Marriage is the only actual bondage known to our law.
There remain no legal slaves, except the mistresses of every house.¹

I. INTRODUCTION

There is no question that “ordinary” rape is a difficult crime, whether from the perspective of the victim, the accused or the state. It presents evidentiary problems for both the prosecutor and the police, may socially and economically ruin a falsely accused man, and causes unimaginable emotional challenges for the victim. But the crime of rape is perhaps even more problematic for all concerned when the assailant is someone known and trusted by the victim—such as a friend, a relative, or worst of all, a spouse. It is obviously most difficult to prove lack of consent in a spousal rape situation, and frequently victims of spousal rape will not report the crime.

Underreporting and social stereotyping of women has made marital rape one of the most misunderstood crimes of the modern era.² Despite the social and legal condemnation of all types of domestic violence in its many forms, the very concept of marital rape is a legal problem unique to the latter half of the twentieth century. This is not to imply that there were no cases prior to this time where a wife accused her husband of rape. On the

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¹ JOHN STUART MILL, THE SUBJECTION OF WOMEN, 1869.
² For purposes of time and space considerations, this Note will focus on marital rape as the act of a husband having forcible sex with his wife against her will. This is not to imply that the opposite situation – a wife forcing her husband to have sex against his will through the use of violence, coercion or threats – does not exist, nor that forced sex between cohabitees is not as serious a crime as “marital” rape.
contrary, this subject has been discussed frequently over the course of time. However, due to overwhelming legal precedent, social custom, and religious attitudes, the act of a husband having forcible sex with his wife was not viewed as the crime of rape in any nation—until now.

Despite the criminalization of this act in England and the Republic of Ireland, some men still do not realize that it is legally possible for a husband to rape his wife. Conversely, some women do not realize that men could not previously be charged with the act of raping his wife. Yet even on the rare occasion when charges are brought, the case often becomes a swearing contest between the wife and husband, as the hard evidence of the woman’s lack of consent is simply not as obvious as it might be in an “ordinary” rape situation. This absence of evidence often lends support to the notion that accusations of marital rape are made by women who are vengeful, seeking to gain financially from their tale during a divorce action, or somehow mentally unstable, and that women who are abused or raped by their husbands (or lovers or boyfriends) and stay in the relationship must derive some form of pleasure or martyr-like satisfaction from doing so. Thus, when combined with societal attitudes towards women and the crime of rape in general, the ineffective treatment of marital rape by the judiciary and legislature reinforces negative societal connotations of woman as the weaker sex who must be protected by man. The role of the man as the superior being is therefore upheld, and the state allows the cycle of violence to continue.

Even with significant changes in concepts of criminal law in society, marital rape is often still viewed as merely a subsection of domestic violence. Legally, this could not be less accurate. There are many indications, however, that if the rapist spouse is even prosecuted, he often receives a more lenient sentence than someone who is convicted of raping a stranger. The rationale for this sentencing discrepancy is the preservation of marital harmony and privacy in the home, combined with the still prevalent social attitude that, due to the very nature of marriage vows, a man cannot rape his wife. In other words, once she says “I do,” nonconsensual sex with one’s lawfully wed wife can never be “unlawful”—the wife can never again say to her husband, “I won’t.”

Despite advances in the rights of women in both of the United Kingdom and the Republic of Ireland, recent backlashes against feminist jurisprudence and feminism in general threaten to undermine all advances made in the

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protection of the "class" of people known as "wives." The purpose of this note is to discuss the subject of marital rape in the context of the common law legal systems of England and the Republic of Ireland. This note will explore the origins of the crime, the concept of spousal exemption from rape charges, the modern societal and legal implications, and the responses of the societies, legislatures and judicial systems of these nations. This note will also examine the changes that have been made in both countries, and what positive results (if any) women can expect from these changes. Further, this note will examine whether the removal of the spousal rape exemption has had its desired punitive and preventative effects on husbands by examining the sentencing trends of both nations. In this day and age, there is no reason for wives in any country to be placed in the position of second-class citizenship by permitting the continued recognition of the spousal rape exemption in any form.

II. HISTORICAL BACKGROUND

According to feminist theory, women have been subjugated to male desires and wishes since the dawn of the species.4 Because of nature's design of the female and male bodies, woman was forced by nature to accept man as the protector and the subjugator, and thus woman became dependent on man after centuries of "domestication by protective mating."5 Over time, as humans began to band together into protective communities, the societal view of woman as chattel predominated, and if someone physically harmed a man's wife or daughter, he had effectively committed "a crime against the male estate."6 In early Roman law, the crime was known as "raptus," which was a form of violent theft that could apply to both property and persons.7 The crime itself was defined not in relation to its impact on the victim, but in its effect on the man who controlled the woman's family.8

It is thus necessary to examine the role of the wife in preceding societies to fully understand the development of modern laws regarding the rights of

4 SUSAN BROWN MILLER, AGAINST OUR WILL 16 (1975).
5 Id.
6 Id. at 17.
8 Alexander, supra note 7.
women in general, and specifically the legal rights of married women.

Historically, husbands have had the right (or obligation) to force wives into obedience through discipline or chastisement, and the male has been assigned the multiple roles of master, protector, disciplinarian, judge and jury regarding his wife. It was believed that an unruly woman, especially an unruly wife, could wreak havoc in both the home and society, and if such conduct was widely tolerated by men, the woman’s unchecked actions could weaken the societal structure.

Ancient Rome certainly viewed empowered women as a threat. For example, after a group of Roman women publicly gathered to protest a law restricting their dress code, one Roman consul stated, “Woman is a violent and uncontrolled animal, and it is useless to let go the reins and then expect her not to kick over the traces. You must keep her on a tight rein... Women want total freedom... Once they have achieved equality they will be your masters.” The sexual obedience of women was of the utmost concern to a husband due to the legal structures that controlled property, inheritance and illegitimacy. If suspicion existed regarding the legitimacy of a male child, there would be substantial interference with inheritance rights. Thus, the chastity of the wife was important to the head of the household, and the laws evolved to reflect that concern. Because adultery was the precursor to illegitimate children, and the drinking of wine was considered a precursor to adulterous behavior by a woman, both were crimes punishable by death in ancient Rome. While drinking later became punishable only by divorce, infidelity remained a capital offense without legal appeal for the woman. However, the wife had no legal or social remedy for the same kind of sexual behavior by her husband. “If you should take your wife in adultery, you may with impunity put her to death without a trial—but if you should commit adultery or indecency, she must not presume to lay a finger on you, nor does the law allow it.” The Roman government chose not to get involved in domestic quarrels, allowing the husband’s dominance over his wife to be complete. Left without legal

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10 Id. at 38.
11 Id. at 37-38.
12 Id. at 37.
13 Id. at 36.
14 Id. at 37 (quoting Cato the Censor’s speech, found in JULIA O’FAOLAIN & LAURO MARTINES (eds.), NOT IN GOD’S IMAGE: WOMEN IN HISTORY 126 (1974).
recourse for any abusive behavior emanating from her husband, the wife's subjugation was effectively given the government's stamp of approval.

