal spouse and at time of alleged offense such person and alleged victim are not separated and living apart unless force is used); OHIO REV. CODE ANN. § 2907.02(G) (West 2002) *amended by* 2002 OHIO SESS. LAW. SERV. FILE 156 (H.B. 485) (West) (spouse cannot be charged with rape unless couple is living separate or force is used); R.I. GEN. LAWS 1956 § 11-37-1 (1953-2001) (married does not include spouses who are living apart and decision for divorce has been granted); S.C. CODE ANN. 1976 § 16-3-658 (Law. Co-op. 2002) (person cannot be guilty of criminal sexual conduct in first or second degree if victim

Tennessee, Rhode Island, Washington, and Virginia—require that a couple be separated or divorced at the time of the assault before certain sexual offense prosecutions may proceed. In Minnesota, Tennessee, Washington, and Rhode Island, the parties must be living apart and have filed for legal divorce or separation. In Maryland, there must be a limited divorce decree between the parties to avoid marital immunity. In Alaska and Kansas, one party must have filed for legal separation, divorce, or dissolution of the marriage to avoid marital immunity. In Hawaii, Mississippi, Ohio, Virginia, Kansas, and South Carolina, marital immunity does not apply to spouses who are living apart. In Kansas, filing for relief under a protection from abuse order will avoid marital immunity. In Louisiana, a legal judgment of separation or separation plus a restraining order must have already been rendered to avoid marital immunity.

The third criterion is an extra requirement of force.⁸ Eleven states—Arizona, Connecticut, Idaho, Maryland, Mississippi, Nevada, Ohio, Oklahoma, South Carolina,

is the legal spouse unless couple is living apart); TENN. CODE ANN. § 39-13-507 (West 2002) (spousal rape requires the defendant to be armed with a weapon, cause serious bodily injury, or living apart and one has filed for separate maintenance or divorce); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2(B) (West 2002) (no person shall be found guilty of rape, forcible sodomy, or object sexual penetration unless, at time of alleged offense, spouses were living separate and apart); WASH. REV. CODE ANN. § 9A.44.010 (West 2002) (married does not include a person who is living separate from spouse and who has filed for legal separation or dissolution of marriage).

⁸ ARIZ. REV. STAT. ANN. § 13-1406.01(A) (West 2002) (“A person commits sexual assault of a spouse by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a spouse without consent of the spouse by the immediate or threatened use of force against the spouse or another”); CONN. GEN. STAT. ANN. § 53a-70b (West 2002) (spouses or cohabitants are exempt from sexual assault unless offender uses force or the threat of force); IDAHO CODE § 18-6107 (Michie 1948-2002) (husband can only be prosecuted for rape where wife “resists but her resistance is overcome by force or violence” or “where she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating, narcotic, or anesthetic substance administered by or with the privity of the accused”); MD. CRIM. LAW § 3-316 (West 2002) (spouses can only be prosecuted for rape in first degree, rape in second degree, or sexual offense in third degree if force is used or couple is living separately); MISS. CODE ANN. § 97-3-99 (2002) (legal spouse of alleged victim may be found guilty of sexual battery if legal spouse engaged in forcible sexual penetration without consent of alleged victim); NEV. REV. STAT. § 200.373 (2002) (marriage is no defense to charge of sexual assault if assault was committed by force or by threat of force); OHIO REV. CODE ANN. § 2907.02(G) (West 2002) *amended by* 2002 OHIO SESS. LAW. SERV. FILE 156 (H.B. 485) (West) (marriage or cohabitation is no defense to rape if offender uses force or threat of force); OKLA. STAT. ANN. tit. 21, § 1111 (West 2002) *amended by* (2002 OKLA. SESS. LAW SERV. CH. 22 (H.B. 2924) (West) (rape of spouse must be accompanied by actual or threatened force or violence, along with apparent power of execution against victim or third person); S.C. CODE ANN. 1976 § 16-3-615 (Law. Co-op. 2002) (spousal sexual battery requires aggravated force, defined

Tennessee, and Virginia—do not recognize spousal rape or spousal sexual assault unless the offender uses force, violence, duress, or threats of great bodily harm. Additionally, Iowa, Louisiana, Minnesota, and Rhode Island have an implied requirement of force because these states exempt spouses from every non-forcible sexual crime.

In some states, the force requirement is not satisfied by the kind of coercion that would suffice if the parties were strangers. It is only satisfied by serious physical force resulting in substantial injuries. In Tennessee, for example, a man cannot be prosecuted for sexual battery against his wife unless he was armed with a weapon or inflicted serious bodily injury on her. Even with that requirement of a weapon or bodily injury, Tennessee still prosecutes spousal sexual battery only as a Class D felony, while aggravated sexual battery, with the same aggravating circumstances, is a Class B felony.

C. Modern Justifications

Although the marital rape exemption has been subjected to widespread academic criticism in the past three decades, a number of contemporary legal scholars continue to defend the doctrine. The three categories in which marital immunity persists—marital immunity for certain sexual offenses, separate marital sexual offense statutes, and extra requirements for marital sexual offenses—rest on three controversial assumptions about why marital sexual offenses should be treated differently.

First, the requirement of separation or divorce before certain sexual offenses are legally cognizable in thirteen states flows directly from Hale’s theory of ongoing consent. The 1962

as “use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature); TENN. CODE ANN. § 39-13-507(d) (West 2002) (spousal sexual battery requires defendant to be armed with weapon, inflict serious bodily injury, or parties must be living separately and filed for divorce); VA. CODE ANN. § 18.2-61(B), § 18.2-67.1(B), § 18.2-67.2(B) (West 2002) (no person shall be found guilty of rape, forcible sodomy, or object sexual penetration unless, at time of alleged offense, the parties were living separately or defendant caused bodily injury to spouse by use of force or violence).

Commentary to the Model Penal Code’s comprehensive marital rape exemption, for example, mirrors Hale’s analysis on ongoing consent:

[M]arriage ... while not amounting to a legal waiver of the woman’s right to say “no,” does imply a kind of *generalized consent* that distinguishes some versions of the crime of rape from parallel behavior by a husband. The relationship itself creates a *presumption of consent*, valid until revoked.

More than three decades later, some scholars continue to advance a similar argument. For example, when advancing a position to increase convictions of acquaintance rapists, John Ingram argues that a man who has a sexual relationship with a woman may presume that he has consent to future sex with her:

Parents habitually kiss their young children at bedtime; business friends shake hands when they see each other; relatives exchange hugs at holiday time. The parties involved in such conduct assume it will continue. It would be cumbersome and ludicrous to reestablish consent to such physical contact on each occasion. If there has been consent in the past, and no present words or actions indicate a change in attitude, it is reasonable to presume that consent continues. I believe the same should be true in sexual relationships.⁹

Ingram, therefore, advocates that the law harbor a “rebuttable presumption” of consent to whatever prior sexual intimacies the parties had previously engaged in. Although this “rebuttable presumption” may be overcome without dissolution of the marriage, it continues to assume that consent may be ongoing, extending through time unless there are changed circumstances.

