

## RAPE-IN-MARRIAGE: LAW AND LAW REFORM IN ENGLAND, THE UNITED STATES, AND SWEDEN

### 1. Introduction

The issue at law was provocation. The wife earlier had promised her husband that she would have sexual intercourse with him if he visited her that night. But when the time came, she refused him, perhaps because two other women in the hut were sleeping nearby. Angered, the husband beat his wife to death with a stick. He was convicted of murder, but the appellate court thought that his act constituted only manslaughter, since the woman's behaviour had been wrongful. "[S]he had invited her husband to come there and it appears that he had every reason to expect that he would have sexual relations with her."<sup>1</sup>

This 1968 case in Malawi, with its rather bizarre ingredients and (to my mind) unpalatable outcome, includes one of the most extensive judicial observations that I have located in court reports bearing on the long-standing Anglo-Saxon doctrine that a husband may not be charged with rape as a principal for nonconsensual sexual assault by him on his wife:

"The question has been raised whether a wife can lawfully refuse intercourse at any time, that is to say, irrespective of custom and place, etc. In this connection, it would seem reasonable for a respectable wife to refuse her husband, for example, in a public place in front of other people. But in the normal way, I doubt whether she can do so. By 'in the normal way', I mean where there is no question of sickness, monthly period or some other factor which would make it physically wrong or improper to have intercourse . . ."<sup>2</sup>

This is neither sophisticated nor necessarily persuasive, but its significance for my purpose lies in the fact that it represents a commonsense and unusual approach to the ancient Anglo-Saxon doctrine that a husband is *always* to be allowed sexual access to his wife without jeopardy of a criminal charge for rape. Note, for instance, the hypothetical episode portrayed by an American law professor who observes that it would not (and argues that it should not) constitute the criminal offence of rape if a man jumps out from behind a tree and sexually assaults a woman and thereafter discovers that the woman is his wife.<sup>3</sup>

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1. *Rep. v. Mwasumola* (1968) 1966-68 A.L.R. Mal. 569.
2. *Id.*, 572. Another interesting case in this genre is *R. v. Mane* [1948] S.Af.L.R. 196 in which a South African man had sexual connection with a woman he presumed was his wife, since he believed he had followed tribal custom in securing her as a bride. She, however, had not consented to the arrangement. The Court ruled that intercourse was against her will and, because the marriage was not valid without her consent, the act constituted rape. Cf. English, "The Husband Who Rapes His Wife", (1976) 126 *New.L.J.* 1223.
3. Fletcher, "The Right Deed for the Wrong Reason: A Reply to Mr. Robinson", (1975) 23 *U.C.L.A.L.R.* 293, 295-296.

No authorities, it should be noted, dispute that a husband is liable for the crime of assault if he forces sex upon his wife against her will.<sup>4</sup> Indeed, it can be argued that liability for assault provides sufficient protection for the wife against sexual aggression by her spouse. But it seems to me that if there is to be a crime called rape,<sup>5</sup> with its particular social and juridical ingredients, and with a penalty attached to it that usually is harsher than that for assault, then the exemption of a husband from its provisions when the victim of his behaviour is his wife is unwarranted because the factors which, it was thought, should distinguish a husband will presently be shown to be no longer socially viable.

A view similar to this led several American state jurisdictions in 1974 and 1975<sup>6</sup> and South Australia in 1976<sup>7</sup> to amend the traditional rule that nonconsensual sexual intercourse by a husband with his wife could not be prosecuted as rape. These moves reversed an extraordinarily hardy Anglo-Saxon common law precedent that is traced to the *dictum* of Matthew Hale (1609-1676) in his *Historia Placitorum Coronae*, first published in 1736.<sup>8</sup> Though he offered no citations to support the proffered rule, Hale was probably reflecting even earlier standards. A tantalizing throwaway phrase in Lord Audley's case, for instance, cites Bracton in support of the view, said to be derived from the laws of King Athelstan (c.930), that a rape charge would not lie if the accused could demonstrate that the alleged victim was his mistress.<sup>9</sup>

Hale's dictum on rape in marriage in *Historia Placitorum Coronae* occupies but four lines in the 10½ pages devoted to rape offences. It is as follows:

“But 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 the husband which she cannot retract.”<sup>10</sup>

I have attempted to demonstrate elsewhere that Lord Hale's views on this as well as other matters relating to rape, in particular his infamous

4. *R. v. Miller* [1954] 2 Q.B. 282.

5. There has been serious (but negative) consideration of whether the offence of rape itself ought to be eliminated from the codes, and the conduct involved treated as a form of assault or wounding as appropriate. See U.K., *Report of the Advisory Group on the Law of Rape* (1976) Cmd. 6352, 13-14. Cf. S.A., *Criminal Law & Penal Methods Reform Comm. of Sth. Australia, Special Report — Rape and Other Sexual Offences* (1976), 8-11.

6. Jocelynn A. Scutt, in an otherwise fine discussion of the marital rape exemption, erroneously sets the chronology of legislation on the subject: Scutt, “Consent in Rape: The Problem of the Marriage Contract”, (1977) 2 *Monash U.L.R.* 255, 283. The Michigan statute provision that Scutt offers as the pioneering legislation (s.520J(3), Mich. Penal Code) duplicates English case-law that rape can be charged against a husband if there has been an adequate filing for separate maintenance or divorce (e.g., *R. v. Miller* [1954] 1 Q.B. 282). Scutt, however, overlooks 1974 legislation in Delaware and the 1975 enactment in South Dakota (since repealed) which removed the rape marital exemption (see discussion *infra*). In addition, the Swedish law abrogating rape protection for husbands in regard to their mates is set by Scutt in 1975, whereas it was enacted a decade earlier, and was preceded by a similar provision in Danish law (see *infra*).

7. Criminal Law Consolidation Act, 1935-1976 (S.A.), s.73(5); Criminal Law Consolidation (Amendment) Act, 1976 (S.A.), s.12(5).

8. Hale, *Pleas of the Crown* (1736) I, 629.

9. “If the party were of no chaste life, but a whore, yet there may be a ravishment: but it is a good plea to say she was his concubine.” *Audley* (1631) 3 State Tr. 401, 409.

10. Hale, *op. cit.* I, 629.

cautionary instruction,<sup>11</sup> go hand-in-hand with his misogyny.<sup>12</sup> His judicial opinions<sup>13</sup> and his homiletic writings<sup>14</sup> are strikingly antagonistic to the interests of women. Particularly notable in this regard was Hale's performance in 1662 when he presided at the trial of two Lowestoft women accused of witchcraft. Hale ignored powerful impeaching evidence against the 9- and 11-year-old accusers of the "witches", and led the jury with his summation to a conviction.<sup>15</sup>

In this paper, I want to examine Hale's doctrine regarding rape-in-marriage as it evolved into precedent in England and American jurisdictions. It will be shown that, though there has been considerable criticism of the rule,<sup>16</sup> the nature of the judicial process in particular served to inhibit a reversal of policy despite changes in sexual mores which the law of rape ought to reflect. Judicial inertia was considerably assisted by pre-trial procedural screens that kept straightforward rape-in-marriage episodes from reaching the appellate level. Prosecutors, if they took action on a wife's complaint, would charge assault rather than risk dismissal of the case by the trial court or reversal by a higher tribunal. The husband-wife "rape" cases that received appellate consideration, most notably *Clarence*,<sup>17</sup> offered far from rigorous tests of the basic doctrine. What might have the 19th century English judges decreed, for instance, if rather than the facts of *Clarence*, they had been faced by a marital situation involving (as in the non-marital *Wilcox* case in Illinois in 1975) an episode in which the complainant—who had agreed to numerous earlier acts of "regular" intercourse—was tied by her wrists to a clothesline and forcibly subjected to intercourse?<sup>18</sup> To rephrase a legal maxim, a more brutal case might have made better law.