In the period immediately preceding the Punic Wars (202 B.C.), the women of Rome began to enjoy some legal emancipation. Divorce was permitted, but this right was generally only exercised in extreme cases of brutality by the husband, and usually only by the wealthier women.15 In fact, the increase in the rights of wealthy women were viewed with suspicion by the lower classes, and, over time, the lower classes became attracted to a more conservative religious sect known as the Christians. This relatively new religion placed great emphasis on man as the head of the marriage, which appealed to the traditional values of the lower classes. Thus, Rome's advances in the status of women were replaced with the submission required by patriarchal religions.16

In most of the world's major religions, the laws have placed great emphasis on the submissive status of women. Both the Talmud and all of the many translations of the Christian Bible refer to the fact that women must subjugate their desires to those of their husbands and the other men in their lives, or face punishment for their impudence.17 Women in other major religions have fared no better,18 either under strict and literal interpretations of various scriptural passages, or under misinterpretations of religious dogma combined with the socially accepted role of man as master. For example, while there are many passages in the Judeo-Christian Bible that refer to the wife as the helpmate of the husband, there are more passages that refer to the man as the "Godhead" of the household and the master of the family.19 Similarly, many of the passages in the Koran have been interpreted to show that women have less value in the eyes of the law, and therefore the wife must only do her husband's bidding. A literal reading of many of

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15 DOBASH & DOBASH, supra note 9, at 39.
17 See generally DOBASH & DOBASH, supra note 9, at 40-43 (discussing various biblical passages referring to the subordinate status of women in the eyes of the church), and BROWNMILLER, supra note 4, at 19-24 (discussing Hebraic beliefs regarding the proper station of women and their duty to maintain their chastity).
18 See generally BROWNMILLER, supra note 4, at 18-19 (noting that the Babylonian woman "was either a betrothed virgin, living in the house of her father, or else she was somebody's lawfully wedded wife and lived in the house of her husband").
19 DOBASH & DOBASH, supra note 9, at 42-43.
those passages, however, indicate that women and men are to be treated equally in the eyes of the law.20

Further, the marriage rituals of almost every major religion contain some ideology underscoring the view of woman as the property of man. For example, Christianity traditionally requires that the wife promise in her marriage vows to "honor and obey" her husband, "forsaking all other, to keep only unto him as long as both shall live."21 Other cultures have required a dowry, which ensured that the new husband would have adequate wealth to care for his new property.22 Under Roman law, the woman's father would provide goods for the new husband and wife, which was known as the dos: "All that property which on marriage is transferable by the wife herself or by another to the husband with a view of diminishing the burden which the marriage will entail upon him."23 The concept of a "bride price" was meant to ensure that the new husband was actually buying the person and services of a virginal wife, who was chaste and free from disease. Under early Hebrew law, the bride price was fifty pieces of silver for a virginal wife.24 This price was reduced where the male was buying a non-virginal mistress or slave from her former male owner. Where a woman's chastity was in doubt, both her property value to her husband and the honor of her family was considered questionable. Often, the unchasteness of the woman was the result of rape, but this typically did not diminish the societal view that she had somehow conspired with the man in the loss of her chastity by rape.25 Thus, her diminished value was somehow her fault, no matter what circumstances brought about that result.

The ancient Hebrews had many views regarding the rape of a woman, and had varying penalties for raping married and unmarried women. Where the rape occurred was also relevant to the sentence meted out for the crime. If she was a virgin at the time of the rape, and the act occurred within the city, both the woman and her assailant were viewed as culpable, and both were subject to death by stoning. If she was raped outside the city, the assailant

21 JOSEPH BRIDGES MATTHEWS, A MANUAL OF THE LAW RELATING TO MARRIED WOMEN 235 (1892).
22 See generally Spatz, supra note 20.
24 BROWNMILLER, supra note 4, at 18.
25 Id. at 16-24.
was ordered to pay her father for the damage he had inflicted on the father’s property and was forced to marry the woman. However, if the woman was a virgin and had already been engaged to someone, the assailant was not given the option to purchase her. He was stoned to death, and she was sold to whomever would have her. Yet a married woman who was raped by a stranger was always viewed as somehow responsible for her attack, and thus her husband was permitted to have her and her assailant stoned to death.26

The Catholic Church and the Christian faith reigned supreme in the Anglo-Saxon world of the Middle Ages, when many laws that still influence the modern world first came into effect. Medieval law supported the theory that women were the subjects of men and removed all authority from women.27 For example, the age-old tradition of “bride capture” remained in force in England until the fifteenth century. That tradition allowed a man to kidnap a woman, rape her, and thus force her family into granting the marriage right to the abductor.28 Bride capture was an alternate way to gain possession of the wife without first obtaining her family’s consent, but the male abductor was still required to pay the bride price to her father when all was said and done. Bride capture was theoretically similar to the ancient legal practice of purchasing a non-virgin from her father, thereby relieving the father of his “burdensome property.” Where a rapist was given a death sentence, the raped girl could prevent her rapist from receiving the death penalty by agreeing to marry him; this served as another form of bride capture.29 The practice was also known as “stealing an heiress.”30 The problem was that bride capture allowed the lower classes to gain entry to the titled and landed families. Through the acquisition of the woman, the man also gained possession to part of her family’s property and money, as well as any dowry that would have accompanied her marriage.31 All of these ancient practices underscore the theme of women as property, which gave rise to later legal fictions regarding the position of both unmarried and

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26 Id. at 19-20.
28 BROWNMILLER, supra note 4, at 17.
29 Schelong, supra note 27 (citing BROWNMILLER, supra note 4, at 7, 15).
30 BROWNMILLER, supra note 4, at 16.
31 Bride capture was probably eliminated as a method of obtaining a wife in England before the time that Elizabeth I came to the throne, for obvious reasons.
married women. These fictions, in turn, gave rise to the legal definition of the crime of rape, and the spousal exemption for rape.

III. LEGAL HISTORY

Three important legal fictions existed at common law that specifically dealt with women—woman as chattel, couverture, and the unities theory.

First, the “woman as chattel” theory stated that a woman was first the property of her father, and on marriage became the property of her

32 In a shocking story of “creative sentencing,” a judge in Cherokee County, Georgia, sentenced a man to marriage after he threatened to kill his girlfriend and their child. The judge stated that this sentence would give the man a legal obligation to support the child. The sentence, of course, leaves no room for the feelings of the woman. While not quite spousal rape, this sentence underscores the fact that modern law has not escaped its historical underpinnings. See Man Follows Orders, Weds Girlfriend He Threatened, ORLANDO SENTINEL, January 21, 1998, at A12.