Second, marital exemptions for mentally incapacitated rape and unconscious rape in twenty states derive from a belief that non-forcible spousal sexual offenses are not harmful enough for the justice system to criminalize because of ongoing consent. For example, the Commentary to the marital immunity provision in the Model Penal Code explains:

At a minimum ... husbands must be exempt from those categories of liability based not on force or coercion but on a presumed incapacity of the woman to consent. For example, a man who has intercourse with his unconscious wife should scarcely be

⁹ John Dwight Ingram, *Date Rape: It’s Time for “No” To Really Mean “No”*, 21 AM. J. CRIM. L. 3, 26 (1993).

condemned to felony liability on the ground that the woman in such circumstances is incapable of consenting to sex with her own husband, at least unless there are aggravating circumstances. The same holds true for intercourse with a wife who for some reason other than unconsciousness is not aware that a sexual act is committed upon her.

Michael Hilf argues that this kind of marital immunity is justified by the lesser expectation of personal autonomy that women have when they enter marriage:

While an act of non-consensual intercourse is an interference with personal autonomy, a married person's general expectation of autonomy is less than a single person's. ... It is obvious that some personal autonomy is sacrificed when one enters into a marital relation in order to allow for some degree of marital autonomy. A married person has, to some extent, a lesser expectation of personal autonomy; therefore, the affront to one's autonomy is less in the case of spousal rape than in the case of ordinary rape. ... While a married person's interest in bodily integrity is not inconsiderable, a balance must be struck between the individual's interest in private autonomy and the public policy favoring spousal immunity.¹⁰

Hilf suggests the circumstances in which “the public policy favoring spousal immunity” outweighed the wife’s “interest in private autonomy.” He asks, “Do we quite seriously want to subject to criminal liability a husband who begins to engage in sexual contact with his sleeping or intoxicated wife? To ask the question is to answer it.”

In an influential article in the *Columbia Law Review*, Donald Dripps crystallizes a theory about sexual intercourse under these circumstances with his notion of “implied authorization” for sex.¹¹ He poses a hypothetical set of facts: A married couple returns home from a party very drunk. After his wife passes out “unconscious on the bed,” the man “engages in coitus with her.” Dripps argues that, although the wife never consented to the sexual act, he enjoyed “implied authorization” to penetrate her without her consent. According to Dripps, the man’s “implied authorization” to have sex derives from the fact that the woman has, “while sober and over a long course of dealing, approved of a complex relationship in which sex plays a prominent role.”

¹⁰ Michael Hilf, *Marital Privacy and Spousal Rape*, 16 NEW ENG. L. REV. 31, 41 (1980)

¹¹ Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1800 (1992).

Dripps' argument for "implied authorization" for unconscious, nonconsensual sexual relations is one modern manifestation of the ongoing consent ideology.

Third, the wholesale downgrading of spousal offenses, the application of lesser penalties to these offenses, and the refusal to prosecute them without a prompt complaint in seven states suggest that some scholars and legislators believe that spousal sexual offenses in general are not important enough or harmful enough for the justice system to criminalize. Many people believe that there is no harm in sexual intercourse without consent when a man has been previously intimate with a woman. For example, in a 1981 statement in front of the Senate Judiciary Committee, Alabama Senator Jeremiah Denton evaluated "whether the anguish caused by intercourse forced by a husband is equivalent to that inflicted by intercourse forced by someone else" and concluded that the "character of the voluntary association of a husband and wife...could be thought to mitigate the nature of the harm resulting from the unwanted intercourse."¹²

In short, each of the modern justifications for the current marital immunities have at their core the belief that marriage extends to men some kind of ongoing consent for sexual acts. The notion that there should be a "rebuttable presumption" of consent to sexual acts, the notion of "implied authorization" to mentally incapacitated and unconscious sexual acts, and the notion that there is less harm from spousal sexual assault because of the "character of the voluntary association of a husband and wife," each derive from Hale's ongoing consent ideology.

II. Formal Neutrality on Marital Status in Sexual Offenses

The doctrine of ongoing consent underlying both the past and current marital immunities in sexual offense statutes contradicts circumstances in the real world at an intolerable cost to married women. As a result, states must abolish their current marital immunities to achieve

formal neutrality on the marital status of the parties, affording no status preference to men who sexual abuse their wives. Upon examination, each of the intertwined modern justifications for continued marital immunities in sexual offense statutes is ultimately unpersuasive.

First, a number of scholars have argued that a woman who has previously consented to sexual intercourse with a man should be presumed to have given her ongoing consent to future sexual acts. Because marriage implies a wife's "generalized consent," as the Model Penal Code terms it, there is a requirement of separation or divorce before certain spousal sexual offenses will be considered criminal in twelve states.

In the real world, however, many women who experience rape in marriage are battered and remain with their abusers for complicated reasons other than "generalized consent" to sexual relations in the future. Battered women are especially vulnerable to wife rape.¹³ Studies indicate that between one-third and one-half of battered women have been raped one or more times by their batterers.¹⁴ A woman who is raped by her husband may stay with him because she has nowhere to go;¹⁵ she may want to provide stability for her young children,¹⁶ and/or she may feel love for her husband, despite his sexual abuse.¹⁷ Many victims of wife rape are financially unable to leave.¹⁸ A number of victims are told by family, friends, religious leaders, or health professionals that they should stay.¹⁹ Many rapists tell their wives that they will murder them if

¹² DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 137 (1985).

¹³ *Id.* at 22.

¹⁴ Raquel Kennedy Bergen, *Marital Rape*, Violence Against Women Online Resources (1999), at <http://www.vaw.umn.edu/finaldocuments/Vawnet/mrape.htm> [hereinafter Bergen, *Marital Rape*].

¹⁵ DIANA E. H. RUSSELL, RAPE IN MARRIAGE 222 (exp. and rev. ed.) (1990).

¹⁶ *Id.* at 220.

¹⁷ Patricia Mahoney et al., *Violence Against Women by Intimate Relationship Partners*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 147 (Claire M. Renzetti et al. eds., 2001).

¹⁸ See RUSSELL, *supra*, at 220.

¹⁹ *State v. Morrison*, 426 A.2d 47 (NJ 1981) (counselors at mental health institution told wife rape victim that they could do nothing for her and that she should go home with rapist).

they leave.²⁰ In fact, sexual abuse as well as other physical abuse frequently increases when women do declare their intention to leave or actually leave their spouses.²¹

Many, perhaps most, women who are raped by their spouses do not leave the relationship after the first instance of rape.²² In a 1998 Pennsylvania case, for example, the victim testified that her husband, Richter, had on a previous occasion raped her and then penetrated her with a brush dipped in plumber's glue.²³ After being taken to the hospital and treated for serious internal injuries, she reported the rape to authorities. Richter pled guilty to aggravated assault and was sentenced to probation and a stay-away order. Nevertheless, six weeks later, Richter moved in with his wife again. After some time, they divorced. Three years after the first rape, Richter went to his ex-wife's house, beat her in the face, broke her tooth, and then forced sex on her. She was again hospitalized from his attack. A few years later, Richter again raped her. The first time Richter sexually assaulted his wife was no less a rape simply because the parties were still married. One cannot assume that Richter's wife gave "generalized consent" to sex with him based on their marriage.