The three jurisdictions to be scrutinized in this paper have devoted considerable attention to the rape-in-marriage rule. The two Anglo-Saxon countries—the United States and England—appear on the verge of following South Australia toward reform. In the United States, the comprehensive revision of the federal criminal code now before Congress includes a provision to allow rape charges by wives against their husbands for acts committed on sites under federal jurisdiction.<sup>19</sup> During debate in England on the Sexual Offences (Amendment) Act of 1976,<sup>20</sup> only Government intransigence about extending reform beyond narrow limits checked a burgeoning move to alter the marital rape exemption. The leading Parliamentary proponent of legislative change on the matter has vowed that he will return to the fray.<sup>21</sup>

11. "[I]t must be remembered . . . that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." *Id.*, 635. The rule, once a mandatory jury instruction in many jurisdictions in the United States, has recently been cast aside by a number of them (*cf. P. v. Rincon-Pineda* 538 P.2d 151 (1975) (Calif.)).

12. Geis, "Lord Hale, Witches, and Rape", (1978) 5 *Brit. J. Law & Soc.* (in press).

13. *Lord Leigh's Case* (1676) 84 E.R. 807.

14. See, e.g., Hale, *Letters of Advice to His Grand-children* (1816), 116-117, 119.

15. *A Tryal of Witches at the Assizes Held at Bury St. Edmunds* (1682).

16. It has been called, among other things, "archaic" (Gordon, *Criminal Law of Scotland* (1967), 831), "uncivilised" (Hahlo, "Rape on Wife?", (1955) 72 *S. Af. L.J.* 93), and "patently absurd" (Clive & Wilson, *The Law of Husband and Wife in Scotland* (1974), 376).

17. *R. v. Clarence* (1888) 22 Q.B.D. 23; *infra*.

18. *People v. Wilcox* 337 N.E. 2d 211 (1975).

19. S.1437, s.1641(a) (96th Cong. 1st Sess., 1977).

20. 1976 c. 82 (U.K.).

21. Ashley in U.K., 911 *Parl. Debs.* (H.C.), 1969 (21st May, 1976).

Sweden has been selected as the third country for review because in 1965 it altered its statute so that husbands could be charged with the rape of their wives.<sup>22</sup> A Swedish governmental commission recently completed a thorough (and, as it turned out, highly controversial) review of the law of sexual offences, which included a brief re-examination of the rape-in-marriage policy.<sup>23</sup> Concern in Sweden about the law of rape, arising in the wake of the Commission's report, has been focused in part on the husband-wife doctrine, and has elicited information on the manner in which the provision has worked. Such data allows some extrapolated assumptions to be made about the course of reform elsewhere.

## 2. The United Kingdom

### (A) R. v. CLARENCE

The *Clarence* case,<sup>24</sup> decided in 1888, was the first instance of English appellate court discussion of the rape-in-marriage doctrine. Paradoxically, though the defendant was *not* charged with rape, the *Clarence* decision served to embalm as precedent Lord Hale's ancient dictum on the subject of marital rape.

Charles J. Clarence had known that he suffered from gonorrhoea when he had sexual intercourse with his wife, Selena. In finding Clarence guilty of "unlawfully and maliciously inflicting grievous bodily harm" and "assault occasioning actual bodily harm", the trial court reasoned that Clarence's "fraud" in concealing his medical condition from his wife had vitiated her consent to intercourse, and that the infection that she subsequently contracted represented bodily harm.

Thirteen King's Bench judges were appointed to review *Clarence* as a Crown Case Reserved,<sup>25</sup> the law in point being unclear. In 1866, in *Bennett*,<sup>26</sup> an uncle, suffering from syphilis, had been convicted of assault on the basis of consensual sexual intercourse with his niece. The following year, in *Sinclair*,<sup>27</sup> a man infected with gonorrhoea had been similarly convicted after sexual congress with a 12-year-old consenting female. In 1878, however, an Irish court had considered substantially the same set of facts in a case involving a couple living in a common-law relationship. It found the earlier English results to be instances "in which a familiar maxim [fraud vitiates consent] was strained and misapplied to reach a person who had undoubtedly been guilty of a great moral offence".<sup>28</sup>

Unfortunately, the prosecution in *Clarence* argued, irrelevantly, that had the prosecutrix resisted her husband's overtures because she knew his condition, and had he proceeded with force, he would have been guilty of rape. The Court of Crown Cases Reserved,<sup>29</sup> in quashing the

22. Swedish Criminal Code, ch. 6, s.1.

23. Sweden, *Sexuella Övergrypp* (1976), 9; *infra* text to n.94.

24. (1888) 22 Q.B.D. 23.

25. The Court of Crown Cases reserved had been established in 1848 as an appellate body, and heard an average of only eight appeals annually from all of Britain on matters of law.

26. *R. v. Bennett* (1866) 4 F. & F. 1105.

27. *R. v. Sinclair* (1867) 13 Cox C.C. 28.

28. *Hegarty v. Shine* (1878) 14 Cox C.C. 124.

29. The *Clarence* judges were, as might be expected, an elderly group (their average age was just short of 68 years), all male, all married, and most upperclass. The four-man minority favoring upholding the trial court included the only two judges in the banc who did not have children. The dissenters also seem to have been men with particularly intense feelings about propriety. It is noted of Day J., for instance, that "where sexual morality was concerned, he knew no compassion, and seemed lost to all sense of proportion": *Dictionary of National Biography* (1912, 2nd. supp.) I, 481, 482.

conviction by a vote of 9 to 4, decided only that fraud as to venereal infection did not vitiate consent for the purposes of assault. This is not to say that the *Clarence* judges failed altogether to attend to the matter of whether nonconsensual intercourse in marriage might involve a charge of rape. The random comments that several of them put forward, often rather cryptically, lend some tentative support to the idea that under normal circumstances a husband could not be convicted of the rape of his wife, but that there might be special circumstances under which he could be so convicted.<sup>30</sup> Wills J. specifically noted the absence of sufficient authority for the idea that rape between married persons is impossible, and he stressed that this was “a proposition to which I am not prepared to assent.”<sup>31</sup> Hawkins J. endorsed Hale’s dictum on husbands’ sexual prerogatives, but then qualified his agreement with the observation that “this marital privilege does not justify the husband in endangering his wife’s health”.<sup>32</sup> Field J., though he found Hale to be a pre-eminent authority, nonetheless noted that “no other authority is cited by him for this proposition, and I should hesitate to adopt it.”<sup>33</sup> Chief Baron Pollock and Smith J. came down on the other side, taking Hale’s principle as an absolute legal right. Pollock C.B. in particular was inexorable, insisting that a wife has “no right or power to refuse her consent” and that the “connection may be accompanied with conduct which amounts to cruelty”.<sup>34</sup> Stephen J. pointed out that the view expressed in the first edition of his treatise, that a husband might under some circumstances be indicted for the rape of his wife,<sup>35</sup> had not been repeated in the latest edition, implying possibly (though not necessarily) that he had changed his mind.

The comments in *Clarence* upon rape-in-marriage amounted to little more than stray, unfocused observations. But later, these inconclusive musings would come to serve as a major basis for more fixed judicial views upholding Lord Hale’s statement on the inviolability of the husband’s right of sexual access to his spouse.

English cases since *Clarence* have concentrated primarily on judicial determination of whether the husband charged could be considered to be legally married at the time of the relevant act of nonconsensual intercourse, or whether the defendant fell outside the protective limits afforded by Hale’s rule on the rape of a wife by her husband. If the couple were deemed not married, a rape charge could stand; if married still, no rape accusation could lie. The premise which underlies these secondary kinds of adjudication, namely that a husband cannot rape his own wife, has largely gone unchallenged.

The first case did not appear until 61 years after *Clarence*. In *Clarke*, in 1949, Byrne J. ruled that a separation order explicitly abrogating sexual rights rendered a husband liable for the rape of his wife if he proceeded without her consent.<sup>36</sup> Otherwise, Byrne J. agreed with Hale. Five years later, in *Miller*,<sup>37</sup> Lynskey J. followed *Clarke* in holding that Peter Miller

30. Cf. Coddington, “Rape of a Wife”, (1932) 145 *J.P. & L.G.R.* 199.

31. (1888) 22 *Q.B.D.* 23, 33.

32. *Id.*, 51.