33 Lest anyone think that the modern world has come very far from its traditional origins, see the case of People v. Moua, No. 315972-0, (Cal. Sup. Ct., Feb. 17, 1985). There, a Hmong male emigrant from Laos kidnapped and raped a Hmong woman, acting out his tribal tradition of bride capture as the appropriate way to gain a wife. Their tradition requires that the man take the woman to his family’s home for three days in order to “consummate” the marriage. In theory, the woman is supposed to protest the act so that she can demonstrate her own virtue and protect her family’s honor, but in the traditional act the man ignores her protests, recognizing them as nothing more than part of the game. Here, however, no meant no and the woman’s family filed rape charges against the man. The judge allowed a cultural defense (to an extent) and permitted the man to plea bargain. He pleaded guilty to false imprisonment (a misdemeanor), and the charges of rape and kidnapping were dropped. He was sentenced to 90 days in jail and ordered to pay the woman’s family $1,000. The act occurred in 1984, and the matter went to trial in February, 1985, in Fresno, California. See generally Deirdre Evans-Pritchard and Alison Dundes Renteln, The Interpretation and Distortion of Culture: A Hmong “Marriage by Capture” Case in Fresno, California, 4 S. CAL. INTERDISC. L.J. 1 (1994). In another case involving a Hmong bride capture, a Hmong father and son pleaded no contest to a conspiracy charge. The two men kidnapped a 15 year old Hmong girl in California and took her to their home in Boulder, Colorado. The girl notified neighbors that she had been taken against her will. The two men received no jail time, were not fined, and charges were to be dropped against them if they “behaved” for a year. Interestingly, the men tried to press charges against the girl’s family for failure to return the bride price of over $8,000 that they had paid to the family. See Kidnapping Custom, ATLANTA J.-CONST., Nov. 7, 1991, at A24, available in 1991 WL 7833951. Allowing these uses of “traditional practice” as a defense indicates that the judiciary still enshrines some ancient beliefs regarding women.
Therefore, if a woman was merely property, she had no individual human rights, and the husband who perpetuated rape on his wife was "merely using his own property" in a manner that he saw fit.35

"Couverture" was the term used to describe the legal status of a married woman. By definition, it meant "the condition or state of a married woman . . . the legal disability that formerly existed at common law . . . whereby the wife could not own property free from the husband’s claim or control."36 Being thus "legally disabled," the wife had no recognizable legal rights independent of those shared with her husband.

An offshoot of the couverture idea was the unities theory.37 According to the theory, upon marriage the husband and wife became one entity, and that one was the husband.38 Thus, the few rights that the wife enjoyed as a single female merged with the rights of the husband on marriage. The result was that the wife could no longer own property, could not sue or be sued, could not enter into contracts or make wills, and could not keep any money she earned or manage her own property.39 The wife was no longer recognized as a person in the eyes of the law. In his Commentaries, Sir William Blackstone stated "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated [into her husband]."40 The idea behind the unities theory was to inspire and perpetuate marital harmony. With only one person in the household who could give orders, there could be no confusion as to the identity of the master. "[S]o long as the marriage relation continues, the law allows . . . but one will between them, which is placed in the husband as the fittest and ablest to provide and govern the family."41

It is believed that the "modern" concept of a marital exemption from the crime of rape arose from a statement made by Sir Matthew Hale in the

34 Schelong, supra note 27, at 86.
37 Schelong, supra note 27, at 86.
40 Schelong, supra note 27, at 86.
41 MONTAGUE LUSH & WALTER HUSSEY GRIFFITH, THE LAW OF HUSBAND AND WIFE 3 (2d ed. 1896).
seventeenth century: "[A] 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."\(^\text{42}\) Despite the fact that Hale cited absolutely no legal authority for his statement, it reigned supreme in the English-based judicial systems for over two hundred years as the reason for the continued recognition of the exemption.\(^\text{43}\) The statement itself, through judicial repetition over the centuries, resulted in the perpetuation of a common law policy prohibiting a married woman from pressing charges against her husband for a crime that, had it been committed by anyone else, would have resulted in at least a jail sentence. Commonly referred to as the "implied consent theory" or "Lord Hale's contractual theory,"\(^\text{44}\) Hale's statement led to the belief that because a woman gave her consent to sexual relations with her husband at the time they were married, he could forever assume that the original consent still applied.

As time passed, several justifications were offered for recognizing a marital rape exemption. Among the fears of jurists was that if rape was recognized as a crime that men could perpetuate on their wives, then women would fabricate rape charges against their husbands and use these charges for some kind of revenge.\(^\text{45}\) Additionally, the fear existed that recognizing crimes within the marriage would permit state intrusion into the privacy of the marriage, thus prohibiting the man and wife from reconciling their problems on their own.\(^\text{46}\) The exemption was also justified on the grounds that marital rape was simply not as serious as other types of rape, and that wives were adequately protected by other legal ideas such as assault statutes, which typically provide less severe penalties.\(^\text{47}\)

\(^\text{42}\) Schelong, supra note 27, at 87 (quoting \textit{MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN} 629 (S. Emlyn ed., 1786)). This quotation is cited in almost every court case dealing with the marital rape exemption. \textit{See, e.g., Warren, 336 S.E.2d 221, 223 (Ga. 1985)} (noting also that Hale stated "[b]ut of all the difficulties in evidence, there are two sorts of crimes that give rise to the greatest difficulty, namely, rapes and witchcraft . . .").

\(^\text{43}\) State v. Smith, 426 A.2d 38, 41 (N.J. 1981) "Thus the marital exemption rule expressly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some [three hundred] years ago. Such a declaration cannot itself be considered a definite and binding statement of the common law, although legal commentators have often restated the rule since the time of Hale without evaluating its merits." \textit{Id.}

\(^\text{44}\) \textit{Id.}

\(^\text{45}\) \textit{Liberta, supra} note 3.

\(^\text{46}\) \textit{Warren, 336 S.E.2d 221.}

\(^\text{47}\) \textit{Liberta, supra} note 3, at 166.
The 1800’s saw many changes in the social order, and a combination of occurrences led to greater power and rights for women. The Industrial Revolution was in full swing, permitting women to work outside the home. This led to some degree of financial independence for women, with the result that for the first time, women could financially find a way to leave abusive husbands. Also, the Married Women’s Property Acts recognized the right of working women to keep the money that they earned at their own jobs. Finally, the English jurists were beginning to doubt the legal validity of Hale’s implied consent theory and to realize it might not be sound to apply it in all situations carte blanche.

IV. Analysis

Unquestionably, the modern trend has been towards greater recognition of the equal rights of wives in the criminal justice system. This has facilitated the demise of the marital rape exemption in England and the Republic of Ireland, but serious discrepancies still remain in the recognition of the crime of marital rape by legal authorities and legal scholars, and in the sentences given to convicted marital rapists. This section will examine the current status of the exemption in both of these nations.

