Equal Protection Considerations of the Spousal Sexual Assault Exclusion

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Statutory formulations of the rape offense have not traditionally included criminal liability for acts of nonconsensual sexual intercourse between spouses. The author examines the validity of this spousal exclusion under a fourteenth amendment equal protection analysis, using the broad Vermont exclusion as a vehicle for discussion. The question of whether spousal victims or actors have standing to challenge such statutory formulations is addressed, followed by a discussion of equal protection standards of review and the nature of affected individual interests. The author suggests that the spousal exclusion should be subject to strict scrutiny and that state interests in perpetuating it are without truly rational foundation. The author concludes that the exclusion should be eliminated in favor of individually reviewing each instance of sexual assault in order to make more effective determinations of culpability and redress.

Historically, rape was the carnal knowledge of a woman by force and against her will.1 Traditionally, common law2 and statutory formulations of the rape offense have excluded nonconsensual acts of sexual intercourse between marital partners. This article considers the spousal exclusion in light of equal protection principles. Besides the main issue of whether liability can be constitutionally imposed for some actors

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although not for others, there are two important subsidiary issues regarding the spousal exclusion which have been dealt with in a variety of ways by modern statutory formulations. Assuming that liability for rape is excluded, then the question arises of whether liability for sexual assault occurring between spouses should be imposed after voluntary separation, court order, or divorce. Second, consideration must be given to whether liability should be excluded for all species of sexual assault, or just for rape.

The answers to these questions have been diverse. Vermont, along with numerous other states, has adopted a broad statutory exclusion

3. A sexual act is defined as "conduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body other than the fingers or any object into the genital or anal opening of another. . . ."

Vt. STAT. ANN. tit. 13, § 3251(1) (Supp. 1980). Such acts between spouses are excluded and are not actionable as sexual assault. Id. § 3252.


Several statutes provide that the exclusion is inoperative when the spouses are living apart. See Colo. Rev. Stat. § 18-3-409 (1978) (must have intent to live apart); Iowa Code ANN. §§ 709.1-4 (West 1979) (silent as to first and second degrees sexual abuse, but imposes liability for third degree violations when the persons are not cohabiting as husband and wife); Me. Rev. Stat. ANN. tit. 17-A, § 251(1)(A) (Pamphlet 1980); Mont. Rev. Codes ANN. §§ 45-5-506 (1979) (otherwise not liable for sexual contact or rape under §§ 45-5-502, 503 but are liable for deviate sexual assault under § 45-5-505).

There are numerous miscellaneous statutory definitions of the spousal exclusion. See Ark.
precluding liability for all sexual assaults occurring between marital partners until the marriage is formally ended at divorce. Because Vermont has such a broad exclusion it will be used as the basis for analyzing the exclusion's validity. Much of the analysis, however, is equally applicable to the other statutory formulations of the exclusion.

A claim alleging denial of equal protection of the laws is an appropriate challenge to a statutory scheme embodying the spousal exclusion. This is because the statute sets up a dichotomy whereby identical acts may or may not be the basis of criminal liability depending upon the participants' marital status. A nonspousal actor might claim that this statutory differentiation unconstitutionally burdens him by imposing liability on him for acts that he would not bear if he were married to the victim. The victim of a spousal sexual assault might claim that she is unconstitutionally discriminated against because she is left unprotected by the statute, while others who arguably may be similarly situated enjoy such protection. These dissonant claims of the nonspousal actor and spousal victim will be thoroughly explored. The first section of this article will examine the standing of each to challenge the statutory classification. The second section contains an examination of the relevant equal protection principles which would guide a court's review of the exclusion. To uphold the existence of the exclusion, the state must present sufficient justification for the statutory classification. The quantum of justification that the state must show is determined by the nature of the individual's interests that are affected through the state's action in maintaining the exclusion. Even if the state's interests are otherwise sufficient, the discrimination may still be

STAT. ANN. §§ 41-1802 to 1809 (1975) (although there is no spousal exclusion for rape, there is no liability for carnal abuse or sexual abuse of a mentally incapacitated spouse); IDAHO CODE § 18-6107 (1979) (liability for rape if the couple have been living apart for 180 days or have filed for separate maintenance or divorce); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1979) (similar to Idaho); N.M. STAT. ANN. § 30-9-10E (1978) (not considered a spouse if living apart or filed for separate maintenance or divorce); N.Y. PENAL LAW § 1.30.00(4) (McKinney Supp. 1979) (action allowed if valid judicial order, decree of separation, or acknowledged written agreement specifically providing that the actor may be guilty of a crime for engaging in conduct that would otherwise be an offense); N.C. GEN. STAT. § 14-27.8 (Supp. 1979) (not liable for sexual assault unless the parties are living separate and apart pursuant to a written agreement or judicial decree); PA. STAT. ANN. tit. 18, § 3103 (Purdon Supp. 1979) (action allowed if the couple live apart or live in the same residence under terms of a written separation agreement or court order); R.I. GEN. LAWS §§ 11-37-1 to -4 (Supp. 1979) (not liable for first degree sexual assault unless living apart and a divorce decision has been granted, whether or not a final decree has been entered).

Only a few statutes treat spousal sexual assault similarly to nonspousal sexual assault. See CAL. PENAL CODE § 262 (West Supp. 1980); DEL. CODE ANN. tit. 11, § 772(b) (1979); N.J. STAT. ANN. § 2c:14-5.5 (West Supp. 1979); 1977 OR. LAWS ch. 844 § 2 (repealing OR. REV. STAT. § 163.335). For a list of those statutes treating unmarried cohabitants as the equivalent of spouses for the purpose of assessing liability for sexual assault, see note 93 and accompanying text infra.

5. Although the Vermont law is gender neutral, this note generally refers to the male as the aggressor.

6. However, even the spousal actor may be liable for assault and battery. See notes 156 and accompanying text infra.
deemed unconstitutional if the scope of the statutory exclusion is so broad that, under the relevant standard of review, the court finds that the exclusion impermissibly differentiates between similarly situated individuals. Thus, after outlining the standards for reviewing equal protection clause challenges, the individual interests affected by the spousal exclusion will be discussed in the third section. Then the state’s justifications will be examined in the light of the individual interests.

I. CRIMINAL LAW STANDING REQUIREMENTS

Before examining the merits of the Vermont spousal exclusion under the equal protection clause, the important procedural question of who may raise the issue must be discussed. Those persons typically interested in questioning the statute’s validity are the victims of spousal sexual assault and the actor-defendants in nonspousal sexual assault cases. Clearly their goals could not be the same: the spousal victim would seek to have criminal liability imposed, at least prospectively,7 while the nonspousal actor would seek to escape liability for a past assault.

There are two United States Supreme Court opinions which seem to control the ability of both victim and defendant to raise equal protection claims. In *Linda R. S. v. Richard D.*,8 the Supreme Court established restrictions on the victim’s ability to challenge disparate treatment of classes of actors. That case dealt with a local district attorney who refused to bring charges against the father of an illegitimate child under a Texas statute which made it a misdemeanor for parents to willfully refuse to support their children.9 The mother of the child then brought a class action seeking to enjoin “discriminatory application” of the statute, which had been judicially construed to apply only to parents of legitimate children.10 Dismissing the mother’s claim for lack of standing, the Supreme Court said that “federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.”11 According to the majority opinion, the mother failed to allege a sufficient connection between her injury and the challenged governmental action to justify judicial intervention.12 To gain standing to litigate her claim, the mother had to establish a “direct nexus between the vindication of her interest and the enforcement of the state’s criminal laws.”13 The Court

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7. See notes 20-23 and accompanying text infra.
9. Id. at 615.
10. Id. at 615-16.
11. Id. at 617 (footnote omitted).
12. Id. at 617-18.
13. Id. at 619. Four justices dissented. Mr. Justice Blackman, with whom Mr. Justice Brennan concurred, argued that the case should be remanded to determine whether there was a live
noted that the woman had suffered some injury from the failure of the child’s father to provide support payments. The majority, however, said there had been no showing that her failure to obtain his support directly resulted from the nonenforcement of the statute against the father.14 The Court said that even if relief were to be granted, it would merely result in the jailing of the child’s father, and the prospect of securing future support payments would be “only speculative.”15 In broad dictum, the Court spoke of the “special status” that criminal prosecutions have and explained that “a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”16