33. *Id.*, 57.

34. *Id.*, 63-64.

35. Stephen, *Digest of the Criminal Law* (1877), 172.

36. *R. v. Clarke* [1949] 2 *All E.R.* 448.

37. *R. v. Miller* [1954] 2 *Q.B.* 282.

could not be guilty of raping his wife Gwendolyn May since, though there had been a petition for divorce, matters had not proceeded far enough legally to terminate the existence of marital rights. However, Lynskey J. did rule that an assault charge would lie against her husband.

The *Miller* decision evoked one of the earliest law review pieces on rape-in-marriage, an essay in which two Australian legal scholars—Norval Morris and A. L. Turner—came down in support of the decision. Morris and Turner argued that there were “overwhelming reasons why the law of rape should not be applied in the same way to marital as to extra-marital intercourse”, though they granted that such reasons were “not easy to articulate.”<sup>38</sup> Permitting a wife to lodge a rape charge against her husband, Morris and Turner suggested, might jeopardize the “delicate fabric of human relationships”. This idea was supported by a rather odd vignette exploring possible difficulties of the newly-married:

“If the wife is adamant in her refusal [of sexual intercourse] the husband must choose between letting his wife’s will prevail, thus wrecking the marriage, and acting without her consent. It would be intolerable if he were to be conditioned in his course of action by the threat of criminal proceedings for rape.”<sup>39</sup>

This reasoning, similar to wayward judicial logic in an earlier English divorce case,<sup>40</sup> in several ways epitomizes the ideology that has kept the marital rape exemption so hardy and long-lived. In addition to rote support of the position that a husband’s interests (“will”) deserve priority over the wife’s, there is an implicit assumption that once her inbred coyness and timidity is overcome, the wife will enjoy the erotic experience and thereafter the marriage will flourish. There may for some be enough semblance of truth in such dramaturgy to impart a surface appeal, though it remains an empirical issue whether such behaviour by husbands might prove more traumatic than enabling.<sup>41</sup> But as Dean Morris himself has come to appreciate in his more recent writing on “victimless crime”, the criminal law should not be employed—or restrained—in order to coerce or to protect people on the sole ground that others deem this to be in their own best interests; such interests ought to be a matter of self-determination.<sup>42</sup>

Two other cases complete the roster of judicial review in England of the marital rape exemption. In 1972, in *Reid*,<sup>43</sup> Cairns J. of the Court

38. Morris & Turner, “Two Problems in the Law of Rape”, (1956) 2 *U.Q.L.J.* 246, 259-260.

39. *Id.*, 259.

40. *G. v. G.* [1924] A.C. 349. The wife desired “a spiritual union” of uncertain duration before “the physical side was developed”. Lord Dunedin thought it “permissible to wish that some gentle violence had been employed; if there had been it would either have resulted in success or would have precipitated a crisis so decided as to have made our task a comparatively easy one . . .” *Id.*, 356-357. The decree of nullity was granted with the finding that “the wife’s refusal was due not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity.” *Id.*, 349.

41. The Morris and Turner view might be caricatured (perhaps somewhat unfairly) by suggesting that the rape of female hitchhikers be condoned on the ground that such a tactic would support public policy favoring increased use of government transportation facilities and larger sales of automobiles.

42. Morris, “The Law is a Busybody”, *New York Times Magazine*, 1st April, 1973, 14ff.

43. *R. v. Reid* [1972] 2 All E.R. 1350.

of Appeal, Criminal Division, echoed some of the *Clarence* judges by expressing strong doubt about the acceptability of the Hale doctrine. A man had been convicted of kidnapping his wife; he appealed on the ground that a husband could not be charged with such an offence. In the course of his ruling, Cairns J. questioned the rape-in-marriage rule that had gone unchallenged in *Miller*<sup>44</sup> and other English decisions since *Clarence*:

“Assuming that [*Miller*] is a decision which would be upheld by this court today, as to which we express no opinion, we find it impossible to stretch that doctrine . . . The notion that a husband can, without incurring punishment, treat his wife . . . with any kind of hostile force is obsolete.”<sup>45</sup>

In *O'Brien*,<sup>46</sup> the most recent English decision on the subject, it was held that a decree nisi effectively terminates marriage and revokes a wife's implied consent to marital intercourse. *O'Brien* takes for granted the old premise of implied consent, a premise which has come under increasing modern attack.

#### (B) PARLIAMENT AND RAPE-IN-MARRIAGE

The House of Lords decision in *D.P.P. v. Morgan*<sup>47</sup>—that a subjective rather than an objective standard of guilty knowledge would be the test of guilt or innocence in rape cases—aroused public interest and elicited considerable feminist agitation.<sup>48</sup> The public and political response to *Morgan*, combined with some heavy-handed judicial statements in the *Stapleton* case,<sup>49</sup> pushed the Government in England to appoint an Advisory Group on the Law of Rape, chaired by Heilbron J., a woman judge. The Group defined its mandate narrowly, primarily because it desired to finish its work expeditiously. Neither in its deliberations nor in its final report<sup>50</sup> did the Group refer to rape-in-marriage. The Report persuaded a Member of Parliament, Robin Corbett, to incorporate most of its recommendations in a private member's bill.<sup>51</sup> There the matter of rape-in-marriage rested

44. [1954] 2 Q.B. 282.

45. *Id.*, 1353.

46. *R. v. O'Brien* [1974] 3 All E.R. 663.

47. *D.P.P. v. Morgan* [1975] 2 All E.R. 347. For a thorough consideration of the *Morgan* decision see Curley, “Excusing Rape”, (1976) 5 *Philosophy & Public Affairs* 325. The author's argument is carefully reasoned. I disagree with it, however, because I believe that it is based on the fallacious assumption that rapists think like college philosophy professors, and that a court opinion holding rapists to the standards of “reasonable” persons rather than to their own standards will somehow make them behave more reasonably.

48. The same agitation might very likely have taken place without the *Morgan* prod: it had in the United States (see S. Brownmiller, *Against Our Will: Men, Women, and Rape* (1975)), and it would in Sweden (M-P. Boethius, *Skylla sig Själ: En Bok om Valdtäkt* (1976)), the Netherlands (J. Doomen, *Verkrachting* (1976)), and France (M-O. Fargier, *Le Viol* (1976)), among other countries, either derivatively or in regard to some local episode such as *Morgan*.

49. Milford Stevenson J., in summing up the case, said: “It was as rape goes, a pretty anaemic affair. The man had made a fool of himself, but the girl was almost equally stupid. This practice of hitch-hiking must be stopped.” The rapist was given a two-year suspended sentence. U.K., 905 *Parl. Debs. (H.C.)* 823 (13th Feb., 1976). Cf. B. Toner, *The Facts of Rape* (1977), 9-37.

50. U.K., *Report of the Advisory Group on the Law of Rape* (1975), Cmnd. 6352. The view expressed about their deliberations is based on personal interviews with several members of the group.

51. On Private Members' bills see generally Richard, “Private Members' Legislation”, in S. Walkaland & M. Ryle, *The Commons in the Seventies* (1977), 113-128.

until March 1976.<sup>52</sup> During Standing Committee hearings on the proposed Sexual Offences (Amendment) Act, George Cunningham, a Labour member, offered the following amendment:

“In any prosecution on a charge of rape a woman shall not be presumed to have consented to intercourse with a man only on the ground that she is his wife.”<sup>53</sup>

Cunningham stressed the “fictitious” nature of the Hale doctrine—“the wife may in fact have withdrawn her consent”<sup>54</sup>—and emphasized that civil law recognised that a wife need not submit to inordinate or unreasonable sexual demands by her husband. She also could refuse intercourse because her husband had been guilty of a matrimonial offence that she did not wish to condone, or because he was suffering from a venereal disease.<sup>55</sup>

Objectors to Cunningham’s amendment thought that it would “open up the floodgates to endless numbers of matrimonial complaints that wives have been raped.”<sup>56</sup> Cunningham believed this hardly likely: since there was no outpouring of assault charges against their husbands by wives now, why would the proposed amendment, if enacted, suddenly arouse a vast number of rape allegations? The Government representative at the Committee hearing insisted (and this was the death verdict for the amendment<sup>57</sup>) that the matter had not been debated in public nor considered in the Heilbron Report and that therefore it ought not be decided at that time. Other opponents stressed the difficulty of establishing the truth of the rape charge if the wife were to say that she had consented passively out of fear of injury.<sup>58</sup> Besides, another Member suggested, the amendment would merely “put a good deal more money in [lawyers’] pockets”, an outcome he was certain other Members regarded as “the worst thing in the world”.<sup>59</sup> The amendment’s sponsor said that what he proposed would most certainly become law within another five years, so why didn’t Parliament get on with it, instead of delaying an inevitable development? The Amendment passed in Committee by a 7 to 4 vote, but only after its proponents agreed to its later deletion.