A. The United Kingdom

The marital rape exemption officially began in England with Matthew Hale’s utterance in History of the Pleas of the Crown. Hale cited absolutely no authority for this idea, but it was apparently based on the centuries-old notions of woman as the chattel of her husband and the unity of the husband and wife on marriage. Through centuries of judicial repetition, this quotation became the common law of England, and by

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48 Lush and Griffith, supra note 41, at 111 (noting that these laws “protect[ed] against the marital right of the husband whatever the wife . . . earned, separately from her husband, by her own independent skill and labor”).
49 Hale, supra note 42, at 629. Note, however, that Hale did believe a concubine could withdraw her consent to sex. Id. at 628-29.
50 See generally Smith, 426 A.2d 38.
adoption, the law of Scotland,\textsuperscript{51} the Republic of Ireland,\textsuperscript{52} and the United States.\textsuperscript{53}

In spite of Hale's statement on the common law, the English courts recognized that a wife could be legally separated from her husband as early as 1721, and that the husband no longer had a right to "confine" his wife if they had mutually agreed to separate.\textsuperscript{54} In the case of \textit{Popkin v. Popkin}, [1794] 1 Mag. Ecc. 765, a suit by a wife for divorce \textit{a mensa et thoro},\textsuperscript{55} the Ecclesiastical Courts of England recognized that "[t]he husband has a right to the person of his wife" but with the qualification "but not if her health is endangered,"\textsuperscript{56} thus setting up the first exception to the marital rape exemption. There were, however, cases that also suggested exactly the opposite, holding that the husband had the right to confine his wife so long as they were married.\textsuperscript{57}

The English courts began to doubt the absolute validity of Hale's assertion on record in 1889 with the case of \textit{Regina v. Clarence}.\textsuperscript{58} Although the majority still believed that "marital rape" as a crime did not exist, Justice Wills (in a separate statement, but still agreeing with the majority) stated that he did not believe that "as between married persons rape is impossible."\textsuperscript{59} In the dissent, Justice Field stated: "The authority of Hale, C.J., on such a

\textsuperscript{51} See generally Daniel Kelly, \textit{The Reassessment of Rape in Marriage}, 35 J.L. Soc. SCOTLAND 3 (1990). That statement appears to have been the basis for Lord Hume's statement in Scotland explicitly recognizing the marital rape exemption in that country.

\textsuperscript{52} See § B, infra, page 160. The Republic of Ireland appears to have adopted the common law lock, stock and barrel without question, except for minor changes in the 1937 Constitution that gave even more protection to the sanctity of the family. It also provided greater protection against state intrusion in domestic relations law.

\textsuperscript{53} Many of the constitutions of the individual States of the United States of America have provisions explicitly adopting the common law, except where altered by statutes or the constitution (see, for example, the constitutions of the State of New Jersey: N.J. CONST. OF 1776, ART. XXII; N.J. CONST. OF 1844, ART. X, § 1; N.J. Const. (1947), Art. XI, § 1, par. 3.).

\textsuperscript{54} Rex v. Lister, 1 Strange 477, 93 Eng. Rep. 645 (1721) (setting out very specific grounds under which a husband had the right to restrain his wife); Regina v. Jackson, [1891] 1 Q.B. 671. See also LUSH AND GRIFFITH, supra note 41, at 5.

\textsuperscript{55} A divorce \textit{a mensa et thoro} is "[a] divorce from bed and board." BLACK'S LAW DICTIONARY 985, 6th ed. 1990.


\textsuperscript{57} Atwood v. Atwood, 24 Eng. Rep. 220 (ch. 1718); \textit{In re} Cochrane, 8 Dowl. 630 (1840).

\textsuperscript{58} Regina v. Clarence, [1889] 22 Q.B.D. 23 (1888).

\textsuperscript{59} \textit{Id.} at 33 (emphasis added).
matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be guilty of a crime." Despite the good intentions of the justices, however, the overall authority of the exemption remained intact in the wake of their decision.

In the late 1940’s and early 1950’s, the English courts heard two pivotal cases regarding the common law exception that had considerable impact on the validity of Hale’s rule. In 1949, the case of *R. v. Clarke* established the first exception to the exemption in cases where the husband and wife were judicially separated. Where such a separation existed, the implied consent of the wife was considered to be plainly revoked in terms even her husband could understand. In 1954, Justice Lynskey stated that a mutual separation agreement would also be sufficient to establish revocation of the wife’s consent. However, he added that where the wife merely left her husband and filed for divorce, her actions were not sufficient for her marital consent to have been revoked. “Can I say that because the wife has left her husband and has brought a petition for divorce that one must infer a revocation of the wife’s implied consent? . . . I cannot see that, because a petition for divorce has been presented, that has any effect in law upon the existing marriage. It is not until a decree nisi, or possibly a decree absolute, has been pronounced that the marriage and its obligations can be said to have been terminated.”

Twenty years later, the exceptions to the marital rape exemption were further limited and delineated by the decision of Lord Lane in *R. v. Steele*. There, the parties had separated and the wife had sought a protective order against her husband, which had not yet been issued when the rape occurred. Lord Lane found that there, because a mutual agreement or some other official withdrawal of consent had not been obtained, the wife’s actions were insufficient to permit the husband to be charged with rape. “A separation agreement with a non-cohabitation clause, a decree of divorce, a decree of judicial separation, a separation order in Justice’s court containing a non-

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60 *Id.* at 57.
63 *Id.*
cohabitation clause and an injunction restraining the husband from molesting the wife or having sexual intercourse with her are all obvious cases in which the wife’s consent would be successfully revoked.” However, merely seeking a protective order was somehow insufficient to revoke the wife’s consent.

A new phase of the controversy began later that year when the common law crime of rape in England was replaced with a statutory definition in the Sexual Offenses (Amendment) Act. In that Act, the definition of rape included the phrase “unlawful sexual intercourse with a woman,” and therefore it was presumed that the statute preserved the common law marital exemption. Sexual intercourse between a husband and wife is, under the common law definition of the word, not “unlawful.” In several subsequent cases, in fact, the justices decided that, based on the wording of the statute, the exemption was alive and well in England.

Ten years later, in 1986, the judiciary began to expand the list of exceptions to the marital rape exemption, including cases in which there was a mutual separation agreement, a judicial separation decree, a protective order, or a decree of divorce. However, all of this judicial activism was reversed in 1990 when the English Law Commission published a paper entitled Rape Within Marriage. That paper stated that the common law marital exemption still existed in England in its general form at that time.

65 Id. at 25.
66 Sexual Offenses (Amendment) Act of 1976, 1976 Public General Acts and General Synod Measures (vol. 2) 2027, ch. 82 (Eng.).
67 Id. See also Daniel Kelly, supra note 51.
69 Roberts, Crim. L.R. 198. There, the judges rejected the defendant’s contentions that the wife’s implied consent became effective again after a non-molestation injunction expired.
71 It is interesting to note that one year earlier in Scotland, with its own separate legal system and without a statutory definition of rape, a judge found the marital rape exemption to be inapplicable in modern times. See generally S. v. H.M. Advocate, 1989 S.L.T. 469. There, the judge reviewed the history of the exemption in Scotland, finding it based on Baron Hume’s statement in 1 HUME ON CRIMES 306, 46th ed. (1844). (“[T]he husband . . . though he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may however be accessory to that crime . . . .”) The judge declined, however, to follow that theory or any of the English case law and held that, even though reasons may have existed in the past for recognizing an exception, there was no longer any reason to recognize it in Scotland. S. v. H.M. Advocate, 1989 S.L.T. 469.
The paper could have ended all questions regarding the status of the exemption in England but for three crucial cases heard by the English judiciary in 1991.