If the broad language of Linda R. S., were followed in a suit brought by the victim of a spousal sexual assault, an adjudication on the merits of an equal protection claim would be precluded. There is, however, some authority that Linda R. S. will not be read to preclude standing for all victims’ claims.17 Justice Rehnquist, dissenting in Orr v. Orr,18 has stated that all that an individual in the position of the mother in Linda R. S. would have to show, based on recent cases, is a “‘substantial likelihood’ that the relief requested will redress the injury.”19 Linda R. S. could also be interpreted more narrowly to require only a direct nexus between the relief requested and the injury.20 However, even under Justice Rehnquist’s interpretation of recent cases, or this narrow reading of Linda R. S., a victim seeking standing to challenge the Vermont spousal sexual assault exclusion would have serious difficulties. Under either standard, a victim could not gain standing if she sought relief based merely on a past sexual assault. Due process requires that a defendant be given prior warning that his conduct will subject him to criminal liability.21 Since the present Vermont statute clearly precludes liability for spousal sexual assault,22 even if it were determined that the

14. 410 U.S. at 618.
15. Id.
16. Id. at 619.
exclusion were unconstitutional, a spousal defendant could not be pros-ecuted for sexual assaults occurring prior to that determination. Because no relief for past sexual assaults could be granted, there would be no standing.

If the victim sought prospective relief, alleging a past and continuing threat of spousal sexual abuse, there would then be a more direct nexus between the injury and the relief requested than in the situation just discussed. The victim would allege that removal of the exclusion, thereby subjecting the spouse to liability, would provide relief from future harm. The claim, in effect, would be that the threat of prosecution would deter future spousal sexual assaults. The injury (future sexual assaults) would have a direct nexus to the relief sought (deterrence). An analogous argument, however, was rejected as merely "speculative" in Linda R. S.\(^{23}\) Dissenting from the majority's view, Justice White, with whom Justice Douglas concurred, argued that our civilization has always "assumed that the threat of penal sanctions had something more than a 'speculative' effect on a person's conduct."\(^{24}\) There is, however, a factual difference which may be a critical distinction. In Linda R. S. the threat of incarceration was considered speculative because the mother wanted support payments and the jailing of the father would not necessarily gain such relief. In the case of the spousal victim, jailing of the offender would provide the relief sought — prevention of sexual abuse. That would entail an additional step, making the relief sought indirect. The victim would be asking a court to remove the exclusion, and then, if sexually assaulted, she could seek redress through normal judicial processes.\(^{25}\) Justice Rehnquist would ask whether there was a substantial likelihood that the relief sought (deterrence) would prevent the injury. The answer to this depends on one's perception of the effectiveness of deterrence as a criminal sanction. Unless the deterrence argument is accepted, a spousal victim's claims apparently meet neither the criteria of Linda R. S. nor Justice Rehn-quist's interpretation of recent cases.

In contrast, turning for a moment to the ability of a nonspousal defendant to raise the claim of unfair discrimination as a defense to a charge of sexual assault, there seems to be little doubt that he can. Of the seven justices in Linda R. S. who discussed the issue,\(^{26}\) all agreed that while the parent of an illegitimate child could not do so, a parent of

\(^{23}\) 410 U.S. at 618. Cf. Coleman v. Wagner College, 429 F.2d 1120, 1126 (2d Cir. 1970) (Friendly, J., concurring) (Deterrence "is a principle justification for our system of criminal sanc- tions").

\(^{24}\) 410 U.S. at 621.


\(^{26}\) See notes 11 and 12 and accompanying text supra.
a legitimate child had standing to raise the issue of invidious discrimination in the application of the statute as a defense to a charge of nonsupport. 27 This dictum was converted into the holding of the Court in Orr v. Orr. 28 Stating that the facts were indistinguishable the Court analogized the plight of the husband in Orr to the parent of a legitimate child as was discussed in Linda R. S. 29 Therefore, the Court in Orr v. Orr held that the husband had standing to challenge the validity of a statutory classification which provided that husbands, but not wives, may be required to pay alimony upon divorce. 30 According to the majority in Orr, one burdened by a statutory classification will have standing to assert an equal protection claim. "The burden alone is sufficient to establish standing." 31 The husband in Orr claimed that he should not be required to pay alimony if similarly situated wives could not be required to pay. 32 This situation is directly analogous to the burden of the nonspousal defendant. He would allege that he should not be held criminally liable if similarly situated spouses were not held criminally liable under the statute. If anything, the burden of the nonspousal defendant is greater than the husband in Orr.

To highlight the issue in Orr, the Court analogized the husband's situation to that of racial discrimination. "There is no doubt that a state law imposing alimony obligations on blacks but not whites could be challenged by a black who was required to pay." 33 Interestingly, Justice White's dissenting opinion in Linda R. S. used a similar analogy. "If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them." 34 These analogies indicate that victim and actor standing have identical foundations. Those who must carry the burden of a statutory classification — be they actor or victim — should be appropriate parties to challenge the statutory scheme simply because there is a burden they bear which others do not. In the context of sexual assault, the nonspousal actor has the burden of shouldering liability for prosecution and the nonspousal victim receives the benefit of the statute's protection. In contrast, the spousal actor retains the "benefit" of no liability under the statute, while the spousal victim must, arguably, bear the burden of the lack of protection under the statute.

29. Id. at 273.
30. Id.
31. Id.
32. Id. at 271.
33. Id. at 273.
34. 410 U.S. at 621. See also Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), cert. denied, 414 U.S. 1143 (1974).
This "burden principle" was accepted in Orr but rejected in Linda R. S., leading to perverse results. Innocent victims could be truly ravaged until an otherwise guilty actor successfully challenges the statutory classification and wins freedom. On the other hand, if it were held that spousal victims have standing when claiming a burden not shared by nonspousal victims, then the merits of a discriminatory treatment allegation would be determined in a context furthering societal interests. No otherwise guilty actor would go unpunished and claims of unequal treatment would be resolved.

II. Equal Protection Principles

The equal protection clause of the fourteenth amendment of the United States Constitution requires that similarly situated individuals be treated in a similar manner by a state. The equal protection mandate, as interpreted by the Supreme Court, neither imposes upon a state an affirmative obligation to protect those within its jurisdiction,\textsuperscript{35} nor prevents a state from classifying persons in a discriminatory fashion.\textsuperscript{36} However, it does guarantee that a classification will not arbitrarily burden a particular group of individuals,\textsuperscript{37} unfairly affect fundamental rights,\textsuperscript{38} nor be based upon impermissible criteria.\textsuperscript{39}

Structurally, judicial review of a legislative classification involves three steps. First, there must be a determination of the nature of the individual's affected interest. Next there is an examination of the state's interest in classifying the way that it did, including a weighing of the two interests. Finally, the tailoring of the statute is scrutinized. The ob-

\textsuperscript{35} U.S. Const. amend. XIV. Assuming for the moment that the spousal sexual assault exclusion was held to violate the equal protection clause, that holding would not mandate that the legislature must include spouses within the reach of the statute's provisions. Instead, the statute would be struck down and the mandate would simply be that the legislature could not make the classification it had chosen. This analysis is consistent with Skinner v. Oklahoma, 316 U.S. 535 (1942) and Linda R. S. v. Richard D., 410 U.S. 614 (1973). See also Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). Cf. Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 341 (1949) ("...we now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights — especially life, liberty, and property — and to do so equally.").

An affirmative duty whereby the state would be required to extend its protective functions to include spousal sexual assault within the sexual assault offense could be found through a substantive due process analysis. Under such a theory, the argument would be that the state, as guardian of individual rights, is under a duty to actively protect individuals from violations of their persons and property. See Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting). To secure these rights is the purpose of government and when the government withholds its protective function it breaches the social compact. See The Declaration of Independence (July 4, 1776).


\textsuperscript{37} Smith v. Cahoon, 283 U.S. 553, 566-67 (1931).