52. The matter was in the air, though. It had been raised in 1975 by the National Council of Civil Liberties which argued that “the law should recognise that no woman deserves to be raped in any circumstances whatsoever.” A. Coote & T. Gill, *The Rape Controversy* (1975), 30.

53. U.K., *Parl. Debs. (H.C.), Official Rpt. of Standing Comm. F.*, 21 (24th March, 1976).

54. *Id.*, 22.

55. For a thorough discussion of such issues see Scutt, *loc. cit.* (*supra*, n.6), 264-275.

56. *Loc. cit.* (*supra*, n.53), 24.

57. The Government officials in the Home Office thought that the marital exemption was not an “urgent problem” and could ultimately be dealt with by the Criminal Law Revision Committee (Interview with Norman Cairncross, Home Office, London, 16th March, 1977). Corbett, the bill’s sponsor, acceded to the amendment’s withdrawal, noting in an interview with me (House of Commons, 15th March, 1977) that “the more you have in a bill the more likelihood that someone will object and hold it back: the less that’s there the better”. Corbett felt, in addition, that there were great time pressures and that any delay in considering his measure might prove fatal. *Cf.* Drewry, “Legislation”, in Walkaland & Ryle, *op. cit.* (*supra*, n.51), 74-75: “Private Members’ Bills . . . which actually reach the statute book . . . do so only with Government approval and can thus be regarded as a peculiar species of Government Bill.”

58. *Loc. cit.* (*supra*, n.53), 30. This and similar common objections to rape-in-marriage amendments are comprehensively considered in Note, “The Marital Rape Exemption”, (1977) 52 *N.Y.U.L.R.* 306.

59. *Loc. cit.* (*supra*, n.53), 37.



Floor debate took place late in May 1976. The supposed latent vengefulness of wives came in for considerable comment. As it had before, and would again, the minatory (and wrong-headed) *dictum* of Hale was paraphrased, that rape was "a very easy charge to make but a difficult one to rebut".<sup>60</sup> The opponents' position was summed up in these terms:

"We have to keep our feet well on the ground and bring to bear a little earthy common sense. There are some women who are so unscrupulous that if they were given the encouragement of a statutory provision such as [the rape-in-marriage] amendment they might be prepared to commit perjury and bring their husbands into a criminal court for the sole purpose of breaking up the marriage. That result is not likely to be regarded as desirable by the House or anyone who wishes to improve the law."<sup>61</sup>

Jack Ashley, the major Parliamentary figure behind the rape law reform proposal, finally conceded defeat on the amendment, withdrawing with a promise—or threat: "I give notice that I shall raise the matter again as soon as possible because I am convinced that every man should ask every woman for her consent on every occasion."<sup>62</sup>

### 3. The United States

The case-law so far indicates an unquestioning acceptance of the Hale dictum, almost as if the courts were incapable of conceiving other resolutions of the issue. There also appears to be a tendency, not uncommon in American jurisprudence, to regard early English common law writers, such as Hale, as a good deal more sacrosanct than their fellow countrymen are apt to hold them. There has been no explicit scepticism by American jurists as to the persuasive force of Hale's dictum, nor any challenge on constitutional grounds. The judicial decisions supporting the marital rape exemption have been supplemented by statutory enactments, so that more than half of the States now have code provisions exempting husbands from liability as principals in the rape of their wives.<sup>63</sup> However, since 1974 some legislative bodies, lobbied assiduously by feminist groups, have turned away from Hale.

#### (A) UNITED STATES CASE LAW

The first significant ruling in the United States on rape-in-marriage—the *Fogerty* case—was, like *Clarence*, only an oblique examination of the issue. Patrick Fogerty and others had been convicted in Massachusetts in 1857 of the rape of 16-year-old Agnes O'Connor. They appealed on the ground that the indictment was flawed. They argued that, among other

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60. The phrase was employed on three occasions by different members of Parliament during the debate: U.K., *Parl. Debs. (H.C.)*, 1962 (21st May, 1976) (Weitzman); *id.*, 1967 (Reiss-Davies); 917 *Parl. Debs. (H.C.)*, 889 (15th Oct., 1976) (Lawrence).
61. U.K., 911 *Parl. Debs. (H.C.)*, 1970 (21st May, 1976) (a generalisation which carries even less weight as divorce becomes "no-fault" in a steadily increasing number of jurisdictions). Members managed to keep their feet so firmly planted that by the time they were finished they had amended the Sexual Offences (Amendment) Act of 1976 to include a clause (cl. 6), unique in Anglo-Saxon jurisprudence so far as I know, that *defendants* in rape cases were to be protected by a shield of anonymity. I have argued elsewhere that this provision was largely spurred by the spectre that persons such as Members of Parliament might be accused of rape, and thereby have their political careers ruined. Geis & Geis, "Anonymity in Rape Cases", (1977) 141 *J.P.* 293.
62. U.K., 911 *Parl. Debs. (H.C.)*, 1969 (21st May, 1976).
63. Note, "The Marital Rape Exemption", *loc. cit.* (*supra*, n.58), 308 n.14. See *e.g.*, N.R.S. s.200-373 (1975); *Ex parte Crawford* 120 Pac. 207 (1941) (Nevada).

things, it did not specify that O'Connor was not "the wife of one of the defendants, or which defendant, if any".<sup>64</sup> Both the appellants and the court took for granted the idea that a husband could not be charged with the rape of his wife: they cited Hale and two textbooks for support. The court ruled that an indictment for rape need not specify absence of a marital relationship, since the accused could easily aver such a relationship in his defence.<sup>65</sup>

*Haines* and *Frazier* also convey an adequate sense of the body of American case-law on rape-in-marriage. In *Haines*, the judge began by noting that the fact situation presented a matter both "unique and novel." "Can a husband commit rape upon a woman who is his wife?", but he went no further than this interrogative statement, ruling that if the man abetted by the husband was acquitted, then the case against the husband no longer could stand. In passing, the court noted that husbands could not be guilty as principals in the rape of their wives.<sup>66</sup> The *Frazier* case directly raised the issue of rape-in-marriage. The couple concerned was no longer living together conjugally, but a court had refused them a divorce (for unspecified reasons), and thereafter they had maintained separate quarters within the same house. In overturning the conviction of the husband for assault with intent to rape, the Texas court merely noted that "all the authorities hold that a man cannot himself be guilty of actual rape upon his wife."<sup>67</sup>

#### (B) LEGISLATIVE DEVELOPMENTS

Little systematic research exists upon the kinds of matters and movements related to social change brought about by legislative action as opposed to change produced by judicial rulings. Some issues, perhaps because of judicial logistics or because of their political components, seem to be best relegated to the legislative realm; others appear more amenable to alteration by court pronouncement. Matters such as the decriminalization of prostitution, for instance, carry heavy tonnage and, at least in the United States, there is a tendency for legislators, one eye cocked at the electorate on the shore, to regard such things as dangerously below the Plimsoll line.

Most questions relating to reform of laws on rape, on the other hand, have not aroused much negative public reaction. Conservatives support changes in evidentiary requirements for rape because they desire to see more criminals more readily convicted; feminists because they believe that women have been victimized not only by the offence, but also by the law enforcement and judicial processes that follow. For this reason, among others, both judges and legislators in the United States have been relatively hospitable to radical changes.<sup>68</sup> In California, for instance, in the *Rincon-Pineda* case, the trial judge refused to give the mandatory jury instruction regarding rape.<sup>69</sup> By the time the case reached the appellate level, the legislature already had altered the requisite instruction so as to

64. *Comm. v. Fogerty* 8 Gray 489 (1857) (Mass.).