The first of these was the case of *R. v. R.*\(^{72}\) There, the wife had left her husband and moved in with her parents. The husband told his wife on the telephone that he was “going to see about a divorce,” and then broke into her parents’ home and raped her. The trial judge found that the wife could unilaterally withdraw her consent to sexual relations with her husband by withdrawing from cohabitation and thus clearly indicating her withdrawal of the implied consent. The judge left the factual issue of the rape to the jury, but the husband pleaded guilty before trial. Justice Owen found that in this situation, where the wife had moved out and the husband telephoned to discuss getting a divorce, the unilateral actions of each of the parties clearly led to a mutual understanding from which the wife’s non-consent could be implied.\(^{73}\) This was an expansion of previous case law doctrine as here, the actions of the parties alone were sufficient to establish the wife’s lack of consent. No further judicial actions were needed to make the arrangement binding.

In *R. v. C. and another,*\(^{74}\) Justice Simon Brown began his opinion with the statement, “[h]appily, perhaps, my ruling matters substantially less in this case than in many others,”\(^{75}\) noting that the other charges that the defendant faced were equally serious as rape. Therefore, his decision regarding whether the exemption still existed in English law would not “materially affect this accused’s eventual fate.”\(^{76}\) He found, however, that “the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give.”\(^{77}\) His statement officially recognized the end of Hale’s exemption.

The third case was *R. v. J.*\(^{78}\) There, Justice Rougier noted at the outset of his decision that in neither of the previous marital rape cases had the defense submitted the argument that, under the Sexual Offenses (Amend-
ment) Act of 1976, the common law marital rape exemption was apparently preserved by the use of the word “unlawful”; therefore, a husband could not be convicted of the rape of his wife for the reason that such sexual intercourse is not “unlawful.” His opinion reviewed most of the marital rape cases of the twentieth century, as well as the Parliamentary reports and legislation on the subject, and he decided that the exemption still existed. Although he was not happy with this conclusion, he made it quite clear that he felt constrained by the state of the law as it existed at the time, and that he could not unilaterally declare an end to the exemption, as it was Parliament’s job to do so. Noting Justice Brown’s opinion in R. v. C. with admiration, he stated:

[He] was prepared boldly to cut the Gordian knot and to hold that the statement of the law of Scotland as appears in the recent case of S. v. H.M. Advocate 1989 S.L.T. 469 should apply to England too, in other words to sweep away an out-of-date rule and to declare that the marital exemption no longer existed.

If I felt free to do so I should certainly follow this eminently sensible line. To anyone accustomed to the late twentieth century equality of the sexes it must be totally repugnant that a wife is deemed by no more than what is a fiction to consent to submit to her husband’s demands for sexual intercourse whatever the circumstances . . . It is true that there is a danger that the abrogation of the rule might lead to a spate of false claims from spiteful or disgruntled wives, but that I consider is something with which the trial process will have to deal . . . [But the] intervention of the statute has precluded any up-to-date declaration of the state of the common law on this subject. The matter has now become one of statutory interpretation and remains so . . . [It] seems to me that if Hale, CJ’s rule is to be declared no longer law it is for Parliament alone to declare it. I only express the hope that this case may play its small part in advancing such a declaration.

79 Id. at 760.
80 Id. at 765-66.
Justice Rougier made it very plain that he would like to rule as Justice Owen did in *R. v. R.* in that same year, but that he could not because he felt that Owen had not been faced with an argument concerning the word “unlawful” in the 1976 statute. “In any event the case seems easily explicable on the basis that it fell within the previously defined category of unambiguous agreement following a court order.”81 Thus, had Justice Owen been faced with such an argument, he could still have ruled as he did in *R. v. R.* because the judicially recognized exceptions were present. However, those same considerations were not before Justice Rougier.

The Court of Appeal, Criminal Division, sided with Justice Owen’s conclusions at the trial court level in the appeal of *R. v. R.* The appellate court described the three preceding opinions as three possible alternatives or interpretations of the problem regarding the common law exemption.82 They found that in the first instance, which they entitled the “literal solution,” the 1976 Act’s use of the word “unlawful” did in fact seem to preserve the common law exemption.83 However, if this interpretation was the correct one, it would overrule all of the prior case law setting out exceptions to the common law rule.84 This choice was found to be unacceptable.

The second alternative was called the “compromise solution,” and said that the word “unlawful” ought to be construed to allow all of the exemptions that had been established in modern times to still apply in marital rape cases.85 The drawback to this idea was that it would permit additional exceptions to be identified in the future. The court felt that this would eventually lead to similar problems of definition and interpretation in the future, and thus lead to instability in domestic relations law. (For example, one such problem would be how to define “withdrawal from cohabitation”.)86

81 *Id.* at 768.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.* at 609-10. The court further noted that this compromise position had been tried in New Zealand and was found to be “unworkable.” *Id.*
The third interpretation was called the “radical solution”, and stated:

Hale’s proposition is based on a fiction and moreover a fiction which is inconsistent with the proper relationship between husband and wife today. For the reasons expressed . . . in S. v. H.M. Advocate, 1989 S.L.T. 469, it is repugnant and illogical in that it permits a husband to be punished for treating his wife with violence in the course of rape but not for the rape itself which is an aggravated and vicious form of violence.\(^\text{87}\)

The court noted that in choosing the third option, it might be trampling on the realm of Parliament. However, because the world had changed so drastically since the time that Hale first stated the exemption, the idea had become a mere legal fiction. Therefore, the court held that “a rapist remains a rapist subject to the criminal law, irrespective of his relationship with the victim. . . . This is not the creation of a new offense, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.”\(^\text{88}\)

The court dismissed the defendant’s appeal but certified the question to the House of Lords as one of general public importance.

The House of Lords reached the case on October 23, 1991. They examined both the Scottish cases and the preceding English cases and found that “[o]n grounds of principle there is now no justification for the marital exception in rape.”\(^\text{89}\) They further found that the use of the word “unlawful” in the 1976 Act was probably surplusage. They reasoned that if the definition was intended by Parliament to mean only “outside marriage,” it would give a contrary meaning to the same word in other laws (such as statutory rape).\(^\text{90}\) The Lords felt that the drafters probably would have been more specific if the word “unlawful” had been placed in the statute merely to overturn the preceding judicial exceptions to the common law exemption.\(^\text{91}\) (Note that the Lords hearing this certified question neither dissented nor wrote separate opinions—it was unanimous.)\(^\text{92}\)

\(^{87}\) Id. at 609.