\textsuperscript{39} Id.
jective of the analysis is to determine whether the legislative classification bears a sufficient relationship to a proper governmental purpose.\textsuperscript{40} The United States Supreme Court has articulated at least two standards\textsuperscript{41} for reviewing the sufficiency of the relationship of classifications to governmental purpose. The standard employed depends upon the nature of the individual’s affected interest.\textsuperscript{42} The “rational relationship” test, applied generally to economic legislation, requires only the showing of a rational relationship between the classification and the end that the statute seeks to serve.\textsuperscript{43} In applying this test, courts generally defer to the legislature’s determination that the enactment furthers some permissible state interest.\textsuperscript{44} This standard places a heavy burden upon claimants, signalling “minimal scrutiny in theory and virtually none in fact.”\textsuperscript{45} The more stringent test, that of “strict scrutiny,” is triggered when a fundamental right is impinged by the legislative classification.\textsuperscript{46} Among others, marriage, procreation decision making, bodily integrity and individual autonomy are considered fundamental rights.\textsuperscript{47} Generalizing about the qualities of fundamental rights, one commentator has suggested that they are rights essential to the freedom of the individual, and their denial will be tolerated only under circumstances where the denial would be tolerated universally.\textsuperscript{48} When such rights are impinged, the state’s interests are explicitly balanced against the discriminatory impact upon the fundamental rights. To sustain the legislation, the burden is on the state to establish that the law advances a compelling state interest.\textsuperscript{49}

Besides these two polar opposites, the Supreme Court employs numerous techniques which effectively produce intermediate standards

\textsuperscript{40} See generally Note, Developments in the Law: Equal Protection, 82 Harv. L. Rev. 1065 (1969) [hereinafter cited as Developments in the Law].


\textsuperscript{42} Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974).

\textsuperscript{43} In articulating the exact words of this standard, the Supreme Court has sometimes required that the classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” Eisenstadt v. Baird, 405 U.S. 438, 447 (1972), quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971) and Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). At other times it has been said that a “statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” Dandridge v. Williams, 397 U.S. 471, 485 (1970) quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961).

\textsuperscript{44} See generally Tribe, supra note 13, at 994-96.


\textsuperscript{46} See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969).

\textsuperscript{47} See notes 71-74 and accompanying text infra.


of review. The intermediate standards still require a balancing of interests: the more important the individual’s interests are held to be, the more substantial the state’s interests must be to sustain the legislation.

Once sufficient state interests to otherwise sustain the classification are established, the issue becomes whether the legislative classification is tailored to promote those interests by including all, but only those persons similarly situated with respect to the purpose of the law. “How well tailored the classification must be remains somewhat obscure.” There is a recognition that “few classifications will be either a perfect promotion of an articulated governmental purpose or a clearly irrational mismatch of classification with ends.”

The validity of an inartfully tailored classification largely depends upon the standard under which the justices review the permissibility of the governmental ends and the degree of relationship between the classification and those ends. Under the rational relationship standard there is judicial deference to a less than perfect fit of similarly situated persons with the statutory classification. For example, a statute might be upheld even though it is under-inclusive in that it does not reach some persons who are similarly situated for the purposes of the statutory scheme. Likewise, a statute still might be valid even though it is over-inclusive in that it treats persons in the scheme similarly, although, in fact, they should be treated differently. On the other hand, if strict scrutiny is applied, the tailoring of the statute is closely examined. At minimum, there must be a showing that the classification is more than one of several reasonable ways of achieving the state’s goal. If the classification is not necessary to achieve the government’s interest, or

51. L. Tribe, supra note 13, at 1082-83.
53. Developments in the Law, supra note 40, at 1122.
54. J. Nowak, supra note 52, at 522.
55. Id. See also Developments in the Law, supra note 40, at 1101.
58. See L. Tribe, supra note 13, at 999.
60. Developments in the Law, supra note 40, at 1122.
perhaps that less drastic means are available, then the law will be held to violate the equal protection clause. This three part analysis of equal protection principles provides the structure for the remainder of this article. First considered is the nature of the individual’s interests affected by the spousal sexual assault exclusion. Then, taking the character of those interests as the guide to measure the closeness of the scrutiny to be employed, the state’s interests in maintaining the exclusion will be examined. Also contained within the next two sections is a discussion of the tailoring of the statute.

III. Nature of the Individual’s Interest

In articulating the nature of the individual’s interest in a situation where the state treats spousal sexual assault differently from similar acts occurring between nonspouses, it should be recalled that those interested in challenging the validity of the exclusion are defendants in nonspousal sexual assault cases and victims of spousal sexual assault. The nonspousal defendant has an interest in equal application of the laws. He also has a liberty interest at stake in his defense to a criminal prosecution. Neither of these interests, however, create an independent right justifying strict scrutiny. Otherwise, the mere assertion that a defendant is treated differently, or that he might lose his liberty, would cause every criminal statute that contained classifications to be subjected to exacting judicial review. This principle can readily be discerned from the Court’s opinion in Skinner v. Oklahoma. In that case the Court recognized that the legislature could distinguish between ‘degrees of evil’ and that it ‘may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience.’ Such classifications warrant strict scrutiny only if they un-

63. A classic examination of the tailoring of a statute is the case of Skinner v. Oklahoma, 316 U.S. 535 (1942). In that case, an Oklahoma statute provided for mandatory sterilization of those individuals who were habitual criminals. A habitual criminal was defined as a person convicted of two or more felonies involving moral turpitude. Id. at 535-36. Embezzlement, however, was expressly excluded from the statute. Id. at 537. Through application of the law, the theft of a chicken and the embezzlement of a chicken, crimes of intrinsically the same nature, were treated differently for the purposes of sterilization. Id. at 539. The United States Supreme Court recognized that the legislation involved “one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.” Id. at 541. Therefore, “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” Id.
65. 316 U.S. at 540.
equally burden individuals' fundamental rights.66 Absent such an impingement, there would be deference to the legislature's classification.67

Other than the interests just described, the nonspousal defendant has no rights affected by his defense to a sexual assault charge. This conclusion does not necessarily mean that the nonspousal defendant cannot obtain strict scrutiny of the statutory scheme which subjects him, but not others, to possible liability. Although the general rule is that a claimant may only assert his own constitutional rights,68 there are numerous exceptions to the rule.69 One exception is where fundamental rights are impinged in situations where it is difficult or impossible for the persons whose rights are affected to present their grievance before any court.70 Thus, if it were determined that spousal victims had fundamental rights impinged by the statutory scheme and that those victims could not present their claims before any court, then the nonspousal defendant might be allowed to "use" the spousal victims' rights to obtain strict scrutiny of his equal protection defense.

Viewed from the prospective of the spousal victim, marital sexual assault and the exclusion thereof from liability for criminal sexual assault affect several recognized fundamental rights: marriage,71 individual autonomy,72 procreation,73 and bodily integrity.74 Although all

66. Id. at 541. There is also "heightened" sensitivity when a criminal statute raises distinctions based on race, see, e.g., McLaughlin v. Florida, 379 U.S. 184, 192 (1964), or gender, see, e.g., Meloon v. Helgemoe, 564 F.2d 602 (1st Cir. 1977), cert. denied, 436 U.S. 950 (1978).
67. 316 U.S. at 541. But cf. Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103 (1961) (suggesting that the equal protection clause creates an independent right to nondiscriminatory penal enforcement). For examples of courts' responses to equal protection challenges under the rational basis standard, compare United States v. Robinson, 311 F. Supp. 1063, 1066 (W.D. Mo. 1969) (otherwise guilty defendant escaped liability because he was convicted under a wiretap statute that was intentionally discriminatorily enforced against only private individuals, the court holding that there was "no rational distinction between the activity of the Government and that of the defendant." ) with State v. Giant of St. Albans, Inc., 128 Vt. 539, 548, 268 A.2d 739, 744 (1970) (upholding a blue law riddled with exceptions against an equal protection challenge).
74. See, e.g., Rochin v. California, 342 U.S. 165, 172 (1952) (stomach pump in search of
of these rights are considered aspects of the right to privacy,\textsuperscript{72} it is well established that procreative decision making and bodily integrity are individual rights having priority over the marital relationship.\textsuperscript{76}

Regardless of whatever else it is,\textsuperscript{77} the act of sexual assault is a violation of the individual's bodily integrity and a denial of the ability to control procreation. The spousal sexual assault statute makes a distinction which affects these fundamental rights. The statute provides protection of these rights for nonspouses but denies the protective function of the statute for nonconsensual sexual acts occurring between spouses. The Supreme Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."\textsuperscript{78} Thus the mere showing of the difference in treatment of these fundamental rights should be sufficient to warrant strict scrutiny.\textsuperscript{79}

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75. Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977). "This right of personal privacy has been said to include 'the right of the individual to be free from unwanted searches and seizures'." Id. (citations omitted). Cf. Gerety, supra note 74, at 236 (privacy is autonomy or control over the intimacies of personal liberty); Ruebhausen & Brim, Privacy & Behavioral Research, 65 Colum. L. Rev. 1184, 1189 (1965) (the essence of privacy is the freedom of the individual to pick and choose for himself the time, circumstances, and 'extent to which his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others').