65. *Ibid.* Challenges to rape indictments on grounds similar to that in *Fogerty* would continue in American state courts for the next thirty years, with decisions going different ways. Reversal on the ground that the indictment was flawed in its failure to specify that the complainant was not the accused's wife sometimes offered a way out for appellate judges faced with what they saw as a particularly gross miscarriage of justice. Cf. *People v. Gonzales* 91 Pac. 1013 (1907) (Texas).

66. *State v. Haines* 25 So. 372 (1899) (Louisiana).

67. *Frazier v. State* 86 S.W. 754 (1905) (Texas).

68. D. Chappell, R. Geis, & G. Geis, *Forcible Rape* (1977), *passim*.

69. *P. v. Rincon-Pineda* 538 P.2d 151 (1975) (Calif.).

place less of a burden on the complainant. The appellate court, after first chastising the judge for failing in his required duty, not only upheld the guilty verdict, but in the course of its ruling also decided that the intervening legislative enactment was too restrictive. It was as if jurists and legislators were vying to see who could go the farthest the quickest.<sup>70</sup>

Repeal of the rape-in-marriage doctrine has not enjoyed the kind of enthusiastic support accorded measures such as those limiting cross-examination into the complainant's sexual history, excising the cautionary instruction, redefining rape to include sexual assault against a member of either sex and penetration of any bodily orifice, as well as changes in law enforcement and medical procedures for dealing with rape victims. Undoubtedly there are diverse reasons for the inertia associated with change in the rape-in-marriage doctrine, including intellectual reservations about the desirability of change. But as was true for rape law reform in Britain, there also seems to be an element of self-concern behind legislative inaction: the matter may be too close for personal comfort for the well-placed, married males who make up the vast majority of the membership of American state legislatures. It may take only a little imagination for them to create a scenario in which, in their worst forebodings, they are cast as the protagonist in a Kafka-like performance.

The prototype of rape reform legislation in the United States, the Michigan Criminal Sexual Conduct law of 1974, dealt very gingerly with rape-in-marriage:

“A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce.”<sup>71</sup>

It has been suggested that this provision might not survive constitutional challenge, since it could be deemed to be a denial of equal protection. The history of legislative thinking that lay behind the approach in Michigan has been summarised in the following terms:

“There are several considerations that led to the limitation of the Act's coverage to couples living apart. Acts between a married couple may provide difficult evidentiary problems. It may be argued, however, that difficult evidentiary problems do not justify withholding the protection of the law from married persons. There is a belief that the situation of spouses living together is susceptible to misinterpretation and likely to allow either spouse to use the law to obtain a better property settlement or child custody. It also might act as an obstacle to reconciliation. In balance, therefore, the legislature decided to avoid bringing this difficult evidentiary and social problem within the scope of the law.”<sup>72</sup>

70. For a well-reasoned dissenting view in regard to what are seen as some excesses in this development see Herman, “What's Wrong with Rape Reform Laws?”, (1977) 3 *Victimology* 8.

71. S.520J(3) Mich. Penal Code, 1974.

72. Cobb & Schuer, “Michigan's Criminal Sexual Assault Law”, (1974) 8 *J. Law Reform* 217, 223. The scope of this article does not allow any further analysis of the interrelation between rape-in-marriage and other family law suits. This potential interrelation of rape-in-marriage, particularly with custody and property claims to which conduct of the spouses remains relevant though divorce is becoming increasingly “no-fault”, is an important social implication of allowing rape-in-marriage, but it has remained unquestioned and unresearched.

Two other American state jurisdictions, building on the Michigan reform, were able to move well beyond its restrictive reiteration of the Hale rule. In Delaware, the rape statute differentiates between first- and second-degree offences, the former carrying the heavier penalty. In 1974, second-degree rape was redefined to read as follows:

“A man is guilty of rape in the second degree when he intentionally engages in sexual intercourse with a female without her consent.”<sup>73</sup>

The South Dakota experience is instructive because reform was short-lived. In 1975, the South Dakota legislature redefined rape as: “. . . any act of sexual penetration accomplished with any person under any of the following circumstances . . .”<sup>74</sup> The change stayed in force for but a single legislative session, however, until a new majority, tilted toward the conservative side and taking the opportunity afforded by a general revision of the state criminal code, redefined a potential rape victim as “any person other than the actor’s spouse.”<sup>75</sup> There had not been any prosecution of a husband for wife-rape during the brief period the altered law was in effect.<sup>76</sup>

The most important potential development to the rape-in-marriage doctrine in the United States has occurred at the federal level. In 1971, the National Commission on Reform of Federal Criminal Laws made the first comprehensive recommendations for revision of the federal criminal code in the country’s history. At that time the Commission defined rape in the traditional manner as “sexual intercourse by a male with a female not his wife” and the proposed law made promiscuous sexual relations with others by the complainant an affirmative defense to prosecution.<sup>77</sup> The draft legislation also differentiated in terms of seriousness between rapes committed by strangers upon the victim and those “involving a voluntary companion of the actor [who had] previously permitted him sexual liberties.”<sup>78</sup> Whether consciously or not, this differentiation began to shape the law according to criteria of harm done, as recommended above.

Six years later, this approach was abandoned. The new provision allows a rape charge to be filed by a wife against her husband as a principal, though the offence complained of must involve a “violent” component. S.1641 of the proposed Federal Criminal Code now reads that “a person is guilty of an offence if he engages in a sexual act with another person and:

(1) compels the other person to participate in such act:

73. 59 Del. Laws, ch. 547 (effective 1st July, 1974); Del. Code, tit. 11, s.763.

74. S. Dak. Acts 1975, ch. 169; S. Dak. Comp. Laws, s.22-22-1 (repealed 1976). The sponsor of the bill introduced it at the urging of representatives of women’s groups, including the National Organization of Women (NOW). “I couldn’t believe we had gotten it through without their figuring out what we were up to”, she recalls remarking to co-workers immediately after the smooth passage of the measure. (Telephone interview with Grace Michaelson, Rapid City, S. Dak., 12th December, 1977).

75. S. Dak. Acts 1976, ch. 158; S. Dak. Comp. Laws, s.22-22-1 (1977).

76. Telephone interview with Thomas R. Vickman, Code Counsel, Legislative Research Council, State of South Dakota, Pierre, 9th December, 1977.

77. U.S., National Commission on Reform of Federal Criminal Laws, *Study Draft of a New Federal Criminal Code* (1970), s.1641; Stein, “Comment on Rape, Involuntary Sodomy, Sexual Abuse, and Related Offenses”, U.S., National Commission on Reform of Federal Criminal Laws, *Working Papers* (1970) I, 867, 874.

78. *Loc. cit.* (*supra*, n.77), s.1641(2).

(A) by force; or

(B) by threatening or placing the other person in fear that any person will imminently be subjected to death, serious bodily injury, or kidnapping . . .”<sup>79</sup>

The following section, titled “Sexual Assault” indicates that “a person is guilty of an offence if he engages in a sexual act with another person who is not his spouse, and . . .

(5) compels the other person to participate by any threat or by placing the person in fear.”<sup>80</sup>

Passage of the 400-page comprehensive measure remains problematical: so far-ranging a bill inevitably antagonizes a host of publics, and their Congressional supporters.