Like Richter's wife, battered wives who are raped are at the greatest risk of sustaining serious injury from their husbands. Having been raped is associated with "significantly more serious physical violence in terms of the severity and frequency of the aggression as well as the severity of the resulting injuries."²⁴ Without separation or divorce, battered wives who are raped are harmed physically as well as psychologically by sexual assaults. For these reasons, there

²⁰ See, e.g., *Jones v. State*, 74 S.W.3d 663 (Ark. 2002) (victim testified that Jones told her "that if I wanted out of the marriage by divorce I wouldn't get it because the only way to get out of our marriage was like our wedding vows is through death and I would have to die"); *Hernandez v. State*, 804 S.W.2d 169 (C.A. Tex. 1991) (victim did not file for divorce because Hernandez "threatened to kill her"); *State v. Morrison*, 426 A.2d 47 (NJ 1981) (estranged husband taped photo of gravesite to victim's door, indicating that marriage would only end in death).

²¹ FINKELHOR & YLLO, *supra*, at 25.

²² BERGEN, WIFE RAPE, *supra*, at 25-6.

²³ *Pennsylvania v. Richter*, 711 A.2d 464 (P.A. 1998).

should be no requirement of separation or divorce before a sexual offense in marriage is legally cognizable.

Second, a number of scholars have argued that the “generalized consent” that marriage grants a husband should extend to circumstances in which the wife is mentally incapacitated or unconscious and cannot consent. The related notion is that incapacitated or unconscious rape by a spouse is not harmful enough for the justice system to recognize. In a number of states, men even enjoy immunity when they themselves drug their wives, rendering them unable to consent.

As a preliminary matter, it is important to note that drugging a wife to have sex with her is not an uncommon weapon in a batterer’s arsenal.²⁵ In one case, for example, a man laced his wife’s food with half a bottle of anti-depressants, rendering her unconscious.²⁶ While she was unconscious, he orally and digitally penetrated her as he videotaped the episode. The use of drugs is analogous to the use of physical force to render a woman incapacitated. Some men beat or choke their wives to render them unconscious before raping them.²⁷ As one victim in a study on wife rape described:

[My husband] would try to choke me, and then I would pass out. Then he would rape me. He would put me to sleep and then rape me. Sometimes when we were out somewhere, and he didn’t like something I did, he would say, “You wanna go to sleep?” and laugh like it was real funny. It was like a punishment.²⁸

Although most states would recognize the choking here as force that makes the sexual offense rape, too many states would not recognize drugging a wife for the identical purpose as force that makes the sexual offense rape.

²⁴ RUSSELL, *supra*, at xxviii.

²⁵ Bergen, *Marital Rape*, *supra*.

²⁶ See Trigg v. Mississippi, 759 So.2d 448 (Miss. Ct. App. 2000).

²⁷ See Ohio v. Beliveau, 2001 Ohio 4112 (Ohio Ct. App. 2001) (defendant threw his girlfriend down and raped her while she was unconscious).

²⁸ BERGEN, WIFE RAPE, *supra*, at 19.

Distinct from the issue of deliberate drugging on the part of the husband, in twenty states men enjoy immunity when they simply take advantage of their wives' mental incapacity or unconsciousness to have sex with them without their consent. Some scholars dismiss the potential harm of this kind of invasion. The problems with this dismissal are both principled and practical.

As a matter of principle, the argument in favor of the marital exemption for mental incapacitation or unconscious rape greatly undervalues a married woman's sexual autonomy—her freedom to decide whether and when to engage in intercourse. A woman has the right to reserve her body for her own ends and not to be used as an object for someone else's ends. Affording married women this right is crucial to their dignity and equality under the law. It is this right that rape laws should be designed to protect.

Hilf argues, however, "A married person has, to some extent, a lesser expectation of personal autonomy; therefore, the affront to one's autonomy is less in the case of spousal rape than in the case of ordinary rape." While married individuals may have lesser expectations of certain kinds of autonomy, it does not follow that in the sexual realm, a woman's autonomy must bow to the demands of her husband's interest in obtaining sex. A man's desire for an orgasm simply does not outweigh his wife's interest in avoiding the invasion of unwanted intercourse. A married woman's expectation of sexual autonomy should be no less than a single person's.

As a practical matter, the argument that incapacitated and unconscious rape are not harmful reveals ignorance about the perils of sexual penetration for a woman. A man who penetrates a woman when she is unconscious denies her the power to negotiate the use of contraceptives and other protection to prevent pregnancy and disease. Unwanted pregnancy and disease are serious injuries for both unmarried and married women.

Even if the man does not make his unconscious wife pregnant against her will or give her a sexually transmitted disease, he has profoundly degraded her bodily integrity. Women's dry orifices are not permeable. To penetrate them takes force that may bruise, tear, and otherwise damage tissue. Physical and psychological pain will likely greet the woman when she regains consciousness. These injuries and this suffering matter. Sexual injury and suffering are what rape laws should be designed to prevent. Because incapacitated and unconscious rape denies sexual autonomy and causes harm, the twenty states that currently provide immunity for it should abolish that immunity.

Third, a number of scholars have argued that spousal sexual offenses in general are not harmful enough for the justice system to criminalize. It is this argument that underlies the general downgrading of spousal sexual offenses, subjecting them to lesser penalties and requiring prompt complaints in seven states. Interestingly, it is the ongoing consent in marriage that supposedly makes spousal sexual assaults less harmful. As previously mentioned, Senator Denton argued that the "character of the voluntary association of a husband and wife...could be thought to mitigate the nature of the harm resulting from the unwanted intercourse." The implicit position is that stranger sexual offenses are injurious to victims, but, because of ongoing consent, spousal sexual offenses are not.

The research, however, indicates that wife rape is as harmful to victims as stranger rape. Marital sexual attacks are more likely than stranger sexual attacks to end in completed rapes rather than attempted rapes.²⁹ Wife rape victims are more likely than victims of acquaintances or strangers to be raped orally and anally.³⁰ Contrary to popular opinion, wife rapes tend to be

²⁹ RUSSELL, *supra*, at 64.

³⁰ See Bergen, *Marital Rape*, *supra*.

more violent than stranger rapes.³¹ Men have raped their wives with wooden batons, fists, dogs, and loaded firearms.³² The physical consequences of wife rape can, therefore, be painful and dangerous:

The physical effects of marital rape may include injuries to the vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. [Researchers] report that one half of the marital rape survivors in their sample were kicked, hit or burned during sex. Specific gynecological consequences of marital rape include vaginal stretching, miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases, including HIV.³³

Despite the serious physical consequences of wife rape, the psychological consequences are usually more devastating.³⁴ Short-term psychological effects of wife rape may include “anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress disorder.”³⁵ Long-term psychological effects may include “disordered eating, sleep problems, depression, problems establishing trusting relationships, and increased negative feelings about themselves” as well as “flash-backs, sexual dysfunction, and emotional pain for years after the violence.”³⁶ In one study of raped wives, “[m]ore than half of the women mentioned considering or attempting suicide at some point.”³⁷

One reason that wife rapes are so traumatic is that victims are less likely to tell family members, rape crisis counselors, or police officers about their experiences, and they are less

³¹ Patricia Rozee, *Stranger Rape*, in *THE PSYCHOLOGY OF SEXUAL VICTIMIZATION: A HANDBOOK* 97, 97 (Michele Antoinette Paludi ed., 1999).