76. The discussion of this hierarchy of fundamental rights is postponed until the state's interests are examined. See notes 94-106 and accompanying text infra.

77. See notes 144-49 and accompanying text infra.


79. Under this view the codification of the exclusion is itself sufficient state action. The inquiry would then be whether the statutory scheme is constitutional. See Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208, 209 (1957). Since the statutory scheme makes a distinction in the treatment of the protection of fundamental rights, it should warrant strict scrutiny. This is somewhat analogous to situations where the legislature passes a law making distinctions based on race or sex. In these situations the presence of state action in private activity is assumed. See Parks v. "Mr. Ford," 556 F.2d 132, 135-36 n.6a (3d Cir. 1977).

It might be argued that the statutory distinction alone is not sufficient to warrant strict scrutiny in that it is not the state that impinges upon the victim's fundamental rights but rather the individual spousal actor. Thus, the argument would run, the statutory scheme should be tested under a more deferential standard of review. Even if this argument were accepted by the court, there are several other theories, outlined below, which arguably establish a sufficient connection between the private conduct and state action to justify close examination of the classification. The indirectness of the state action will always be a factor in any instance where a victim challenges a
Even if the state interests are sufficient to justify some type of spousal exclusion given the character of the individual's interests, equal protection principles still require that the exclusion be tailored to reflect those state interests. In other words, state and individual interests must be coordinated to prevent unjustified impingement of any individual in-

criminal law classification on equal protection grounds except in the hypothetical case where the government is itself the criminal actor. But upon examining the purposes of the equal protection clause and our system of criminal laws, it is of primary importance that a remedy should be had when a victim is not given an equal opportunity to be protected by our criminal justice system. Moreover, not all challenges to the criminal laws by victims on equal protection grounds would warrant strict scrutiny. For example, where only property rights are invaded, a more deferential standard would be appropriate.

In the present context, if the mere distinction contained in the statute is not sufficient to warrant close scrutiny, there remain several theories which illuminate the state's involvement in the act of spousal sexual assault. First, it could be argued that the state is a party to the marital relation. See, e.g., Maynard v. Hill, 125 U.S. 190, 210-11 (1888). The marriage relationship is pervasively regulated by the state. See, e.g., Sosna v. Iowa, 419 U.S. 393, 404 (1974); DeBourgh v. DeBourgh, 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1957). During the continuance of the marriage, the state has the power to regulate all the incidents of the relationship. Sherrill v. Sherrill, 334 U.S. 463, 354 (1948); id. at 360 (Frankfurter, J., dissenting); Maynard v. Hill, 125 U.S. 190, 210-11 (1888). One aspect of the regulation and involvement of the state has been the determination that spousal sexual assault should not be actionable as such. Thus, because of the very pervasiveness of the state's involvement in the marriage relation, it cannot be said that there is no state involvement in spousal sexual assault.

Arguably, the required connection between the fundamental rights infringement and state action could also be established if it were empirically shown that the effect of the exclusion is to encourage spousal sexual assault. This would be analogous to such situations as the Court's refusal to enforce racially restrictive covenants based partially on the theory that less private discrimination would take place if the courts did not enforce that discrimination. See Barrows v. Jackson, 346 U.S. 249, 254 (1953). The spousal claimant would have to show that the incidence of sexual assault among spouses is greater because of the aggressor's nonliability, or, that the incidence of spousal sexual assault is more frequent than nonspousal sexual assault because of the spousal aggressor's nonliability. Either of these comparisons would be difficult to demonstrate, given the almost universal application of the exclusion. Presently, there are no studies of the effect of the exclusion on the incidence of spousal sexual assault.

Finally, "if the conception of liberty is sufficiently developed to define a sphere of private autonomy free from both governmental and private infringement, a government decision not to protect individuals from private infringements will plainly be a species of unconstitutional state action." L. Tribe, supra note 13, at 1150. It could be argued that state action is established by the action of a court in refusing to give declaratory relief to a spousal victim. By its refusal to grant the relief it would be sanctioning the conduct. See Parks v. "Mr. Ford," 556 F.2d 132, 154-55 (3rd Cir. 1977) (Gibbons, J., concurring). Courts have refused to sanction some private actions. See, e.g., Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kramer, 334 U.S. 1 (1948). In one case the plaintiff alleged that a private individual had violated her constitutional right of privacy. The defendant argued that this right runs only against state action. The court rejected the defendant's contention.

The claim that this constitutional right runs only against "state action" overlooks the fact that the act of a court — even the entry of a judgment denying relief — is state action within the meaning of the Fourteenth Amendment... Hence, the denial of relief in this case — relief essential to vindicate a basic human and constitutional right — would itself violate the Constitution. Galella v. Onassis, 353 F. Supp. 196, 232 (S.D. N.Y. 1972) (citations omitted). Applying this test to spousal sexual assault, it must be determined that the relief is "essential to vindicate a basic human and constitutional right," which entails an examination of the state's justification for the exclusion. Id.
terests. Contained in the spousal exclusion embodied in Vermont’s Sexual Assault Act are three groups of individuals whose treatment relative to the exclusion bears examination. These groups include those individuals who compel their spouses (or are compelled by their spouses) to perform “unnatural acts,” those spouses who are separated from their mates, and unmarried cohabitators. Each group will be separately examined.

Vermont’s statute excludes liability under the statute for all sexual acts occurring between spouses. 80 This exclusion encompasses “unnatural acts.” The question is whether this exclusion of liability for all sexual acts is justified by the articulated state interests. If the state interests do not justify such a broad exclusion, it could be argued that the statute as a whole is under-inclusive because it does not protect against such acts, and correlativey, that the exclusion itself is unconstitutionally over-inclusive because it excludes liability for such acts from the operation of the statute.

To anticipate somewhat, the position that this broad exclusion does not reflect the state’s interests can be asserted partly by analogy to several courts’ treatment of statutes prohibiting consensual sodomy. These courts have struck down statutes prohibiting consensual sodomy as applied to the unmarried on equal protection grounds believing that marital privacy prevented applying the statute to married couples. 81 The issue, as the courts perceived it, was whether marital status had any logical basis for determining the morality or legality of the acts. Marriage, at least one court has reasoned, is not relevant in these situations, because all arguments pertaining to ‘deviate’ intercourse are applicable irrespective of the participant’s marital status. 82 Accepting this as fact, that deviate sexual intercourse is no different in character whether it is performed by spouses or unmarried couples when consensual in nature, 83 it must be shown that the act becomes qualitatively different for the purposes of distinguishing between spouses and nonspouses when the element of compulsion is introduced. Moreover, it has been

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80. See note 4 supra.
83. Id.
said that forced spousal sodomy can be constitutionally proscribed, and, in other jurisdictions, it has been held that the state has a compelling interest in protecting the individuals within marriage from such deviate acts. Presumably, Vermont has the same interest in protecting its citizens from such acts and prosecuting those who force others to perform them. If this were true, then unless the state has an alternative method of protecting the interests of individuals within marriage from sexually deviate acts which makes the protection of the sexual assault statute unnecessary, the state’s interests in excluding spouses from liability must be at least equally compelling.