\(^{88}\) Id. at 611.


\(^{90}\) Id. at 489.

\(^{91}\) Id.

\(^{92}\) Id. at 490.
What makes the tension between previous marital rape case decisions and that of Owen and the House of Lords in *R. v. R.* even more interesting is the consideration of *ex post facto* laws. In *R. v. J.*, Justice Rougier specifically (and somewhat prophetically) mentioned that he felt that the law ought to exist in such a state that a man knows whether his actions will merit criminal sanctions.³ He went to great lengths to ask that when the press reported his decision on the case, they not say that he had found that a man could or could not be held guilty for the rape of his wife.⁴ The consideration of *ex post facto* laws in this area was brought fully into controversy when, on appeal, the husband in *R. v. R.* argued that to convict him of marital rape would amount to an *ex post facto* conviction. Despite the fact that the House of Lords' opinions specifically cited the Criminal Appeals court's wording that this did not create a new crime, the husband appealed his case to the European Court of Human Rights⁵ claiming a violation of Article 7(1) of the Convention.⁶ That court found, inter alia, that a common law court could "exercise their customary role of developing the law through cases" so long as the changes in the law were reasonably foreseeable.⁷ Here, the court reasoned, the underlying law already explicitly contained exceptions to the general rule. Further, as the underlying crime of rape was sufficiently defined in the law, it was possible for the defendant to have had sufficient knowledge to know that his act of raping his wife constituted a crime.⁸

The national debate touched off by this line of cases has been considerable. For example, consider the remarks of Richard White regarding the Law Commission's Working Paper No. 116, *Rape Within Marriage*. He argues that the Commission misses the point when it considers whether a

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³ *See R. v. J.*, 1 All E.R. 759.
⁴ *Id.* at 768 (noting that several exceptions to the exemption already appeared to exist in English case law).
⁶ Council of Europe, Directorate of Information, THE EUROPEAN CONVENTION OF HUMAN RIGHTS, Appendix, Article 7, § 1, § 2 (1968). Article 7 § 1 states that "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed." Section 2 states "This Article shall not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."
⁸ *Id.* at 375, 377.
wife should be "permitted to put her own interests before those of her family by involving the criminal law." (It implies that she should not.) Mr. White proceeds to perpetuate Victorian-era stereotypes of women by stating, "[g]iven the alleged reluctance of many women to consent to intercourse without some degree of persuasion, what would be the effect of the attitude of men to the threat of rape?" His obvious implication is that the abolition of the exemption would have an incredible impact on the viability of the family unit in England.

Professor Emeritus Glanville Williams of Cambridge University wrote a series of articles for the same publication two months later. Calling the working paper "heavily slanted," he intimated that the Law Commission was caving in to the "feminist pressure groups" in revoking the marital rape exemption. "A charge of rape is too powerful (and even self-destructive) a weapon to put into the wife's hands. The best course would be to have a statutory or judicial reversal of [previous case law], so that the husband who forces himself on his wife becomes guilty of an assault as a summary offense. "The reason for keeping marital 'rape' down to the status of a summary offence is that, in my estimation, it cannot be nearly so traumatic for the wife as stranger-rape." His belief is that the social stigma of being labeled a rapist, combined with a prison sentence, is unfair to the husband because "the [stranger rapist] never received consent, while the [husband rapist] has received favour in the past and is now perhaps only temporarily out of favour." He further argues that the act of a husband forcing his wife to have sexual relations should not be labeled as "rape," but instead as a "common assault or other non-sexual offense." He argues that calling the act "rape" encouraged the courts and the juries to impose harsher sentences where they were not merited. "[M]y own vote, if I had a vote, would be for keeping the rape exemption for all husbands, present or discarded, while retaining their liability for assault, and also, of course, their liability for other more serious crimes committed as part of the forcible coition, and for contempt of court if the wife has obtained an injunc-

100 Id. at 1727-28.
102 Id.
103 Id. Note that the husband rapist receives half of the prison sentence of a stranger rapist.
None of these suggested offenses carries a significant penalty when compared to the fact that, in England, depending on the circumstances of the case, a rapist can receive a life sentence for his actions.\(^{106}\)

The English judges have apparently shared Professor Williams’ view regarding the severity of the offense. Because rape in England is not a crime of violence, the husband generally receives a lower sentence for rape than would a stranger unless he uses violence in the extreme.\(^{107}\)

There was a predictable uproar against Professor Williams’ comments. What is clear, however, is that had his ideas been given credence by Parliament, the marital rape exemption would persist. Alternately, if the judicial exceptions provided the only safe harbor for a wife in a marital rape situation, deterrence would be undermined. Under the exceptions, the offending husband typically received an incredibly lenient sentence, no matter how serious his crimes.\(^{108}\)

Statistics estimate that in London alone, each year 100,000 people seek medical treatment for domestic violence incidents, including incidents of spousal rape.\(^{109}\) This number is greatly debated by anti-feminists in the United Kingdom, who claim that the actual number is significantly lower. The detractors cite factors such as repeat calls by the same women, calls regarding merely the threat of violence versus actual bodily harm, and calls regarding merely the threat of violence versus actual bodily harm, and calls

\(^{105}\) Id.


\(^{108}\) See generally Helen Fenwick, Marital Rights or Partial Immunity?, 142 N.L. JOURNAL 831 (1992) (noting that under Professor Williams’ sentencing guidelines, no distinctions are drawn between former and present cohabiters and strangers who commit rapes, and asking further how long the husband rapist’s immunity is to last). Additionally, the Conservative Party has faced opposition to its attempts to change Britain’s domestic violence laws. See generally Marianne Curphey, The Law and Marriage Go Together, THE TIMES, London, Oct. 28, 1995, at B-1. The ruling party of Parliament was forced to withdraw its Family Homes and Domestic Violence Bill right before it was to go into effect in 1995 after “backbenchers” in its own party argued that the bill itself would “undermine the institution of marriage”, and that it was a charter for “live-in lovers.” The Bill would have given cohabiting couples the same rights as married couples where one party had been forced to leave the home due to the violence of the other party. See generally British Government Drops Bill on Domestic Violence, REUTERS NEWS SERVICE, Nov. 2, 1995, available in LEXIS, International News file.

made by men threatened either by lovers of the same sex or the opposite sex. Allegations are also made that there are "professional parasites [in] the domestic violence racket" who inflate statistics because they are afraid of "the prospect of their easy money drying up."

Clearly, therefore, although the laws of England have changed, and marital rape is now defined as a crime, there is only slightly greater legal protection for married or cohabiting women. The judiciary began the trend away from special treatment for husbands, but it is now in the hands of Parliament to ensure that this class of rapists is not treated differently from any other.