³² See, e.g., *Shunn v. State*, 742 P.2d 775 (Wy. 1987) (defendant battered and raped his wife with a wooden baton); *Temple v. State*, 517 S.E.2d 850 (C.A. Ga. 1999) (Temple kicked down estranged wife’s door, choked her, slapped her, beat her with gun, held gun to her head, threatened to kill her, sexually assaulted her with gun, and beat her until she lost consciousness); *People v. M.D.*, 595 N.E.2d 702 (C.A. Ill. 1992) (defendant raped victim with his fist repeatedly, ripping her vagina and causing internal damage, after which victim suffered from long-term urinary incontinence); *State v. Dominy*, 6 S.W.3d 472 (TN 1999) (Dominy repeatedly raped wife with dog).

³³ Bergen, *Marital Rape*, *supra*.

³⁴ FINKELHOR & YLLO, *supra*, at 126.

³⁵ Bergen, *Marital Rape*.

³⁶ *Id.*

likely to receive support when they do.³⁸ In her groundbreaking study on wife rape, Diana Russell concluded:

[W]ife rape can be as terrifying and life threatening to the victim as stranger rape. In addition, it often evokes a powerful sense of betrayal, deep disillusionment, and total isolation. Women often receive very poor treatment by friends, relatives, and professional services when they are raped by strangers. This isolation can be even more extreme for victims of wife rape. And just as they are more likely to be blamed, they are more likely to blame themselves.³⁹

In addition to feeling betrayed, isolated, and blamed, victims of wife rape are also more likely than victims of stranger rape to endure multiple offenses from their attackers and to suffer from persistent terror.⁴⁰ In their study on marital rape, David Finkelhor and Kersti Yllo reported that fifty percent of the women in their study had been sexually assaulted twenty times or more.⁴¹ The negative physical and mental consequences of such repeated sexual attacks include chronic injury and trauma.⁴² Given the serious physical and psychological harm of wife rape, the seven states that currently maintain such unfair requirements should not downgrade it, subject it to lesser penalties, or refuse to prosecute it without a prompt complaint.

Formal neutrality as to the marital status of the parties in sexual offense statutes is, at this point, long overdue. At a bare minimum, twenty-six states must abolish the remaining marital immunity for sexual offenses. They need to treat marital and non-marital sexual assault the same and repeal the laws that require separation or divorce, extra force, or prompt complaint, as well as the provisions that downgrade spousal sexual offenses or exempt incapacitated or unconscious rape from legal condemnation. By eliminating the provisions that evince bias against married

³⁷ BERGEN, *WIFE RAPE*, *supra*, at 59.

³⁸ Bergen, *Marital Rape*, *supra*.

³⁹ RUSSELL, *supra*, at 198.

⁴⁰ Bergen, *Marital Rape*, *supra*.

⁴¹ FINKELHOR & YLLO, *supra*, at 23.

⁴² Patricia Mahoney et al., *Violence Against Women by Intimate Relationship Partners*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143, 146 (Claire M. Renzetti et al. eds., 2001).

women and favoritism toward sexually abusive men, these proposals would achieve formal neutrality on the question of the marital status of the parties in sexual offense statutes.

III. Development of the Law on Sexual Offenses by Intimates

As much as formal neutrality on marital status in sexual offense statutes is needed, it is not enough. Even the complete abolition of marital immunity in some jurisdictions has done little for raped wives who face police, prosecutors, judges, and juries who infer that, absent extraordinary violence, the wives' prior consent to sexual intercourse implied ongoing consent to the alleged rape. It has also done nothing for those women raped by former lovers, boyfriends, and cohabitants who face the same legal actors who make the same improper inference of ongoing consent. The ongoing consent ideology, applicable to all forms of intimate rape, is perhaps the most difficult and enduring problem produced by the marital rape exemption.

When analyzing marital rape, few legal scholars have linked marital rape to rape by other intimates. By focusing on the formal contours of marital immunity in forcible rape statutes, most legal scholars failed to notice the larger problem of the ongoing consent ideology that the marital rape exemption originally caused. Unlike legal scholars, social scientists analyzing marital rape have often included all intimates in their analysis, regardless of the legal status those intimates share. As Raquel Kennedy Bergen explained in her 1996 book, *Wife Rape*, "I do this to acknowledge that one need not be legally married to suffer the trauma and consequences of being raped by one's intimate partner."⁴³ The harm marital rape causes is not unique to the marital relationship. It arises when intimates cohabit or date, regardless of the legal status they share. There are many important similarities between rape by intimates and marital rape. In her book *Rape in Marriage*, Diana Russell detailed those similarities in this way:

⁴³ BERGEN, *WIFE RAPE*, *supra*, at 8.

First, in both situations there is frequently a lack of recognition by both parties that forced intercourse, or intercourse because of threat of force or inability to consent, is rape. Second, the rape often occurs more than once; frequently it occurs many times. Third, the woman is often unwilling to employ all her resources, particularly her capacity to be violent, when trying to fend off the rapist. Fourth, there is often more of a sense of disillusionment and betrayal as a consequence of rape by intimates than when a woman is raped by an acquaintance or stranger. Fifth, the police and public at large are often even more skeptical, unsympathetic, and unhelpful than in cases of rape by non-intimates. Sixth, as with a husband, the woman often has a hard time getting rid of an unwanted male lover when she wants to. The male lover frequently seems to feel his masculine role threatened if it is not he who decides on any major changes in the relationship, particularly the ending of the sexual side of it. Even when the relationship is over, she may have a hard time getting rid of an ex-lover or ex-husband. And seventh, the perception of the woman as an unequal partner with unequal rights, indeed, as the property of the man, is also evident in both types of relationships.⁴⁴

Russell concluded, “another thing that many lover relationships have in common with marriage is that once a woman has voluntarily consented to intercourse, many men believe she has given up her right to refuse them on future occasions.” On many levels, then, rape by non-spouse intimates is the functional equivalent of spousal rape. The question remains whether intimate rape is the legal equivalent of marital rape. Revisiting the legal history of the marital rape exemption sheds light on this question.

A. History of the Marital Rape Exemption Revisited

After noting that sexual intercourse between husband and wife is always *lawful*, Rollin Perkins pointed out in his treatise that “all other sexual intercourse is *unlawful*.” Perkins’ second point is crucial. Under English common law when Hale formulated the marital rape exemption, marriage was the only context in which people were legally allowed to be sexually active. For most of the history of English common law, legitimate sexual activity was confined to marriage. Extra-marital sexual acts—whether consensual or nonconsensual—were proscribed by laws on adultery and fornication.⁴⁵ It is important to incorporate the criminalization of these other sexual

⁴⁴ RUSSELL, *supra*, at 269.