#### 4. Sweden

##### (A) INTRODUCTION

The Anglo-Saxon approach that exempts a husband from liability as principal for the rape of his wife is by no means universally duplicated in the penal codes of the remainder of the world’s jurisdictions. A brief survey by an Israeli jurist a decade ago<sup>81</sup> found the exemption in effect in France and Germany, but noted that most Communist bloc countries, including the U.S.S.R.,<sup>82</sup> Czechoslovakia,<sup>83</sup> and Poland (which has a law dating back to the pre-communist days of 1932<sup>84</sup>), allowed husbands to be charged with marital rape. Israel followed English law and hence Hale’s doctrine, but several courts had raised objections to the rape-in-marriage exception.<sup>85</sup>

The situation in the Spanish-speaking countries and Italy appears unclear. One writer, after a thorough examination of the issue in Mexican law, affirmed the principle that “the wife can indeed be the subject of the offence of rape committed by her husband.”<sup>86</sup> But the majority of textbook writers on Spanish and Italian law think otherwise.<sup>87</sup>

79. S.1437, s.1641. The marital exemption was excised from S.1437 in November 1977 at the urging of feminist groups. Senator Birch Bayh circulated a memorandum among Judiciary Committee members proposing the change. When it was evident that the move would have overwhelming support in the committee, the amendment was made to the bill without debate. Telephone interview with Paul Sumitt, Chief Counsel, Subcommittee on Criminal Law and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C., 12th December, 1977.

80. S.1437, s.1642. Other provisions of this section cover inability to understand the nature of the conduct, physical and mental incapacity, and mistake as to marriage.

81. Livneh, “On Rape and the Sanctity of Matrimony”, (1967) 2 *Israel L.R.* 415.

82. Art. 117, U.S.S.R. Criminal Code (1960). Cf. G. St. George, *Our Soviet Sister* (1973), 192: “Rape . . . is a very serious criminal offence in the Soviet Union . . . Generally women have the first and last say in sex situations, including marriage; and any husband forcing his attentions on even an unwilling wife might be technically guilty of rape.”

83. S.238, Czechoslovakian Criminal Code, 1950.

84. Art. 204, Polish Criminal Code, 1932.

85. *El Fakir v. Attorney General* (1964) (4) 18 P.D. 200; *Katib v. Attorney General* (1966) (2) 20 P.D. 136.

86. Lara, “El Delito De Violacion En El Matrimonio”, (1965) 6 *Derecho Penal Contemporaneo* 64, 66.

87. *Id.*, 75. Typical of the majority opinion is the view of a Brazilian jurist, Chrisolito de Gusmao, *Delitos Sexuales* (1961), 155: “The husband who prefers violence to other means for obtaining satisfaction from this and other duties of his wife, is lacking in the most elemental obligations of gentlemanliness and possesses a purely animal temperament not restrained by education, sentiment, or morale: but his action falls within the moral sphere and not that of penal law.”

The three Scandinavian countries, Denmark, Norway, and Sweden, allow husbands to be prosecuted as principals for the rape of their wives. Each provides a particularly good subject for further examination of the issue since, unlike the Communist nations, information on criminal activity is generally accessible. In Denmark, the penal code defines rape as intercourse with *any* woman obtained by force. A milder penalty is decreed for instances in which “the woman has previously had [a] sexual [relationship] of a most lasting kind with the perpetrator”, and husbands are exempt from prosecution where the law otherwise penalizes intercourse with victims who are mentally sick, feeble-minded, or who for like reasons are unable to object.<sup>88</sup> Norway’s law is similar to that in Denmark.<sup>89</sup> The first conviction for marital rape in Norway apparently took place in 1974,<sup>90</sup> and was heralded by a feminist writer as “a breakthrough that should be responsible for both the reporting and prosecution of many more within-marriage rapes.”<sup>91</sup>

#### (B) MARITAL RAPE IN SWEDEN

There are three matters to note about the marital rape situation in Sweden. The first is the rationale underlying the law. The second involves an assessment of the impact of the law as indicated by police reports and criminal justice processes. The third is the current Swedish controversy surrounding rape reform.

##### (i) Rationale underlying the Swedish Statute

“The proposal is a consequence of the principle that it is the right of all persons to determine for themselves whether they shall participate in sexual intercourse.” This principle, enunciated in the Riksdag, Sweden’s Parliament, animated the Government’s action to remove the marital rape exemption. The measure, enacted in 1965, was “one of the most discussed principal innovations” in the revision of the criminal code.<sup>92</sup>

Opponents argued that the new measure would provide a weapon for police harassment, and that it would overtax law enforcement resources and marital vows. In addition, it was maintained by medical authorities that the law would be employed in an undesirable manner in divorce proceedings, and would be used for blackmail and extortion. It was also thought likely that wives seeking abortions would resort to the marital rape provision to qualify when they otherwise might not.

The Government’s response<sup>93</sup> was pragmatic: implement the principle, it was declared, because it is a just principle, and then allow experience to dictate how matters might be altered if this proves necessary. At the same time, penalty structures were differentiated for varying kinds of rape in order to alleviate any fear that husbands convicted of marital rape might be liable to what were regarded (for them) as draconian responses. Rape by a stranger would carry a prison term of no less than two and not more than ten years. Husbands, falling outside this category by definition, were vulnerable to prosecution only for *valdförande* (sexual

88. Ss.216, 217, 218, Danish Criminal Code, 1960.

89. S.222, Norwegian Penal Code, 1902; J. Andenaes, *Spesiella Strafferett* (1971), 90. (1974) *Norsk Retstidende* 1121.

91. A. Lykkjen, *Voldtekt* (1976), 25.

92. (1965) *Kommentar till Brottsbalken*, 202-204.

93. *Ibid.* It is noteworthy that the rape-in-marriage change was put into effect over the objections of most women’s groups in Sweden. Interview with Lars-Goran Engstrom, secretary, Sexual Offences Commission, Malmö, 30th May, 1977.

coercion, or sexual assault), which would carry a sentence of not more than four years' imprisonment.

The rape-in-marriage provision was reviewed in 1976, eleven years after its implementation, as part of the general re-examination of criminal code provisions dealing with sexual offences. Only a few lines of the 233-page report were directed to the provision, and these offered unqualified endorsement:

"The principle that every person should determine if she shall accept sexual intercourse still underlies the determination that assaults in marriage and marriage-like cohabitation should be defined as sexual offences. If these attacks were to be redefined otherwise, the only consequence would be that they would come to be adjudged to be an illegal use of force. Such a rearrangement, according to our belief, offers no particular advantages. The objections raised during the original hearings on the proposal have not proven to be valid. Reports to the police of rape-in-marriage and marriage-like cohabitation rarely lead to court proceedings. The problems in connection with such reports and proceedings are no different than those associated with other crimes. Our practical experience does not dictate any alteration in the reform measure. The recommendation of the Sexual Offences Commission is that sexual attacks in marriage and marriage-like cohabitation should not be excluded from application of the criminal law."<sup>94</sup>

#### (ii) *The Extent of Marital Rape*

Only two analyses of rape statistics have ever been conducted in Sweden, and one is so seriously flawed in its method and presentation as to be unacceptable.<sup>95</sup> The second, by Ulf Linderholm, while not very elaborate, offers some useful numerical information on patterns of rape as reported to the Stockholm police during 1970. The Linderholm study indicates that there were 132 reports of rape and attempted rape<sup>96</sup> of

94. Sexualbrottsutredningen, *Sexuella Övergrepp* (1976), 9. The matter has been summarised by Anita Meyerson, secretary to the newly-constituted Sexualbrottskommittén: "As far as I know nothing of importance has been written about the Swedish husband-wife statutory provision except the discussion preceding the legislation . . . Trials in such cases are very rare, and I think that the principle that a married woman should be protected against sexual assaults by her husband is now generally accepted." Letter to author, 19th September, 1977.