B. The Republic of Ireland

It is interesting to note that before its acquisition by the English, Ireland was ruled by Brehon law. Under that system, the laws governing marriage were not controlled by the church but were instead set by the state. Among other things, there was no theory of unity, women were allowed to own property, and women did not automatically become the property of their husbands on marriage. Domestic violence was illegal, and the abusive husband was required to answer to the wife's family. The wife was permitted to divorce the husband and was allowed to recover her full bride price from him on divorce. Abusive husbands were punished for domestic violence, especially if the wife was permanently scarred as a result of the attack.

With the rise of Catholicism in Ireland, however, the rights of women began to diminish. By the time the English reign in Ireland ended in the twentieth century, the nation was firmly entrenched in the English common law ideals and had a constitution firmly based on Catholic beliefs.

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11 Id.

12 Christine Taylor, Northern Ireland: The Policing of Domestic Violence in Nationalist Communities, 10 Wis. WOMEN'S L.J. 307, 312 (1995) ("[B]rehon law still afforded women more protection from a violent spouse than the English common law").

13 Id.

14 Id.

15 Id.

16 Id.

17 Id.

18 See generally IR. CONST. (1937).
Many of the nation’s social policies are profoundly influenced by the Church and its traditional notions of the roles of men and women in society. For example, divorce was not legalized in Ireland until 1996. The Irish Constitution still acknowledges the family unit as a sort of mini-state within the state, with the husband/father as the holder of all power. In fact, the Constitution delineates the role of the wife as home-maker with astonishing clarity. Domestic violence was not fully recognized as a serious social problem until the 1990’s, due to a combination of the Constitutional emphasis on the privacy of the family and the state’s duty to protect marriage, and overexposure to violence in the form of terrorism.

In the early 1990’s, statistics began to indicate that there was a growing problem of domestic abuse in the Republic. Irish women’s groups, such as the Dublin Rape Crisis Center and the Council for the Status of Women, and female politicians, such as former Irish President Mary Robinson, began to speak out publicly about the issues of rape and domestic violence. That

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119 Id. at art. 41, § 1. Ireland is still under its 1937 Constitution, which refers to “Family” as the “natural primary and fundamental unit group of Society... a moral institution possessing inalienable and imprescriptable rights, antecedent and superior to all positive law.” This, in turn, is based on Pope Pious XI’s Quadragesimo Anno, which pronounces it ‘an injustice, a grave evil, and a disturbance of right order’ for a large institution like the State to take to itself the functions of a smaller one like the family.” Fintan O’Toole, Forcing Women to Live with the Worst of Both Worlds, THE IR. TIMES, Mar. 10, 1993, at 12.

120 IR. CONST. at art. 41, § 2(1): “In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.” § 2(2): “The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.”

121 Id.

122 Id. at art. 41, § 3(1): “The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”

123 See generally Taylor, supra note 112. This type of “social violence” is reported on television almost daily due to the “troubles” in Northern Ireland. The present phase of sectarian violence is commonly held to have begun in 1969. While Northern Ireland is part of the United Kingdom, the common history of the two regions has seen incredible violence for several centuries. Irish stories and ballads make heroes of the men who died in the struggle for reunification. This reinforces the strong tradition of respect in both the north and south for men who stand up for their beliefs and use violence to achieve their goals. Id. at 308.

124 In 1994 alone, the Women’s Aid helpline received 6,000 reports of domestic violence; the overall population of the Republic of Ireland is only 3.6 million people. Mary Cummins, Domestic Violence-Will Men Get the Message?, THE IR. TIMES, Feb. 28, 1995, at 2.
publicity, combined with highly publicized cases of incest, rape, and the nation's first two cases of spousal rape, led to legislative changes in domestic violence law in Ireland.

Martial rape was criminalized by the Irish legislature under the 1990 Rape Act, which came into effect in January 1991. Prior to that enactment, Irish statutory law had specifically codified the marital rape exemption as it existed at common law in accordance with the English model.

The first case to be tried under the provision of the Act had many internal problems (Case A). It reached trial for the first time during the week of July 23, 1992, and was dismissed shortly after the wife began her testimony in the Central Criminal Court. The judge found that the defense had "not been given a statement of all the evidence against the accused man".

The "Kilkenny Incest Case," as it came to be known in the Irish newspapers, was incredibly shocking. A man had subjected his wife and child to over fifteen years of incredible violence. He had been sexually molesting his daughter from the age of eleven years. The other men in the town referred to the girl as "the local bike" and would call her on the telephone at night after the bars closed to ask her "how much she charged" and "what positions" she would perform. Kathy Sheridan, Walls of Fear, Walls of Silence, THE IR. TIMES, Mar. 6, 1993, at 7. While still a teenager, she gave birth to her father's child. (It must be noted that abortion is illegal in Ireland, so the girl, who lived in a rural Irish town with incredibly high unemployment, had few choices regarding the matter.) After being found guilty of incest, which is a misdemeanor in Ireland, the father received a sentence of only seven years. Ella Shanahan, Garda Aid for Crisis Families is a Success, THE IR. TIMES, May 15, 1993, at 5.

In the rape case, a twenty-year old woman named Lavinia Kerwick was date raped by a nineteen year old named William Conry. She broke with the legal tradition that afforded complete secrecy to a rape prosecutrix, and took a very public stance regarding her rape. After being convicted of rape by a jury, Conry received a nine year suspended sentence because Justice Fergus Flood found "mitigating circumstances." Many people in Ireland asked what the result would be in a marital rape case after Justice Fergus Flood found Lavinia Kerwick's date rape case to merit the incredibly light sentence. See generally Mary Cummins, A Watershed Case that Raises Vital Questions, THE IR. TIMES, July 17, 1993, at 7. "Dealing with the legal aspects of the case, Mr. Justice Flood said the maximum sentence a court may impose for rape was penal servitude for life. The sentence to be imposed in a particular case was solely a matter for the trial judge in the independent and impartial exercise of judicial discretion." Kilkenny Rape Case, THE IR. TIMES July 15, 1993, at 4.

See "Case A" at notes 130-133, and "Case B" at note 133, infra.


Due to secrecy laws and other factors, the case name and abbreviations were not obtainable. Therefore, this case is referred to as "Case A."
in advance." Specifically, there was an allegation that the wife had lied to the Garda Síochána, the Irish police force, regarding her husband's motive for attacking her. The case was initially set for retrial in the Central Criminal Court in Dublin in 1993, but was postponed again when the man's lawyers sought a High Court order to quash the case.

Finally, the case went to its second trial on December 7, 1993. The same testimony was presented, with the exception that the wife admitted having had three affairs, and again the husband contended that on each of the three occasions which she was alleging rape, the intercourse had been consensual. During jury instructions, the presiding judge in the case was able to instruct the jury that "the law only recognised rape, not marital rape," because the 1990 Act overturned the previous recognition of the spousal exemption. He therefore cautioned the jury that they had to "accept the law as given by the judge whether they liked [the law] or agreed with it." The eight man, four woman jury unanimously found the man not guilty after deliberating only an hour.