⁴⁵ Anne Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 6 (1998)

acts into the analysis. As Anne Coughlin recently argued, “we cannot understand rape law unless we study the doctrine, not in isolation, but in conjunction with the fornication and adultery prohibitions with which it formerly resided and, perhaps, continues to reside.”⁴⁶

When viewing the marital rape exemption in light of the broader proscription against fornication and adultery, the doctrine’s shape shifts. In a jurisdiction in which all non-marital sexual activity was illegal, the rape immunity prohibited women from bringing charges against the only men with whom they *could have been* legally sexually active. The rape immunity, therefore, was not centrally about the formal status of marriage between husband and wife per se (except to the extent that marriage conferred legal authority for sexual activity). It was fundamentally about the sexual activity between the parties itself.

Coupled with proscriptions against fornication and adultery, the marital rape exemption dictated which men could be charged with rape. Men who *had not* previously gained legal sexual access to women (through marriage, which was the only legal form of sexual access at the time) could be charged with raping them. Men who *had* previously gained legal sexual access to women, by contrast, could not be charged with raping them. The law, therefore, protected men from being charged with sexually assaulting the only women with whom they *could be* legally sexually active. The marital rape immunity was a polite trope for the notion that women could not bring sexual offense charges against men with whom they were (legally) sexually active. Therefore, when the marital rape exemption developed, there were no legal intimate relationships besides those in marriage. Marital sexual relations comprised the whole category of legal intimate relations.

[...discussion of history of the criminalization of fornication and adultery omitted...]

⁴⁶ *See id.*

In the past, then, women were either unmarried or married and assumed to be sexually inactive or active, respectively. By the late twentieth century, marriage no longer represented a meaningful distinction between those women who had sex and those who did not. As legitimate sexual activity moved outside the marital relationship, the ongoing consent ideology founded on the marital rape exemption moved outside the marital relationship as well.

B. Cohabitants and Voluntary Social Companions

As a result of the societal transformation that legitimized sex outside of marriage, a number of states adjusted the focus of their marital exemptions from formal marital status to the substantive matter of sexual relations. In 1962, the Model Penal Code, for example, supplemented its comprehensive marital rape immunity with a provision that included cohabitants. It said: “Whenever in this article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship.”

Some states went further than cohabitation in their sexual offense codes to create provisions applying to “voluntary social companions.” The Model Penal Code itself downgraded first-degree rape to second-degree if the victim was “a voluntary social companion of the actor upon the occasion of the crime” who had “previously permitted him sexual liberties.” Delaware, Hawaii, Maine, North Dakota, and West Virginia enacted similar statutes that gave partial immunity to men who sexually assaulted women who has previously permitted them sexual contact.⁴⁷ If a man had previous consensual sex with a woman, he could not be convicted of raping her.⁴⁸ For example, from 1986 to 1998, Delaware’s criminal code on first-degree rape provided:

⁴⁷ FINKELHOR & YLLO, *supra*, at 149

⁴⁸ *Id.*

A person is guilty of unlawful sexual intercourse in the first degree when the person intentionally engages in sexual intercourse ... without the victim's consent and the defendant was not the victim's voluntary social companion on the occasion of the crime and had not permitted the defendant sexual intercourse within the previous 12 months.⁴⁹

If a victim had “permitted the defendant sexual intercourse within the previous 12 months,” regardless of the marital status of the parties, the defendant could not be convicted of first-degree rape.

In their study, Finkelhor and Yllo analyzed the effect of adding voluntary social companion provisions to sexual offense statutes:

These voluntary-social-companion laws may work to vitiate the effect of abolishing the marital exemption. ... If “voluntary social companions” are interpreted to include husbands and cohabiting boyfriends, the marital-rape exemption may still be in effect for that first-degree charge.⁵⁰

As they went on to explain, “the extension of the exemption to voluntary social companions appears to imply that by merely allowing sexual intimacy once, a woman grants a form of permanent consent.” Finkelhor and Yllo thereby explained how Hale's ongoing consent theory behind the marital rape exemption evolved into an inference of ongoing consent based solely on the existence of a prior intimate relationship, without marriage.

Connecticut, Hawaii, and Minnesota currently extend their spousal immunities to cohabiting partners.⁵¹ In Connecticut, for example, cohabitation is a complete defense to sexual assault when the victim is mentally incapacitated or physically helpless and to sexual assault involving sexual contact without consent. Hawaii's statute indicates that “married” includes “a male and female living together as husband and wife regardless of their legal status.” Hawaii's

⁴⁹ Del. Code Ann. Tit. 11 section 775 (1986), stricken in its entirety June 11, 1998 and replaced with 773 1st-degree rape. Today, the statute is formally neutral.

⁵⁰ FINKELHOR & YLLO, *supra*, at 149.

⁵¹ CONN. GEN. STAT. ANN. § 53a-67 (West 2002); HAW. REV. STAT. § 707-700 (2001); MINN. STAT. ANN. § 609.349 (West 2002) *amended by* 2002 MINN. SESS. LAW. SERV. CH. 381 (S.B. 2433) (West).

commentary to this provision explains that the “definition of *married* was amended to recognize the prevalence of many male and female couples living together although not legally married.”

Notably, modern scholars who argue for the marital rape exemption treat rape by non-spouse intimates as the equivalent of spousal rape. The Commentary to the Model Penal Code’s comprehensive marital rape exemption, for example, applies it to all those intimates in “equivalent” relationships:

marriage *or an equivalent relationship*, while not amounting to a legal waiver of the woman’s right to say “no,” does imply a kind of generalized consent that distinguishes some versions of the crime of rape from parallel behavior by a husband.

Likewise, Ingram offers an expansive range of relationships to which his “rebuttable presumption” of consent should apply. He argues, “[t]he same presumptions [of consent] should also arguably be recognized with unmarried cohabitants, and probably with regular, frequent social companions, regardless of their level of sexual activity.”

Dripps agrees with this view. After claiming that sex with an unconscious wife is legitimated by the man’s “implied authorization” to proceed without consent, Dripps clarifies that the couple’s marriage itself is not essential. He points out, such “implied authorization” would exist for those engaged in an ongoing cohabiting or dating relationship as well—indeed, whenever “a long-standing sexual relationship connects the defendant with the victim.”

C. Evidence of the Sexual History between the Defendant and the Complainant

The extension of marital immunity to cohabitants and voluntary social companions in some states was not the only manifestation of the broad reach of the ongoing consent ideology. Another manifestation came from an unlikely source: another area of feminist reform in rape laws. In the late 1970s and 1980s, legislatures passed rape shield laws. Rape shield laws were designed to protect rape victims from embarrassing questions about their private sexual lives

when they testified. In general, they forbade the admission of evidence of a complainant's prior sexual history at a rape trial. Forty-eight states and the District of Columbia passed some form of rape shield law. These laws, by statute or by judicial decree, contained one nearly universal exception: prior sexual behavior between the complainant and the defendant himself would be admitted. By this exception, the law declared that evidence of the prior sexual behavior between a rape defendant and a complainant was relevant and admissible when he claimed the defense of consent.