95. Falconer, "*Valdtåksbrottet*", (1975) 34 *Sv. Juristid.* 161.

96. The population base covered by Stockholm police crime figures is about 630,000 persons, which makes the rape rate for the city 21.0 per 100,000 population. This figure is about on par with that for many cities in the United States. In 1970, in Minneapolis-St. Paul, a metropolitan area with a heavy concentration of persons of Swedish descent, the rate of rape and attempted rape reported to the police was 20.5 per 100,000 persons. New York had a 22.3 rate; Boston a 12.8 rate. (Source: U.S., F.B.I., *Uniform Crime Reports for the United States* (1971)). It must be noted, however, that cross-national comparisons are hazardous undertakings, given subtle and not-so-subtle idiosyncracies in the manner in which crimes are defined and crime statistics are compiled. On the other hand, there does not appear to be any striking difference between what is regarded and tabulated as rape, and how it is tabulated, in Sweden and in American jurisdictions. If this is true, the Swedish rape rate seems surprisingly high for a country with a general tradition of lawfulness and non-violence. The Swedish rape statistics also offer support for the idea advanced by the present writer and several colleagues that a major impetus behind rape offences might be located in the theme of "relative deprivation", so that a site in which there exists an ethos of sexual liberality (and where the reality involves, almost inevitably, less sexual permissiveness than the stereotype portrays) would manifest higher rape rates

which 22 (17 per cent) were discarded by the police on the belief that "no crime has taken place" or that the case was not sufficiently strong to warrant action. Thirty-five of the instances involved "blitz" rapes, such as attacks by strangers in parks, but in only three of these instances did the attempted rape prove successful. There were six cases of group rape.<sup>97</sup> Rapes-within-marriage constitute a relatively small proportion of the total number of rapes. There were four instances involving a wedded couple, and two in which the pair was engaged—a status in Sweden that very nearly approximates to marriage.<sup>98</sup> These cases seemed somewhat more brutal than the usual rape incident coming to police attention, and more often involved a revenge motive. In one instance, for example, a young woman who had left her fiancé was attacked in her apartment by him and a friend. They forced her to engage in repeated acts of intercourse, shot at her feet with a pistol, and struck her with various objects. In another case, the offender forced the victim to undress and thereafter, before intercourse, took photographs of her in different positions.<sup>99</sup>

A review by the author of Stockholm police files for 1976 found only two cases resembling rape-in-marriage; in neither was the couple legally married. The first involved two former mental hospital patients, who had met at the institution and then upon their release set up housekeeping together. The offender was returned to the hospital after his roommate's rape report, and she withdrew her complaint. In the second episode, the engaged couple had separated, then reunited. The fiancée's rape charge was prosecuted as assault, and the man received a 45-day sentence.<sup>100</sup>

### (iii) *The Current Swedish Controversy*

The report of the Sexual Offences Commission in Sweden aroused a storm of protest, largely because of two recommendations:<sup>101</sup> firstly, that pimping be decriminalized, and secondly, that the behaviour of the victim of rape (whether, for instance, she had invited her assailant to her house before the attack) be taken into account by the court in determining the severity of the offence. It was alleged that these recommendations, along with several points of emphasis in the report,<sup>102</sup> reflected the "sexism"

96. (Continued.)

than a site that has a more restrictive sexual etiquette. (See Chappell, Geis, Schafer, & Siegel, "A Comparative Study of Forcible Rape Offenses Known to the Police in Boston and Los Angeles", in Chappell *et al.*, *Forcible Rape* (1977), 227-244).

97. U. Linderholm, *Valdtakter Som Kommit Till Polisens Kännedom i Stockholm 1970* (1973). The study is summarised in Sveri, "Nagra Kriminologiska Synpunkter po Sexualbrottsligheten", in *Sexuella Övergripp* (1976), 179-193.

98. Schiff, "Sexual Liberation, the Welfare State and Sexual Malaise in Sweden", (1975) *S Sociological Analysis & Theory* 359.

99. Linderholm, *loc. cit.* (*supra*, n.97),

100. Information supplied by Detective-Inspector Eva Graf, Stockholm Police Department, 25th May, 1977. For a detailed report of a case of marital rape in Sweden see Boethius, *op. cit.* (*supra*, n.48), 34.

101. No dispute focused on the Commission's other recommendations, including decriminalization of incest involving persons over the age of 18, and reduction of the age of consent for sexual intercourse to 14 years.

102. A professor of criminology, for instance, suggested that the cadre of rape victims included "many women who themselves had built up a sexual atmosphere which unleashed the criminal event" and that concentration of victims in the 18-to-30-year-old bracket was perfectly understandable since this bracket included many single, wage-earning women out "to enjoy themselves and meet a man". Books such as Susan Brownmiller's *Against Our Will* were said to be sensational journalism, lacking scientific merit except to the extent that they provided an interesting picture of how controversial sexual problems had become in American society: Sveri, *loc. cit.* (*supra*, n.97), 179-193.



of the 8-man (average age 60 years), 1-woman Commission. Feminist groups from across the entire Swedish political spectrum united for the first time to force rejection of the rape and pimping segments of the Commission report, and the appointment of a new group to re-examine these matters.

The rape-in-marriage issue figured prominently in the controversy as a catalyst for reaction against the prevailing assumptions that rape was not a notably serious problem in Sweden, and that the protest concerned a relatively insignificant matter. Feminists argued that Swedish women were hoist by the petard of their sexual stereotype abroad whereas, contrary to their image as uninhibited erotic creatures, they were really rather shy and reserved. It was claimed that there was great reluctance to report rape because women believed that they should (though in truth they did not) regard such sexual encounters more casually, and also because when women did report rapes, they were subjected to a range of unpleasant enforcement and court procedures.<sup>103</sup> It was said in particular (and in all seriousness) that Sweden might well have the highest rape rate in the world, with the recorded part only a very minute segment of the total. A reputable University statistician was reported as supporting this position with the following disingenuous analysis:

“Is the figure 60,000 (for the annual number of rapes in Sweden) so unrealistic? There are about 1,800,000 women and a corresponding number of men who are between 15 and 50. On the basis of this total and research regarding sexual behaviour which have been carried out, it can be estimated that there are about 180,000 instances of sexual intercourse per day in Sweden, or about 66 million instances per year. In order for there to be 60,000 completed instances of rape and sexual assault, it is necessary that barely one episode of sexual intercourse out of a thousand be carried out against the woman’s will with the kind of force or threat of which the law speaks.”<sup>104</sup>

### 5. Conclusion

It seems essential for informed legal analysis of the rape-in-marriage issue to obtain at least a general sense of the behaviour under consideration: its emotional qualities, its significance, and, if possible, its extent.

Marital rape has been portrayed occasionally in fiction, with John Galsworthy’s representation of Soames’ violation of his wife undoubtedly the best-known depiction. Galsworthy captures the essence of male upper-class Victorian English thought on the situation: the husband “had asserted his right and acted like a man”.<sup>105</sup> There is a similar kind of episode, though uncompleted, involving a honeymooning couple in a short story

103. A Swedish rape victim is quoted as saying: “I notified the police and then I went to a doctor who examined me. Both the police and the doctor took the attitude: you are over 50 years old and handicapped, you ought to be well pleased that someone will have you. It wasn’t so dangerous, be happy instead.” Boethius, *op. cit.* (*supra*, n.48), 30-31.

104. Leif Persson, quoted in Boethius, *op. cit.* (*supra*, n.48), 34.

105. J. Galsworthy, *Forsyte Saga*, Book I, Part II, Chap. IV. The more pedantic — and less believable — lawyer in Galsworthy, a member of Lincoln Inn, surfaces to his protagonist’s thoughts. His behaviour, Soames reflects to himself, “often received praise in the Divorce Court, he had but done his best to sustain the sanctity of marriage, to prevent her from abandoning her duty . . .” *Cf.* S. Brownmiller, *Against Our Will* (1975), 381.

by Albert Moravia.<sup>106</sup> Another Moravia story offers a fine characterization of the ambivalence of both husband and wife to a combination of hostile and erotic aggression that surfaces as they confront more basic antagonisms that have grown up between them.<sup>107</sup>

There exist no sophisticated behavioural science studies of rape-in-marriage. In the United States, Pauline Bart's report on 1,070 questionnaires filled out by victims of rape found that 5 per cent of the women reported being raped by relatives, 0.4 per cent by husbands, 1 per cent by lovers, and 3 per cent by ex-lovers, adding to a total of 8.4 per cent of the cases involving men with whom the alleged victims had had close relationships.<sup>108</sup> Richard Gelles tabulated reports from forty Rape Crisis Centres throughout the United States and found that only 12 of 3,709 telephone calls (0.3 per cent.) were received by them from wives complaining about forced sex by their husbands.<sup>109</sup> In a volume of case histories, Diana Russell presents an episode that speaks for rape law reform since it involves (though the line between tacit passive consent and resistance is blurred) what the victim defined as forced sex with her husband in front of a roomfull of guests at a house party.<sup>110</sup>

The descriptive and survey material, to the extent that such fragmentary information can be generalised, may be said to support the following observations. Firstly, forced sex in marriage is apt to involve acts with ingredients and motives and feelings probably qualitatively different in intensity, affect, and guilt than those in other—but by no means all other—rapes. Secondly, there is no question that, however small the amount (and undoubtedly the low survey figures reflect in part wives' definitions of what truly constitutes rape, as these have been influenced by law) there are episodes of forced marital sex against the will of the wife, and that some of these are likely to be provable in court.