A second group of persons excluded from protection or liability under the Vermont statute are those spouses who are separated, whether or not under a judicial order. While waiting for a divorce action to be heard, the husband can still forcibly seek sexual satisfaction and there can be no action against him under the statute. Even if the spouses maintain separate households on a permanent basis, the exclusion remains in effect. In these instances where the marital relationship has obviously broken down, there must be a determination whether the state interests are sufficient to justify such a broad exclusion. If not, the classification is impermissibly over-inclusive because those who are separated or waiting for divorce are included within the spousal exemption.

A third group to consider in examining the scope of Vermont’s spousal exclusion are those who live together without the “benefit” of marital bonds. Identical acts of forced sexual behavior could occur between married cohabiters and unmarried cohabiters, but actual criminal liability under the statute can be only imposed on those individuals who are not married. Although Vermont does not recognize common law marriage, recent decisions and statutes in other states

86. See notes 156-66 and accompanying text infra.
87. Many jurisdictions impose liability for sexual assault when the spouses are separated. See note 4 supra. These statutes represent a recognition that there are limits to the state’s interests in excluding liability.
93. Several statutes define “spouses” as those living together as man and wife, regardless of
have begun to blur the distinction between marital partners and unmarried cohabitators. This trend lends support to the idea that unmarried cohabitators and married couples are similarly situated for the purposes of assessing liability for nonconsensual sexual acts occurring between cohabitators. Given this situation, the classification created by the Vermont statute is under-inclusive, if the state’s interests do not provide a basis for distinguishing between these types of cohabitators.

IV. NATURE OF THE STATE’S INTEREST

Examination of the origins of the spousal rape exclusion “reveal that it is rooted in the ancient concepts of a wife as a chattel and the inviolability of the husband’s supreme role in the marriage relationship.”\(^\text{94}\) At the time the rape laws came into being, women were viewed as their husband’s property,\(^\text{95}\) and the exclusion was a means of legitimating and protecting the husband’s sexual behavior.\(^\text{96}\) Probably somewhat related to this property theory is the “unity of person” principle. At common law the legal identity of the woman merged into that of her husband upon marriage.\(^\text{97}\) Since during marriage only one person remained, there could be no sexual assault.

Both the property and “unity of person” theories are obsolete. In a recent opinion, the United States Supreme Court has said that nowhere in modern society “is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.”\(^\text{98}\) Today, the purpose of the rape laws has become the protection of individual safety and freedom of choice.\(^\text{99}\) Unless a sufficient modern justification exists, the present spousal exclusion is just a holdover of the discrimination of the past.\(^\text{100}\)


\(^\text{99}\) Marital Rape, supra note 94, at 311.

\(^\text{100}\) If the history of the spousal exclusion were combined with the fact that most rapes are done by males, a plausible case for heightened scrutiny based on a gender discrimination can be argued. See Massachusetts v. Feeney, 442 U.S. 256, 274 (1979). In Feeney, the Court stated that “[w]hen a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is
Two general ideas might be said to underlie the modern justifications for the spousal exclusion. The first is a perception that the status of being married, by itself, has changed the nature of the nonconsensual sexual acts. The other idea asserts that the quality of such acts is sufficiently different and less dangerous when occurring within marriage. Each of these conceptions has produced numerous theories to support the exclusion.

A. Marriage as Status

It could be argued that the legislature has recognized the special status of marriage, and has determined that liability under the sexual assault statute should not attach to nonconsensual sexual acts in marriage. The concept of marriage is important in American jurisprudence. It is a recognized fundamental right. The state is vitally interested in matters surrounding the relationship. This relationship is favored in the law, and the law holds marital partners to various special obligations and liabilities. Based on these considerations, it could be argued that vulnerability to nonconsensual sexual acts is simply an obligation of the relationship. This obligation, stemming perhaps from an obligation to engage in sexual intercourse within marriage, arguably
justifies the difference in treatment that married individuals receive. If, however, it is determined that an individual's fundamental rights of bodily integrity and procreation decision making are impinged by the legislative classification, a series of judicial precedents seem to clearly preclude the validity of the classification if its only ground is the fact of marriage itself.

The first in the series, *Eisenstadt v. Baird*, 107 has provided a modern definition of the nature of the marital relationship. During the course of the opinion which invalidated a statutory scheme more severely limiting access of unmarried individuals than married individuals to contraceptives, the Court said:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. 108

The Supreme Court opinion in *Planned Parenthood of Central Missouri v. Danforth* 109 explicitly established the independence of the individual within marriage concerning matters affecting the procreation decision. Factually, the case involved a Missouri statute requiring that a wife obtain her husband's consent before an abortion could be performed. The state's theory in support of the requirement was the perception of marriage as an institution and the belief that any change in the family status should only be made jointly by the spouses. 110 The state argued that, because "[t]he consent of both parties is generally necessary . . . to begin a family, the legislature has determined that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent." 111 The Court rejected this theory, however, holding that a state could not require consent of a spouse as a condition for abortion. 112 In reaching its decision, the Court recognized that a wife could act unilaterally, perhaps having a serious deleterious effect on the marriage, 113 yet marital harmony would also not be promoted by giving the husband the veto power over the decision of the woman. 114 Thus, the Court was faced with a direct conflict be-

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110. *Id.* at 68.
111. *Id.* quoting brief for Appellee Danforth at 38.
112. *Id.* at 69.
113. *Id.* at 70.
114. *Id.* at 71.
between the individual rights of the wife and those of the marital relationship as an institution. Resolving the conflict, it was reasoned that the balance must weigh in the woman’s favor since it is the “woman who physically bears the child and who is the more directly and immediately affected by the pregnancy. . . .”

In addition, state courts have held that a woman has the right to have a hysterectomy or a sterilization operation without spousal consent. These courts reason that the right of a competent person to control his or her body is paramount to the spouse’s desires.

These decisions are a recognition that the individual, not the marital relationship, is the repository of the basic right to control procreation. Thus when individuals within the marital relationship have differing opinions concerning procreation, each has the protected right to control his or her own reproductive functions. This right to the control of the reproductive functions of one’s own body is just an aspect of the more comprehensive right to bodily integrity. More generally, then, these cases stand for the principle that the individual’s right to control his or her body continues within the marital relationship even when the exercise of that right has a deleterious effect upon the marriage. The additional principle for which these cases stand — that the marriage relationship cannot be favored in the law at the expense of the fundamental rights of the individuals within that relationship — eliminates the marital status itself as an underlying justification if fundamental rights are impinged.

Several traditional theories for the exclusion stem at least partly from

115. Id.
120. Gerety, supra note 74, at 266.
121. The many convictions of spouses for nonconsensual sodomy are another recognition of the spouse’s individual right to bodily integrity. See note 84 supra. See also Brooks v. Burkeen, 549 S.W.2d 91, 93 (Ky. 1977) (“The Federal constitutional right to privacy has been held to protect the decision of one spouse to act in a way which affects the most basic considerations of a marriage from the veto of the other spouse.”); Fadgen v. Lenkner, 469 Pa. 272, 283, 365 A.2d 147, 152-53 (1976) (Manderino, J., concurring). The action for criminal conversation should be abolished because the right to privacy is broad enough to include the spouse’s right to engage in sexual activity with one other than his or her spouse and there is no compelling state interest which justifies limiting the exercise of that right. Id.
the concept of the marital status. The most frequently cited justification for the perpetuation of the spousal exclusion is the contract theory. According to this theory, the wife irrevocably consents to her husband’s offers of sexual intercourse.\textsuperscript{122} Consent, of course, is a defense to a charge of sexual assault.\textsuperscript{123} The state’s interest underlying the theory, presumably, is in upholding the marriage contract.\textsuperscript{124} The state theory has flaws similar to the status rationale. If the consent is irrevocable, it denies individual control over the birth control decision subsequent to the marriage ceremony. This is especially true if no artificial means of birth control are employed. The procreation decisions, however, have held that the individual retains the decision to control whether one’s body shall be a source of another’s life. It would be an untenable anomaly if the procreation decisions were to be read narrowly as standing only for the proposition that the individual’s control over sexual functions were limited to the ability to practice artificial birth control or receive an abortion. To the contrary, these decisions should be read to recognize that a spouse may withhold sexual relations at any time during marriage, because each person is an individual, retaining the right to make such fundamental decisions.\textsuperscript{125}