Given the widely varied forms of rape shield laws across the country, this uniform exception was striking. It communicated a shared assumption about sexual relations: once a woman "hath given her body" to a man, she was assumed to continue to consent to sexual intercourse.⁵² Coupled with the traditional norm of ongoing consent derived from the marital rape exemption, this universal exception facilitated the improper modern inference of consent based solely on the existence of an intimate relationship.

The transformation of doctrinal rape law from one that focused on marital status to one that included non-marital intimate relationships confirms that the sexual relationship, rather than marriage per se, was at the heart of the marital rape exemption. The fact that rape shield laws make no distinction between spouses and non-spouses in terms of the blanket exceptions they provide for the admission of sexual history between the defendant and the complainant means that the ongoing consent ideology has affected a new area of the law.

As a result, it is not enough to have formal neutrality in sexual offenses statutes that simply allow for the prosecution of spouses for sexual assault. States need to reject the ongoing consent ideology that now affects both marital and other intimate rape.

⁵² HALE, *supra*, at 629.

IV. Formal Neutrality on Marital Status in Sexual Offenses Revisited

Two main proposals for reform of the marital rape exemption have emerged over the past thirty years: the argument that states should simply abolish the marital immunities in their sexual offense statutes and the argument that states should add an explicit provision on marital status in their sexual offense statutes declaring that men may be prosecuted for raping their wives. Twenty-four states and the District of Columbia have no immunities for sexual crimes based on the formal relationship of the parties. The statutes in these states are either silent as to marital rape, or they contain an explicit provision clarifying that marriage is no defense to sexual assault. An examination of how these state statutes work in practice reveals their inadequacies in terms of eliminating the ongoing consent ideology that affects marital and other intimate rape.

A. Silence on Marital Status in Sexual Offenses

A number of scholars have called for states to delete all provisions in rape laws that refer to the marital status of the parties. This proposal seems appealing because it removes from statutes the specific provisions that prevented prosecutors from charging men for sexual offenses against their wives. However, an examination of cases in the seventeen states that currently have sexual offense laws that are silent on the question of the marital status between the parties discloses that such silence is an inadequate solution to the ongoing consent ideology derived in the marital rape exemption.

Despite the ability to bring suits against spouses for various sexual offenses in these seventeen states, there is a paucity of written appellate dispositions involving spousal rape or spousal sexual abuse. The lack of criminal appeals suggests that the belief in ongoing consent in marital relationships may continue to discourage prosecutors from pursuing these cases and being able to obtain convictions.

There is also very little applicable case law involving rape by intimates who are not legally married but simply cohabit. Where it appears, one can detect the improper inference of ongoing consent based on intimate relationships. In *Vermont v. Gonyaw*,⁵³ for example, the complainant and Gonyaw had a relationship that began six years before an alleged sexual assault. Although not married, they cohabitated for the first three years of that relationship. At trial, Gonyaw wanted to testify in front of the jury as to the sexual relationship they had prior to the alleged sexual assault. At a hearing in front of the judge, the complainant testified that they had not engaged in consensual sexual intercourse for more than a year before the assault. Gonyaw, by contrast, testified that they had consensual sex four days prior to the alleged assault. The trial court prohibited Gonyaw's testimony and the jury convicted.

The Vermont Supreme Court reversed. It stated, "[a] jury hearing evidence, even though contradicted, of consensual sexual acts after their separation, one which allegedly occurred four days before the act complained of, might well have" acquitted Gonyaw. It held, "[c]onsensual sexual activity over a period of years, coupled with a claimed consensual act reasonably contemporaneous with the act complained of, is clearly material on the issue of consent." The court limited its holding to circumstances in which the prior sexual activity was "reasonably contemporaneous, and the relationship between the parties must support a reasonable belief that there was consent to renewed sexual activity." The court thus concluded that the complainant's "consent to renewed sexual activity" with Gonyaw could reasonably be inferred if she had engaged in a sexual act with him four days prior to the alleged assault.

Vermont's criminal code does not have a marital rape exemption and is silent as to its abolition. Although prosecutors can bring charges against Gonyaw for sexually assaulting the complainant, Vermont's silent statute does not otherwise help to curb the improper inference

⁵³ 507 A.2d 944 (V.T. 1985).

jurors and judges will likely make based on the intimate relationship of the parties. The complainant is subjected to the inference that sex four days prior to the alleged assault can support a reasonable belief in renewed, ongoing consent to sexual activity with the defendant.

Improper inferences of ongoing consent based on intimate relationships also emerge in cases involving intimates who are not legally married and have never cohabitated. Take, for example, the recent Nebraska case of *State v. Sanchez-Lahora*.⁵⁴ At trial, the complainant testified that Sanchez-Lahora asked her to sell drugs for him, and when she agreed, he insisted on sex. After she declined, he went to the kitchen, retrieved a gun, and asked her if she wanted to die. Each time she refused his advances, Sanchez-Lahora asked if she wanted to die. He then pressed the gun to her forehead and stated, “[o]ne bullet for you,” and had oral, vaginal, and anal sex with her.

Sanchez-Lahora himself took the stand and testified that he and the complainant had a secret relationship and had previously met five or six times at a club. He admitted that on the night in question he had sex with her, but claimed that the sex was consensual. He also sought to introduce testimony that he and the complainant “had been engaging in a sexual relationship for several months prior to that date,” estimating that they had had sexual intercourse 11 to 14 times. The trial court denied Sanchez-Lahora’s motion to present this evidence under Nebraska’s rape shield law, which required the defendant to “(1) show a relation between the past conduct and the conduct involved in the case and (2) establish a pattern of conduct of behavior by the victim which is relevant to the issue of consent.”

The Nebraska appellate court reversed. It cited approvingly an evidentiary syllogism it found implicit within Nebraska’s rape shield law:

⁵⁴ 616 N.W.2d 810 (Neb. C.A. 2000).

Major [premise]: The victim's past sexual behavior with the defendant was consensual behavior. Minor [premise]: The victim's behavior in the present prosecution is the type of activity in which the victim participated with the defendant in the past. Conclusion: Therefore, the victim's behavior in the present prosecution was consensual.

As to the disputed evidence, then, the appellate court concluded, “[w]e believe the evidence of the alleged prior sexual conduct between the defendant and the victim does tend to establish a pattern of conduct relevant to the issue of consent,” and, thus, the jury should have heard it.

In abolishing its marital rape exemption, the state of Nebraska remained silent in its rape statute on the marital status of the parties.⁵⁵ Nebraska's silent statute does not help the woman who complained of Sanchez-Lahora's behavior. She is subjected to the assumption that her prior consent to sex with Sanchez-Lahora implied ongoing consent to sex with him. The court's syllogistic reasoning is clear: prior consent to similar sexual acts means consent to the sexual acts in question. Again, the prior intimate relationship itself creates an improper inference of ongoing consent.

Statutory silence on marital status and intimate relationships between the parties is inadequate. Silence does nothing for those women, married or not, who have had sexual relationships with defendants when the defendants claim that such sexual relationships entitle them to assume consent to the sexual acts alleged to have been rapes. The next section turns to explicit provisions in sexual offense statutes authorizing the prosecution of spouses for marital rape to see if they provide a better solution to the improper inference of ongoing consent based on intimate relationships.