There seems no need to recite or rebut specific objections to abolition of the marital rape exemption. These, it seems to me, largely represent *ad hoc* speculations regarding meretricious consequences that are unlikely or, on balance, much less serious than failure to provide as much protection to a wife against marital rape as is provided to her and to other women against males to whom they are not married. The marital rape exemption is based on a dictum by a misogynistic judge (though it also undoubtedly has deep roots in a host of social and juridical attitudes toward women). In England, there has never been a serious head-on court challenge to the doctrine, one that could permit judges, a number of

106. A. Moravia, *Bitter Honeymoon* (1977, Panther ed.), 194, 208, 219.

107. *Id.*, 161, 171-172.

108. Bart, "Rape Doesn't End with a Kiss", (1975) *Viva* 39 (June).

109. Gelles, "Power, Sex, and Violence: The Case of Marital Rape", (1977) 26 *The Family Co-ordinator* 339, 343 (brief case history at 343).

110. D. Russell, *The Politics of Rape* (1975), 72:

"I was in the back room, nursing my daughter with my shirt off, and my husband came in and said, 'Come on in and join us.' I was really very much dominated by him at the time, and I couldn't quite refuse. I didn't want to appear uptight and embarrassed, so I went into the other room to watch.

Don grabbed me and started cajoling me, 'Let's have a good fuck scene. Nobody else will do it.' I said no, no, no, no, I didn't want to do it, so he forced me. He took my clothes off. There were about six or seven people there. It was a very gross scene. Everybody was really appalled, but nobody would do anything to stop him. I fought him as much as I could. I tried to keep my legs closed and kept pushing him off. But I didn't actually attack or slug him. It still sickens me, revolts me."

whom have voiced scepticism about it, to set forth a different policy. But legislative movements in the English Parliament, in Sweden, in a few American jurisdictions and the United States Congress, as well as in South Australia, indicate that marital rape exemptions are anachronistic.

The Swedish experience provides a particularly persuasive response to the dire forebodings about the consequences of marital rape laws. It indicates that in the dozen years the Swedish law has been in force there have been no serious problems with it. It shows that there is no case for rescission.

Swedish statistical information indicates that the law has been used only very infrequently for complaints of rape by wives against their husbands. This might suggest that much emotion and effort is being expended on a matter of little practical significance. However, I would argue that the Swedish data support several different themes. To begin with, it seems most unlikely that removal of the marital rape exemption will place intolerable burdens on the police, the courts, or marriage itself. Secondly, while removal of the exemption undoubtedly will not solve the problems of forced connubial sex—any more than rape laws solve the problem of rape—we do not know how many husbands are deterred by the threat or the moral persuasion of the law. Thirdly, additional new approaches are needed to aid “battered wives”. Finally, it should be stressed that the possibility of marital rape charges offers an important symbolic endorsement of a significant social principle: that all women have the right to restrict their sexual behaviour to situations in which they participate of their own free will.

Incorporating marital sexual attacks within rape law is problematical because of the uncertain basis of rape law itself, and the controversial nature of any sexual consent marriage is thought to imply. Issues of consent, affinity (that is, the relationship between the parties), and harm have been intermingled, and statutes have been promulgated that assume casuistically that the concepts are virtually interchangeable. Consent, for instance, is sometimes not only assumed to be positively correlated with but actually derived from the closeness of the relationship between the parties. Under Swedish law, a pre-established relationship automatically renders the defendant liable to a lesser sentence in a rape attack. There is an implicit or explicit absorption of the civil law principle of “contributory negligence” or, as Kalven and Zeisel described the process in their study of jury reactions to rape victims, the arrogation of an “assumption of risk” to the victim which “assumption of risk” becomes exculpatory for the offender.<sup>111</sup> Yet at best there is only a statistical relationship between the complainant’s behaviour, the harm done to her, and the relationship of the parties to the offence. Severe injuries obviously can occur in instances in which affinity is close and in which victim behaviour is not sufficiently wary. Severe injuries should be one of the law’s primary concerns.

As sexual mores alter, there is a corresponding tendency to remove or reduce the dominion of the law in regard to sexual acts such as homosexuality and incest between consenting adults. The age for legal sexual intercourse persistently (though not uniformly) moves downward, and many jurisdictions no longer attend to sexual acts involving mentally

111. H. Kalven and H. Zeisel, *The American Jury* (1966).

retarded persons, though some forms of such behaviour are prescribed as rape. The goal is (or should be) to assess prescribed forms of sexual behaviour in terms of their potential and real harm to the participants. It is necessary at this point to realise that "harm" in the sphere of sexual attacks incorporates violation of two principal interests. The first is the victim's interest in physical integrity, the second is that of retaining freedom to choose sexual partners and modes of sexual behaviour. Those acts which pose a risk of harm to the interests identified which is both socially tolerable and acceptable to the parties themselves, become, in the phrase of the Wolfenden Committee, "not the law's business".<sup>112</sup> The other more serious acts need to be graded in ways commensurate with their degree of gravity.

The proposed federal statute in the United States, fashioned in large measure along the lines recommended in the Model Penal Code,<sup>113</sup> makes it clear that it considers serious violations of physical integrity the prime harm to be avoided, and gives this attribute of rape clear legal protection. Thus, rapes of an actual or potentially more violent nature are distinguished from those producing lesser harm. That husbands are exempt from prosecution for even the second, less serious form of sexual attack appears to be a compromise dictated by political concerns as well as uncertainty about the desirability of rape prosecutions for acts of a less egregious kind and for which other remedies—such as assault prosecutions and legal separation—might be regarded as both more benign and more effective.

There would probably be more general willingness to eliminate affinity clauses if the rape statutes differentiated sharply between more harmful and less harmful acts. Part of the difficulty here is that rape is and should be a special kind of offence involving two distinct types of invasions of interest. By contrast, feminist rhetoricians tend to concentrate on the sexual ugliness of rape and its chauvinistic hostility to women as a group, whereas rape victims themselves focus overwhelmingly on their fear of death or serious injury.<sup>114</sup> The criminal law can be responsive to such fears by, among other things, redefining attempted rapes as assaults, and penalising more heavily rapes in which weapons are employed and injuries are inflicted or seriously threatened.

The idea of exempting husbands from rape charges by their wives is thus anachronistic, if indeed the practice ever had any semblance of a wives anachronistic, if indeed the practice ever had any semblance of a just law. The South Australian amendments, problems of drafting aside,<sup>115</sup> point roughly in the right direction of rape reform generally. Given a redefined, more restricted rape offence tailored to the lesser harm it threatens, the case in support of the rape-in-marriage exception loses any possible underpinning it might have possessed. Rape law should focus on the consequences of the criminal act and not on the status or the intimacy of the relationship between the parties, except as they modify the consequence in fact and not by presumption. In this enterprise, the principle of harm to the victim appears to be the cutting tool which can be best employed to fashion a satisfactory delineation of the crimes of rape and sexual assault.

112. U.K., *Report of the Committee on Homosexual Offences and Prostitution* (1957) Cmnd. 247, 24.

113. American Law Institute, *Model Penal Code* (1962), s.213.1.

114. A Burgess & L. Holmstrom, *Rape: Victims of Crisis* (1974).

115. Sallmann, "Rape in Marriage", (1977) 2 *Legal Service Bull.* 202.