Additional reasons to question the validity of the contract theory abound. Opponents of the theory argue that the doctrine is not factually sound as it requires one to infer that the wife intends to let her husband initiate sex upon demand.\textsuperscript{126} In contrast, opponents argue that

\textsuperscript{122} This theory of consent, although not explicitly a reason for the Vermont spousal exclusion, has been the primary reason for the exclusion. See, e.g., State v. Haines, 51 La. Ann. 731, 25 So. 372 (1899); Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489 (1857); State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (Essex County Ct. 1977) aff’d, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979); State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977); Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905); Regina v. Clark, [1949] 33 Crim. App. 216, 2 All E.R. 448. This theory of implied consent was first advanced in 1 M. Hale, THE HISTORY OF THE PLEAS OF THE CROWN 628 (London 1800): “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent an [sic] contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” At the time Hale wrote these words it was an “accepted view of the law because at that time a valid marriage could not be dissolved except by death . . . [and] [t]he only way in which a marriage could be voided . . . was by a private Act of Parliament.” Regina v. Miller, [1954] 2 Q.B. 282, 286, 2 All E.R. 529, 530.

\textsuperscript{123} VT. STAT. ANN. tit. 13, § 3252(1)(A) (Supp. 1980).

\textsuperscript{124} Whilst marriage is often termed . . . a civil contract . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change . . . . The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.


\textsuperscript{125} Some states do not differentiate in their statutory treatment of spousal and nonspousal actors in imposing liability for sexual assault. See note 4 supra.

\textsuperscript{126} Comment, Rape and Battery Between Husband and Wife, 6 STAN. L. REV. 719, 722
marriage is merely an indication that the wife will usually consent to intercourse but that she "probably believes that she can expressly decline the act at any given time." In refusing to recognize this basic fact of modern marital relations, the contract theory has simply "lost touch with the reality of the 20th Century." In other areas of the law the irrevocable consent fiction can be viewed as having been directly contradicted. For example, although Vermont's courts have not addressed the question, in other states divorces may be granted on the grounds of indignities or cruelties arising from excessive sexual demands. In addition, although the consent is said to be sexual intercourse, Vermont excludes liability for nonconsensual "unnatural acts." Thus the exclusion is broader than the support that the contract theory provides. Moreover, it is unreasonable to infer such consent when the spouses are separated. The contract theory does, however, provide a ground for differentiating the behavior of cohabitators who have not formalized their relationship with the state.

Two other theories more clearly articulate modern state interests in the marriage relation. It has been said that the exclusion represents an attempt to promote marital privacy or encourage marital reconciliation by preventing prosecutions. These are permissible interests if the exclusion does not unfairly burden fundamental rights. If these poten-

(1954) [hereinafter cited as Rape and Battery]. The consent is implied, the inference being that, "'consent to marry" and "consent to intercourse at all times" are the same thing because the marriage ceremony does not contain specific references to intercourse. Consent in Rape, supra note 2, at 258.

127. Rape and Battery, supra note 126, at 722. The result of the irrevocable consent theory has been called "illogical" because in cases of "rape of a woman other than one's wife, the victim's prior consent to sexual access is not a defense where she withdraws or refuses to consent on another subsequent occasion." State v. Smith, 148 N.J. Super. 219, 228, 372 A.2d 386, 391 (Essex County Ct. 1977), aff'd, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979) (emphasis in original).

128. State v. Smith, 148 N.J. Super. 219, 227, 372 A.2d 386, 390 (Essex County Ct. 1977), aff'd, 169 N.J. Super. 98, 404 A.2d 331 (Super. Ct. App. Div. 1979). This "superficial reasoning has been perpetuated . . . without consideration of the fact that such a mechanical application of principles of contract law are illogically applied in the area of forcible sexual invasions." Id.


130. In light of the repressive attitude of the common law toward sex, "'consent to intercourse' envisaged within the marital union probably meant 'consent to intercourse in the missionary position.'" Consent in Rape, supra note 2, at 279.

131. Other jurisdictions impose liability for nonconsensual deviate sexual acts. See note 84 and accompanying text supra.


133. See statement of Senator Bloomer, Vermont Senate Judiciary Hearings on the Sexual Assault Act, Transcript at 12 (Feb. 16, 1977); Rape and Battery, supra note 126, at 725.
tial justifications are tested under a deferential standard, there must be a determination as to whether these interests are rationally or substantially promoted.

The purpose of marital privacy is to promote the marriage relationship by allowing the fostering of consensual acts between marital partners. Marital privacy was not designed as a shield to allow one marital partner to force the other into nonconsensual acts. Given its purpose, it is inapplicable as a rational justification for the exclusion of liability for sexual assault. Moreover, because other actions can be brought for nonconsensual sexual acts occurring during marriage, it is illogical to exclude liability upon this ground alone.

The state’s interest in favoring marriage includes the encouragement of reconciliation. The exclusion could be said to reflect the state’s hope that the partners will informally resolve their problems. Unfortunately, “reconciliation hardly seems an expected or likely consequence of a relationship that has deteriorated to the point of forcible sexual advances.” If this were the sole justification for the exclusion, it would have the effect of permitting one spouse to escape justice at the expense of the other based on an unlikely hope of reconciliation. Moreover, this theory is somewhat contradicted by the allowance of other actions.

Some commentators have cited problems of proof as another possible justification for the spousal exclusion. This rationale can also be seen as a result of the existence of the relationship itself. Often mentioned are such problems as fabricated complaints in seeking a more favorable divorce settlement, and actually establishing that a sexual attack occurred. Yet these problems cannot be a valid reason for denying a cer-

135. See Trammel v. United States, 100 S. Ct. 906, 913 (1980) wherein the Court modified the common law privilege that prohibited one spouse from testifying against the other in federal criminal proceedings. The Court held that the choice of whether to give such testimony belongs to the witness spouse alone. Rejecting the argument that permitting one spouse to testify against the other would interfere with marital harmony, the court reasoned that there was probably little harmony to preserve when one spouse is willing to testify against the other in a criminal proceeding. Moreover, not permitting a spouse to testify against the other in order to avoid prosecution herself would have the “effect of permitting one spouse to escape justice at the expense of the other.” Id.
136. See, e.g., Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973). In Richard, the Vermont Supreme Court, in allowing spousal tort claims said: “there has been nothing to show that in states which have permitted such action that the peace and harmony of the home is disrupted to any greater extent . . . than in states which deny such action.” Id.
138. See note 135 supra.
140. Consent in Rape, supra note 2, at 286-87; Rape and Battery, supra note 126, at 724-25; Marital Rape, supra note 94, at 313-15.
tain segment of society equal protection of the law. The legal system is
designed to adjudicate difficult evidentiary issues.\textsuperscript{141} If these problems
were a valid justification, then they would also apply to other actions
allowed between spouses,\textsuperscript{142} or to other situations where the victim is
familiar with the attacker.\textsuperscript{143}

In summary, the contract theory, marital privacy, the promotion of
reconciliation, and problems of proof are all at least partly based upon
the marriage relationship as an institution or status. None of these
theories can withstand strict scrutiny because of the priority given to in-
dividual fundamental rights in our constitutional scheme. Even in the
absence of an impingement of individual fundamental rights, serious
criticisms can be leveled against each of these theories, raising doubts
about the rationality of any of them as a justification of the spousal ex-
clusion.

B. The 'Qualitative' Difference and Alternative Remedies

Another group of theories supporting the spousal classification rest
on a perceived \textit{qualitative} difference in the consequences of a sexual
assault occurring between married persons as compared to unmarried
persons. At least one commentator maintains that forcible rape is a
separate criminal category to deter the classical form of rape — the am-
bush of a lone woman by a stranger in a deserted place at night.\textsuperscript{144} In
that form sexual assault carries with it a grave risk of serious physical,
mental, and many-times social harm.\textsuperscript{145}

Because in its classical form it is the expression of an unprovoked,
unpredictable, and highly brutal impulse, it calls forth fear and
vengeance. Accordingly, forcible rape is usually much more severe-
ly punishable than other nonfatal invasions of the person.