B. Explicit Provisions in Sexual Offenses Authorizing Prosecution of Spouses

A number of scholars have argued that states should do more than remain silent; they should insert new provisions into their sexual offense statutes that explicitly authorize the

prosecution of spouses. Jurisdictions have enacted two kinds of analogous statutes: prosecutorial “allowance” codes and “no defense” codes. An examination of the cases in these states discloses that even these explicit provisions are also an inadequate solution to the ongoing consent ideology embedded within the traditional marital rape immunity.

[...discussion of case involving married individuals omitted...]

Ongoing sexual consent analysis emerges in cases involving intimates who are not legally married. In the recent Alaska case of *Napoka v. State*, the complainant, fourteen-year-old N.A., made a report to a state trooper after he gave a presentation at her school about sexual abuse.⁵⁶ She stated that Napoka had raped her nine or ten times over the past few years. Upon investigation, Napoka admitted to the trooper that he had engaged in non-consensual sex with N.A. on three previous occasions, so he was indicted for those three instances. At trial, the state moved to exclude evidence of the other sexual acts between Napoka and N.A. The trial court granted the motion, but on appeal, this decision was reversed. The court of appeals stated:

N.A.’s prior sexual conduct with Napoka was clearly relevant to the two issues confronting the jury: (1) whether, as a factual matter, N.A. consented to have sex with Napoka on the three occasions identified in the indictment, and (2) whether, even if N.A. did not consent, Napoka nevertheless reasonably believed that she did consent.... The disputed evidence was relevant, not because it showed that N.A. had engaged in sexual activity before, but rather because it showed that N.A. had engaged in sex *with Napoka* before. If, as the defense claimed in its offer of proof, Napoka and N.A. had a long history of consensual sex, this fact would obviously be important to the jury’s proper decision of these two things.

According to this court, then, the prior sex was crucial to the jury’s consideration of N.A.’s consent on the instance in question and, even if she did not consent, Napoka’s *reasonable belief* that N.A. consented on the instance in question.

⁵⁵ NEB. REV. STAT. § 28-319 (2001) (silent on sexual assault in first degree, Class II felony); § 28-320 (silent on sexual assault in second or third degree, Class III felony and Class I misdemeanor).

⁵⁶ 996 P.2d 106, 107 (C.A. Alaska 2000).

Alaska’s marital statute includes an explicit provision regarding forcible and nonconsensual marital rape such as the kind that N.A. allegedly suffered. The court in *Napoka*, however, declared that the evidence of prior sexual activity between Napoka and N.A. revealed her “willingness to engage in sexual activity with Napoka” on the instance in question. Alaska’s explicit “no defense” provision does nothing for N.A.; the court still found that her prior relationship with Napoka implied ongoing consent.

Explicit provisions regarding marital status do not attack Hale’s understanding of sexual relations: that a woman who “hath given her body” to a man continues to consent to sexual intercourse with him through time. To reach the heart of this improper inference, society needs a new law on sexual offenses by intimates.

V. New Law on Sexual Offenses by Intimates

[...section rejecting restrictive rape shield laws and expert testimony as the only solutions omitted...] Some other reform measure is needed to blunt potential bias against women who are sexually assaulted by their intimates.

A. Analysis of the New Law on Sexual Offenses by Intimates

I propose that states abolish provisions in their sexual offense codes that deal exclusively with the marital status of the defendant and the complainant. I propose, instead, that each state’s sexual offense statute include the following provision:

A prior or subsequent sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense and shall not affect the grading of a sexual offense. The sole fact that the complainant consented to the same or different acts with the defendant on other occasions shall not be a sufficient basis for inferring consent on the instance in question. The mere existence of such a sexual relationship shall not be a sufficient basis for the defendant to claim a mistake of fact as to consent defense.

These three sentences would significantly change the way that the legal system weighs evidence of a sexual relationship between the complainant and the defendant.

“A prior or subsequent sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense and shall not affect the grading of a sexual offense.”

This first sentence would address rape by intimates as a whole and not single out marital rape victims for special treatment. Collective treatment of rape by intimates is appropriate because victims who have been previously intimate with their assailants suffer similar harm to marital rape victims. More importantly, from a fairness standpoint, victims who have been previously intimate with their assailants are often subject to the same improper inference of ongoing consent regardless of the formal legal status the parties share. As a result, the sexual relationship between the parties itself is the centerpiece of the proposed provision; whether that relationship occurred “in marriage, cohabitation, dating, or other circumstances” is immaterial because the provision covers each circumstance.

The first sentence also clarifies that such a prior sexual relationship “shall not be a defense to a sexual offense.” In that sense, it is similar to the “no defense” provisions of Alaska, Colorado, and Georgia, which state that the marital status of the parties “shall not be a defense” to a charged sexual offense. The new law on rape by intimates is different, however, because it focuses on what drives the traditional marital rape exemption: the prior sexual relationship between the parties itself. For that reason, the new law says that the prior sexual relationship itself (rather than technical marital status) “shall not be a defense.”

In addition to addressing a prior sexual relationship between the parties, the first sentence addresses a *subsequent* sexual relationship between the parties. Many battered women stay with their abusers even after they have been assaulted repeatedly. The fact that they stayed after the

abuse does not mean that they consented to being battered or that the battering was not a crime. Likewise, many raped women continue to have relationships with their abusers, relationships that may include subsequent sexual relations.⁵⁷ As we have seen, the fact that they stayed after the rapes does not mean that they consented to being raped or that the rapes were not crimes.

Finally, the first sentence clarifies that a sexual relationship between the parties “shall not affect the grading of a sexual offense.” At least four states allow the mere fact that the parties were married or cohabitating to affect the grading of the offense and, as a consequence, how seriously the police, prosecutors, courts, and juries take these offenses. In basic fairness to women, this explicit statement that a previous sexual relationship shall not affect the grading of the offense should be included in the statute as a matter of legislative intent.

“The sole fact that the complainant consented to the same or different acts with the defendant on other occasions shall not be a sufficient basis for inferring consent on the instance in question.”

This second sentence of the new law on sexual offenses by intimates means that that one cannot conclude that the complainant consented on the instance in question simply by virtue of her consent to the same act with the defendant on a different occasion. Simply because a woman previously agreed to have oral sex with a man before does not mean that she consented to oral sex with him on the instance in question. The prior act, alone, provides no basis for making that inference. Combined with other evidence, such as how the complainant acted on the instance in question in light of her prior behavior in the relationship, the prior act may be a *factor* upon which one might infer consent, but as a lone bit of evidence, it is not sufficient for one to infer consent.

⁵⁷ See, e.g., United States v. Parker, 54 M.J. 700 (A. Ct. Crim. App. 2001) (victim testified to having sexual relations with defendant after two rapes); State v. Alston, 312 S.E.2d 470, 473 (N.C. 1984) (discussing defendant and complainant’s sexual relations after complaint made to police of rape); Commonwealth v. Richter, 711 A.2d 464, 466 (P.A. 1998) (victim allowed defendant to move back in after rape).