Despite the failure of this case on all fronts, the ensuing reaction of the Irish legal community has generally been positive, unlike the reactions of the English legal scholars.

In March of 1993, the Irish Minister for Justice, Ms. Geoghegan-Quinn, reintroduced the Criminal Justice Bill. That Bill would allow the

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132 Man Accused of Raping His Wife Three Times is Cleared by Trial Jury of All Charges, THE IR. TIMES, Dec. 9, 1993, at 8. In her initial report to the police, the woman had said that her husband was having "jealous fantasies" about her having an affair, but on the stand, she had admitted having affairs with other men. Id.
133 Man in Marital Rape Case Freed, THE IR. TIMES, Mar. 5, 1993, at 2. The second marital rape case in Ireland, which I refer to as "Case B", was to be tried in the same court on March 5, 1993, but was dismissed when the State decided to enter nolle prosequis on all charges on the date of the trial. No reasons appear to have been given regarding that decision. Id.
134 Man Accused of Raping His Wife Three Times is Cleared by Trial Jury of All Charges, supra note 132.
135 Id.
136 Id.
137 The Bill was introduced in 1992 by then Minister for Justice Mr. Flynn. The Bill was never passed by that session of the Dail, which is the Irish legislature. See generally Paul O'Neill & Mary Cummins, Judge Suggests Publication of Rape Case Details, THE IR. TIMES, Oct. 5, 1992, at 6; Dermot Kelly & Michael O'Regan, Minister Reintroduces Bill to Allow
Criminal Court of Appeal to review lenient sentences handed down to rapists. Further, it would require the sentencing courts to consider the impact of the crime on the victim when sentencing the convicted defendant. The sentencing courts would also be permitted to require that the defendant pay compensation to the victim for injury or loss sustained as a result of the defendant's actions. In the same session of the Dail, another representative urged that the judiciary be required to attend "regular seminars on rape and sexual abuse." Later that year, the Minister for Justice proposed that rape victims be given their own separate counsel during the trial of the accused rapist.

In 1994, the Dail also began to recognize problems of domestic violence and rape between cohabiting couples. The Family Law (Protection of Persons), introduced in May 1994, applies to both married and non-married couples and allows an abused person in either type of relationship to seek a protection order or a barring order against the abusive cohabitant. More recently, a Domestic Violence Bill was introduced in the Dail in 1995. That Bill would give greater power to the Garda Siochana to enter a home without a warrant where the abuser has caused the victim actual bodily harm. Further, it would extend the circumstances under which a barring order could be granted to include instances where it is in the best interests of the victim's "mental and emotional welfare."

There have also been negative reactions to the concept of marital rape and the increase in protection for all rape victims. The same Justice who heard the first marital rape case, Mr. Fergus Flood, was sharply criticized in the media for categorizing the victim of a stranger rape as an "entirely innocent"

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138 This bill is obviously a response to the Lavinia Kerwick and Kilkenny Incest cases (see notes 124 and 125, supra).
140 Paul O'Neill, Minister Backs Separate Counsel for Rape Victims, THE IR. TIMES, July 19, 1993, at 7. During the same meeting, the Minister also advocated that changes be made in the prison postal system, stating that the Kilkenny incest victim's father had been sending her threatening letters from prison.
141 Maol Muire Tynan, New Laws to Aid Domestic Strife Victims, THE IR. TIMES, May 18, 1994, at 8. The difference between the two is that a protective order still permits the abuser to enter the family home, but forbids him from making threats or visiting further abuse on the other person, whereas a barring order prohibits the abuser from entering the house.
143 Id.
It was unclear whether he meant to imply that marital rape is a less serious offense than “stranger rape,” as had Glanville Williams. Also, the Criminal Law Rape Amendment Act of 1990 made it a matter of judicial discretion whether to require a corroboration instruction in rape cases. If corroboration were required in a marital rape, a conviction would be almost impossible. Similarly, although evidence of a woman’s past sexual conduct is no longer required to be introduced in a rape trial in Ireland, its admission is still permitted under judicial discretion. If the defendant requests that the information be introduced, it usually is. Evidence of a victim’s sexual history makes it easier for a jury to decide wives cannot be raped. For example, if the husband and wife had recently had consensual sex prior to the time the wife alleges rape, a jury could easily decide that the wife must be lying, and no rape occurred.

While the marital rape exemption in Ireland has been defeated by the legislature, it remains to be seen whether a case will come forward in which the judicial system will apply the law. Further, even if the jury returns a guilty verdict, it is highly probable that the defendant will receive a lighter sentence than a man convicted of “stranger rape.” Effectively, therefore, the wife in Ireland still does not receive the full protection of the law in cases of spousal rape, and the reality is that the husband rapist will probably receive special treatment over that given by the courts to a stranger rapist.

V. CONCLUSION

Both England and Ireland managed to break free from their common law past and take radical legal steps to acknowledge the fundamental right of a wife to control her own bodily integrity. The marital rape exemption in

145 Id. This same Justice imposed only a nine year sentence on a man found guilty of raping a 14 year old girl in 1989, despite the fact that the man left the country when the trial was originally supposed to begin. See Man Jailed for Eight Years for Rape Six Years Ago of Girl, 14, THE IR. TIMES, July 1, 1995, at 16. Similarly, he imposed only a seven year sentence in another rape case after “[t]aking his previous good character into account,” stating that he initially considered the offense “in the nine-to-ten years bracket.” Rapist Jailed for Seven Years, THE IR. TIMES, May 18, 1995, at 4.
146 Id.
England and Ireland no longer exists. In England, the exemption received its death sentence from a forward thinking judiciary at a time when Parliament could not (or would not) change a legal fiction which placed married women at a disadvantage relative to non-married women. Ireland brought an end to the exemption through legislation, although the new law has not yet been successfully tested in court. Further, it remains to be seen in both nations how the courts will address the issue of sentencing the convicted husband rapist. The obvious and vocal anti-feminist backlash against these new laws has created a loud and powerful group who would contend that the husband rapist deserves a much lighter sentence when and if he is found guilty. Should either nation enact a law setting mandatory sentencing below that of non-husband rapists, two problems would follow. First, it would give preferential sentencing treatment to a class of men (husbands) who have committed the same crime as another class of men (strangers). Second, it would provide absolutely no protection for the wife who is raped.

Recent sentencing trends in “stranger” rape cases in Ireland indicate that any rape committed in that nation is not viewed as a serious crime. Thus, it is hard to imagine a judge in Ireland who would find that a husband rapist deserved any type of sentence other than a suspended one. Further, if the defendant husband asked for a corroboration instruction in his trial, the jury would probably get it. Unless the rape itself occurred in front of someone else (such as a child), it is unlikely that the husband would be convicted of marital rape. In England, while a rapist husband stands a higher chance of being found guilty, his sentence would also probably be less than that of a stranger rapist. Thus, in either country, the common law exemption, for marital rape though it has been buried, still rules wives from the grave.