In the ordinary marriage relationship the classical form of forci-
ble rape is not probable. Presumably the parties have at times been
very intimate, and the possibilities of serious social, physical or
mental harm from a familiar, if unwanted, conjugal embrace are
rather small. Thus neither the deterrent nor vengeance thought ap-
propriate to the classical crime are appropriate here.\textsuperscript{146}

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\item[141.] Richard v. Richard, 131 Vt. 98, 105, 900 A.2d 637, 641 (1973) ("we have not lost such
faith in our courts and juries that they could not weed out the spurious claims of the few").
\item[142.] See State v. Smith, 148 N.J. Super. 219, 225, 372 A.2d 386, 389 (Essex County Ct.
\item[143.] Problems of proof exist in all rape cases except "the paradigm situation of the stranger
leaping from the bushes. Thus if the lack of enforceability argument is carried to its logical conclu-
sion, it would result in the revision of rape law so that the crime consisted only of the paradigm.
..."
\textit{Consent in Rape, supra} note 2, at 286.
\item[144.] \textit{Rape and Battery, supra} note 126, at 723-24.
\item[145.] \textit{Id.} at 724.
\item[146.] \textit{Id.} (footnotes omitted).
\end{enumerate}
\end{footnotesize}
Consistent with this commentator’s view, several courts have said that the true purpose of the criminal category is the protection from the emotional horrors of sexual assault. Recognizing that spouses consent to intercourse many times during the course of marriage, it could be argued that the state has determined that the consequences of spousal sexual assault do not carry the same potential for serious harm and therefore spousal sexual assault should not be actionable as such.

Even if the main purpose of the rape laws is to protect against the emotional effects of such an assault, if it can be fairly said that there is a state impingement of an individual’s fundamental rights through the operation of the exclusion, then equal protection doctrine requires that the law be subjected to strict scrutiny. This qualitative approach would then be examined as a possible justification for the exclusion. In examining this approach, it is incorrect to say that marriage prevents trauma from accompanying sexual assault. The existence of shelters for married women is an indication that a sizeable number of wives suffer emotional and physical harm from spousal sexual abuse. On the other hand, there are probably many instances where a husband has forced himself upon his wife and the relationship continued as if nothing had happened.

Under strict scrutiny analysis, the fact that some spouses suffered emotional and physical trauma similar to that suffered by nonspouses would clearly show that the statute was not precisely tailored. The classification would then be unconstitutional. If a middle tier test were employed, the state would be obliged to show that by concentrating its enforcement efforts on the nonspousal offender class and ignoring the spousal offenders, it is likely to achieve some greater measure of protec-

147. Commonwealth v. Goldenberg, 338 Mass. 377, 384, 155 N.E.2d 187, 191-92 (1959), cert. denied, 359 U.S. 1001 (1959) ("The essence of the crime is not the fact of intercourse but the injury and outrage to the feelings of the woman by the forceful penetration of her person. It is a crime radically different from assault and battery although the latter offense is incidental to it."); State v. Romo, 66 Ariz. 174, 189, 185 P.2d 757, 767 (1947); State v. Castner, 122 Me. 106, 119 A. 112 (1922).

148. Interview with Charles Burt, OREGON MAGAZINE, Mar. 1979, at 12.

149. It could be contended that an appeal to this approach is incorrect. This approach essentially says that sexual assault should not be a crime unless the victim is emotionally harmed as a result of the forced character of the relations. The law makes no such inquiry. Once it is determined that a sexual invasion has occurred, the perpetrator violates the law. See note 3 supra. The severity of the emotional harm may, however, influence the severity of the punishment.

150. The Women’s Crisis Center in Brattleboro, Vermont estimates that 60% of the married women they see as clients are victims of spousal rape. Describing spousal rape as a situation which is dealt with almost daily, the center has files documenting incidents where guns, knives, or other weapons have been involved. Letter from the Staff of the Women’s Crisis Center (Mar. 1, 1979). Other cases of spousal sexual assault are discussed in Faulk, Sexual Factors in Marital Violence, 11 MEDICAL ASPECTS OF HUMAN SEXUALITY 30 (Oct. 1977); Gelles, Power, Sex, and Violence: The Case of Marital Rape, 26 THE FAMILY COORDINATOR 339 (Oct. 1977). Cf. D. Martin, BATTERED WIVES 182 (1972) (marital status does not lessen traumatic effects on the victim).
tion for its citizens that a non-classified statute would achieve.\footnote{151} Similarly, the state would have to show that by exclusively protecting a class disproportionately vulnerable to attack and offering no protection to the class of spouses, it is maximizing its overall objective of protecting its inhabitants from sexual assault.\footnote{152} Furthermore, the state would have to affirmatively show that the class of spousal victims is a limited number as compared to nonspousal victims.\footnote{153} Under a deferential standard, a showing that most spousal victims do not suffer such trauma might be sufficiently rational to uphold the state’s distinction between degrees of evil.\footnote{154} If an empirical study were to show that most (or a sizeable number of) spouse victims suffer a comparable amount of physical or mental harm as nonspousal victims do, then the classification should be viewed as increasingly irrational. Currently, however, there are no studies examining the comparative incidence of spousal and nonspousal sexual assault.\footnote{155}

As a result of his perceptions of the effects of spousal sexual assault, the aforementioned commentator concludes that “[a]lthough wives need some form of protection under the criminal law from the injurious consequences of forced sexual intercourse with their husbands, rape is a category ill-suited to marriage.”\footnote{156} The commentator suggests that criminal battery actions are the proper remedy in cases of forced intercourse in marriage.\footnote{157} This is equivalent to an action for assault under Vermont law.\footnote{158} According to the commentator’s view, the fact of un-

\footnote{151} For analogous reasoning as to the size of the victim and offender classes in a statutory rape situation which made it a crime to have sexual relations with females under 15 years old, but not for males, see Meloon v. Helgemoe, 564 F.2d 602, 605-06 (1st Cir. 1977), \textit{cert. denied}, 436 U.S. 950 (1978). The court discussed the various rationales for a gender based statutory rape statute holding that such reasons were insufficient. Thus, the statute violated the equal protection clause of the constitution. \textit{Id.} at 608.

\footnote{152} \textit{Id.} at 605-06.

\footnote{153} \textit{Id. But see} Craig v. Boren, 429 U.S. 190 (1976) (rejecting Oklahoma’s contention that because ten times as many males as 18-20 age group were arrested for drunken driving as were women in the same age group for purposes of supporting a gender based criminal statute).


\footnote{156} Because the idea of male superiority is still the dominant ideology in our society and because of changes which bring about greater equality between the sexes, there is a resulting strain and frustration for the males attempting to retain their superior position. This will tend to increase the violence between husbands and wives. \textit{Id.}

\footnote{157} \textit{Rape and Battery, supra} note 126, at 725.

\footnote{158} The maximum penalties for simple assault are not more than one year imprisonment or $1,000.00 fine. \textit{Vt. Stat. Ann.} tit. 13, § 1023(b) (1974). The penalties for sexual assault are not more than 20 years imprisonment or $10,000.00 or both. \textit{Id.} at § 3252 (Supp. 1980). The penalties for aggravated assault are not more than 15 years imprisonment or a fine of $10,000.00 or both. \textit{Id.} at § 1024(b) (1974). For aggravated sexual assault the violator could get 25 years or a fine up to $15,000.00 or both. \textit{Id.} at § 3253 (Supp. 1980).
wanted intercourse alone is not sufficient to make a husband guilty of battery.\textsuperscript{159} Required would be some injury to the victim’s health for an action to lie.\textsuperscript{160} If physical harm other than unwanted sexual conduct is required, then a spouse is protected against the accompanying assault and battery and not the sexual invasion. This means that the fundamental rights of procreation decision making and the sexual aspects of the right to bodily integrity and privacy go unprotected. Yet, deprivation of these rights is no less serious in marriage than outside marriage.\textsuperscript{161} Continuing, if the assault action is considered inapplicable to the sexual component of the act, then the classification’s rationality is called into question if there is no reason for excluding an action for sexual assault other than to say that an ordinary assault action exists. Because, if the ordinary assault action is construed in a manner as consistent with the commentator’s views, it does not provide a remedy for sexual invasions.\textsuperscript{162}

Even assuming that the assault statute includes the sexual aspects of spousal sexual assaults, and that a psychological difference in the consequences of a spousal sexual assault justified the classification during the course of marriage, there would still be serious problems with the tailoring of the exclusion. Presumably, unmarried cohabitators are also often quite intimate. The normally consensual nature of that relationship in all probability mitigates the psychological trauma in a manner similar to the mitigation occurring during marriage. The exclusion is therefore under-inclusive because unmarried cohabitators, in a similar position to married cohabitators in relation to the purpose of the statute, are liable while spouses are not.\textsuperscript{163} The tailoring of the classification may also be arbitrary in another respect, given the psychological basis as a justification. When spouses are separated the effects of a spousal sexual assault can be quite severe.\textsuperscript{164} Regarding these spouses, the attack

\textsuperscript{159} Rape and Battery, supra note 126, at 728.