The second sentence also addresses prior consent to sexual acts that are *different* than the one charged. It likewise clarifies that one cannot infer consent simply by virtue of the complainant's consent to a different act with the defendant on a different occasion. Simply because a woman had consensual vaginal sex with a man previously does not mean that she consented to oral sex with him on the instance in question.

Finally, the second sentence of the new law on sexual offenses by intimates abolishes the defendant's ability to claim that he enjoyed "implied authorization" to proceed with sex with the complainant without her consent whenever "a long-standing sexual relationship connects the defendant with the victim." The new law on sexual offenses by intimates nips this analysis in the bud: The complainant's consent on the instance in question may not be inferred solely from her consent to the same or different acts with the defendant on other occasions. No "implied authorization" for future sex follows "a complex relationship in which sex plays a prominent role."

"The mere existence of such a sexual relationship shall not be a sufficient basis for the defendant to claim a mistake of fact as to consent defense."

The third sentence of the new law clarifies that a defendant may not assume he has consent solely by virtue of the fact that he has been sexually active with a woman before. There may be any number of reasons a man harbors a legitimate mistake of fact as to a woman's consent, but the mere fact that he has been sexually active with her before should not provide him with the opportunity to make such a claim. This provision prevents the defendant from relying on a particularly unreasonable mistaken belief: that once a woman consents to sex with him, she has given him ongoing consent to future sexual acts. Combined with other evidence of what occurred on the instance in question in light of past practices between the parties, the fact that a man has been sexually active with a woman before may be a *factor* upon which he may

conclude, reasonably but mistakenly, that she consented on the instance in question. But the mere existence of a relationship itself cannot provide him with a reasonable mistake.

In proposing this new law on sexual offenses by intimates, I am advancing a particular normative vision of consent to sexual intercourse. I believe that consent to sexual intercourse is temporally constrained permission that is specific as to act and non-transferable to others. Rape law has not evinced this normative vision of consent. Historically, rape law portrayed consent to sexual intercourse as temporally unconstrained permission that could be imprecise as to act and even indiscriminate as to person. Marital immunity for sexual offenses enshrined two of these objectionable aspects of this distorted normative vision into rape law.

First, it established sexual consent as temporally unconstrained permission. As Vivian Berger noted in her influential *Columbia Law Review* article on the marital rape exemption, marital immunity derived from the “fictional notion that marriage implies continuing consent to sexual relations.”⁵⁸ As we have seen, ongoing sexual consent to her husband was imagined to be a “term” of the marriage “contract,” something that continued for the duration of the marriage.⁵⁹

Second, marital immunity established sexual consent as permission that was imprecise as to sexual act. Once a woman professed a nuptial “I do,” she could not assert a conjugal “I don’t do that.” Her husband could force her to engage in any sexual act, and the law provided her no refuge.

The new law on sexual offenses by intimates abandons this retrograde normative vision of consent in favor of a more egalitarian view. This new law would help to temporally constrain sexual consent and make it precise as to act. Consent would be temporally constrained because a

⁵⁸ Vivian Berger, *Man’s Trial, Women’s Tribulation: Rape Cases in the Courtroom*, COLUM. L. REV. 1, 9 (1977).

prior or subsequent sexual relationship would not itself be a defense to a rape charge. The mere existence of consensual sex on another occasion would not be sufficient to infer consent on the instance in question. Consent would also be specific as to act because neither the defendant nor the jury would be permitted to infer that the complainant consented to the sexual act in question simply by virtue of the complainant's prior consent to the same or a different sexual act.

Defendants charged with sexual offenses in jurisdictions in which this new law on sexual offenses by intimates has been adopted could still claim consent as a defense, of course. These defendants would not, however, be able to argue that, simply by having had sex with the complainant before, they could assume consent to the sexual acts in question.

The new law on sexual offenses by intimates I propose may break new ground in rape law, but it travels a well-worn path. As we have seen, three states have enacted "no defense" provisions in their rape codes that clarify that marital status is no defense to a charged sexual offense. The new law on sexual offenses by intimates is not a great leap from those provisions; it simply re-focuses the law on the impact of the prior sexual relationship rather than the technical marital status. In addition, the states of California and Colorado have interesting, analogous provisions regarding the substantive issue of consent in their sexual offense codes. Both the California and Colorado codes on consent state, "[a] current or previous dating relationship shall not be sufficient to constitute consent" for a sexual offense. This analysis is a central rationale behind the new law on sexual offenses by intimates.

This new law on sexual offenses by intimates would authorize prosecutors to obtain jury instructions that would limit the jury's ability to infer consent from a prior sexual relationship between the parties. Three states with arguably the best statutes on marital immunity each have

⁵⁹ State v. Smith, 426 A.2d 38, 44 (N.J. 1981) (noting "If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract,' may she not also revoke a 'term' of that

statutes that provide that marriage is not a defense to a charge of rape. However, these three states lack patterned jury instructions to take advantage of the statutes. The progressive language in these laws, declaring that marriage is not a defense to rape, is ineffectual without an accompanying jury instruction cautioning the jury not to make an improper inference of consent based solely on the marital relationship. [...section discussing jury instructions omitted...]

B. Application of the New Law on Sexual Offenses by Intimates

If the victims in *Gonyaw*, *Sanchez-Lahora*, and *Napoka* had lived in jurisdictions in which the new law on sexual offenses by intimates had been in effect, the appellate courts evaluating those cases would have had to acknowledge that a prior sexual relationship between the defendant and the complainant did not itself afford the defendant an inference of consent. Moreover, on retrial, the juries in those cases would be properly cautioned about how to weigh that evidence and their ability to make an improper inference of ongoing consent would be appropriately constrained. [...full discussion of prior cases omitted...]

Critics might worry that the new law on sexual offenses by intimates would engender unfair results in cases in which the issue of consent is a particularly close one. They need not fret. Assume, for example, a situation in which a woman voices no affirmative consent to sexual intercourse, nor does she verbally or physically object to it. What happens when her husband penetrates her but she remains passive and silent? As a practical matter, of course, no prosecutor would bring such a weak case to the jury. Even if the parties were not married, this case could not result in a conviction under current law in the vast majority of jurisdictions. The new law on sexual offenses would not change that fact.

Moreover, as a theoretical matter, the application of the new law on sexual offenses in a hypothetical prosecution based on these facts would not make the case more troubling. Should

contract, namely, consent to intercourse?”).

the husband be able to argue that his wife consented on the instance in question based solely on the existence of his prior relationship with her? No. His defense of consent should be based on evidence surrounding the disputed sexual act itself: that his wife was passive and silent on the instance in question. Coupled with this evidence, he would also be able to point to past sexual practices between them to argue consent. Whether he would prevail would depend on the substantive definition of consent in the jurisdiction, rather than on the new law on sexual offenses by intimates that I have proposed.

Conclusion

Legally declaring that “a prior sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense” will not end the occurrence of sexual offenses by intimates, of course. It will, however, end the marriage between an intimate relationship and the improper inference of ongoing consent to sexual intercourse. Because the ideology of ongoing consent has bullied the legal interpretation of intimate relationships in rape cases for generations, such a divorce is long overdue.