\textsuperscript{160} \textit{Id}.

\textsuperscript{161} Illustrative of the seriousness of the offense are the consequences of involuntary conception for the woman. Her alternatives are either to carry the child to term or face the ethical and religious dilemma of an abortion. See Ramsey, \textit{The Morality of Abortion, reprinted in Moral Problems} (J. Rachels ed. 1971).

\textsuperscript{162} To separate the act into two portions . . . and to say that there was consent to so much of the sexual part of the assault, . . . seems to me to be subtlety of an extreme kind. There is . . . just as much and just as little consent to one part of the transaction as to the rest of it . . . [B]ecause the consent was not to the act done, the thing done is an assault. If an assault, a rape also, as it appears to me . . . [T]o me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault . . . [A]n assault which includes penetration does not seem to me . . . to be anything but rape.


\textsuperscript{164} This position is supported by those statutes defining “spouse” as including unmarried cohabitators. See note 93 supra.

\textsuperscript{164} See, \textit{e.g.}, Regina v. Miller, [1954] 2 Q.B. 282, 289, 2 All E.R. 536.
is more like the classical form of rape in that it probably is generally more unprovoked, unpredictable, and potentially brutal than a non-consensual act occurring during marital cohabitation. By treating separated spouses similarly to cohabitating spouses, although in fact they are dissimilar from each other, the classification is over-inclusive.

One final theory can be quickly dismissed. Divorce might be considered an adequate alternative remedy justifying the classification. It is, however, "small comfort to a married woman whose husband has forcibly ravished her against her will to know that she may resort to the matrimonial courts to recapture or retrieve her right to sexual privacy." If this justification is the sole reason for the exclusion, it would be inadequate because a divorce action provides absolutely no protection during marriage.

C. State Interests Revisited

So far, substantially all of the discussion has focused on the state’s interests in excluding liability for spousal sexual assault. The attention now shifts to a consideration of the state’s interests in making sexual assault a separate offense.

Rape is made a crime to protect the personal integrity of a woman against forcible sexual abuse. Historically, it has been considered a sex offense because emphasis was placed on that aspect of the crime. The essence of the crime, in fact, is not the victim’s lack of consent to the act of sexual intercourse but the physical and psychological harm inflicted upon the victim. The traditional approach overlooks the most significant aspect of the individual and social harm occasioned by the forcible physical abuse of a person and the psychological consequences occasioned by such an act. The crime’s predominant aspect is that it constitutes an unwarranted invasion of the personal integrity of the victim. . . .

Given this purpose, which is consonant with the position that sexual assault is a violation of bodily integrity and procreation decision making, it is clear that the state has a compelling interest in protecting its inhabitants from sexual assault. Consistent with both this purpose and the examination of alternative methods available to the state under equal protection principles, the state can promote its interests in protecting against violations of personal integrity by eliminating the ex-

166. It could be argued that divorce is a more appropriate remedy when one spouse refuses to engage in sexual relations, rather than after one forces the other to engage in them. See Brown v. Brown, 78 N.H. 337, 100 A. 604 (1917); Diemer v. Diemer, 8 N.Y.2d 206, 209, 203 N.Y.S.2d 829, 832, 168 N.E.2d 654, 656 (1960). Contra Pratt v. Pratt, 75 Vt. 432, 56 A. 86 (1903).
clusion. The judicial system would then handle the problem of spousal sexual assault on a case by case basis. The fact of marriage and how well the relationship worked, including past sexual conduct between the spouses, would be relevant evidence to consider in weighing the claim.\textsuperscript{168} As a practical matter, juries would probably not convict a spouse of a sexual offense unless the evidence was clear that serious sexual abuse had occurred. Moreover, the trial judge has enormous discretion under the present statute in imposing sentence.\textsuperscript{169}

This alternative would provide both flexibility and protection. It is flexible because there is an individualized determination of the merits of each claim. Furthermore, it would protect those whose claims are similar to nonspousal sexual assaults. On the other hand, potential minor offenses would either not result in a conviction, or be punished lightly. An unclassified statute would most completely serve the purposes of the law — the protection of personal integrity — by treating separated spouses, spousal rapists, and sexual deviates similar to unmarried cohabitators and others who commit sexual assault.

\textbf{Conclusion}

Sexual assault is a serious offense. The present Vermont statute has excluded liability for nonconsensual sexual acts occurring during marriage. The scope of the exclusion encompasses unnatural acts and acts occurring while the spouses are separated. On the other hand, unmarried cohabitators are subject to liability under the terms of the statute.

A court’s analysis of the validity of the spousal sexual assault exclusion under the equal protection clause could arguably take many paths, each leading to a different result. For example, a spousal victim might not gain standing to challenge the validity of the classification. Or, even if granted standing, the court might decide that her interests should be treated under a deferential standard of review. A nonspousal defendant might seek to challenge the statutory scheme but the challenge might be heard under a deferential standard because \textit{his} fundamental rights are not impinged by the classification. On the other hand, the court might strictly scrutinize the claim of either spousal victim or nonspousal defendant because the statute makes a distinction in the area of fundamental rights. The latter possibility is, at least arguably, the proper approach.

Although the principle of equal protection requires that similarly situated persons be treated similarly, the substance of that protection depends on the character of the individual’s interests. The sexual assault

\begin{quote}
\textsuperscript{169} See note 158 \textit{supra}.
\end{quote}
offense protects against violations of personal integrity. Personal integrity includes the fundamental rights of bodily integrity, procreation decision making, and privacy. Clearly this is how the individual’s interests should be characterized. Thus, the state’s interests in classifying the way it has should be strictly scrutinized.

Substantially all of the modern state interests in classifying in the manner chosen are perceived to stem from the idea that the marital status itself changes the nature of the acts, or from the idea that consequences of that status change the quality of the offense. Theories evolving from the marital status include the irrevocable consent theory, the promotions of marital privacy or reconciliation, and problems of proof. Each of these theories present specific problems, making their existence as a justification doubtfully compelling, and hardly rational. All of these status theories have the flaw, under strict scrutiny, that they seek to promote the marital relation over fundamental rights. As has been established, this is impermissible, given the priority of the individual in our constitutional scheme.

As a result of a perceived psychological or physical difference in the consequences of unwanted marital intercourse as compared to the severity of an unexpected attack outside of marriage, it has been suggested that the sexual assault statute is an inappropriate vehicle to punish spousal offenders. Thus, the alternative remedies of assault and battery or a divorce are considered adequate substitutes. These theories also have singularly specific problems. The underlying premise may also rest on inadequate foundation, at least under a strict scrutiny approach. Clearly, at least some spouses are the victims of severe sexual attacks inflicted by their marital partners. These attacks may also be in the form of unnatural acts or done during the time of separation. Moreover, unmarried cohabitants are liable for such attacks even though the psychological or physical effects might be quite similar to married cohabitants.

Finally, the availability of the less onerous method of simply eliminating the exclusion and determining the severity of the attack and the necessity of protection and punishment on an individualized basis through the legal system may, in itself, be a sufficient alternative to warrant striking down the classification.