

ADDENDUM

A Comparative Study of Canadian and American Rape Law

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and

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I. INTRODUCTION

Within the last five years there has been an explosion of interest in the law as it applies to the crime of rape, yet little of this interest has focused on a comparison of the legislation and jurisprudence of different countries. The laws of Canada and the United States prove an excellent source for comparable legal research in the area of rape as English common law provided the foundation for the criminal law of both countries. Many similarities developed as a result of this common legal heritage, although some differences emerged since the American jurisprudence was separated from its English influence at an earlier point in time. The socio-cultural resemblance between Canada and the United States also produced notable similarities in the recent movement for rape law reform, although some marked distinctions remain. In an attempt to begin a comparative analysis of Canadian and American rape law, this article will focus on the following issues: spousal exemption, the standards of force, resistance, and consent; the admissibility of the complainant's prior sexual conduct; corroboration; and the recent redefinition and restructuring of the crime of rape.

II. THE SPOUSAL EXEMPTION

Although the legal status of women, particularly married women, has

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changed radically since rape laws first developed, a man still cannot be charged with raping his wife in Canada and many of the American states. The spousal exemption effectively preserves the ancient status of wives as their husbands' chattels. Arguably, rape laws were developed to protect the property interest of a father or husband in his daughter or wife's sexual capacity.¹ From this perspective, a husband who raped his wife was "merely making use of his own property."² The originators of the spousal exemption, however, structured their analysis within the framework of contract law. Lord Matthew Hale, writing in the 17th century, stated: "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 her husband, which she cannot retract."³

Lord Hale's view that the marriage contract presumed irrevocable consent to sexual relations was, until recently, widely accepted. Consequently, very few cases deal with the issue of marital rape. English courts discussed marital rape in the 1888 case of *R. v. Clarence*.⁴ The accused was charged with assault causing bodily harm after transmitting gonorrhoea to his wife. His conviction was quashed on appeal, but of the six judges commenting in *obiter*, only Mr. Justice Stephen and Baron Pollock clearly supported Lord Hale's view that rape within marriage was a legal impossibility.⁵ Baron Pollock, referring to sexual intercourse between spouses, wrote: "It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent."⁶

In contrast, Mr. Justice Hawkins commented that a woman "conferred upon her husband an irrevocable privilege to have sexual intercourse with her."⁷ However in his view, the privilege applied only during the time in which the "ordinary relations" of the marriage existed between them. Similarly, Mr. Justice Smith felt that a husband could not be said to have assaulted his wife by exercising his right to intercourse unless "consent given at marriage was revoked."⁸ Thus, consent was not

¹ See S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 18 (1975); L. CLARK & D. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* 115-19 (1977); Gold & Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U.L. REV. 695 (1978); LeGrand, *Rape and Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 924 (1973); Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System*, 23 CRIME & DELINQ. 136, 149 (1977); Note, *The Marital Rape Exemption*, 52 N.Y.U. L. REV. 306, 309 (1977).

² Note, *supra* note 1, at 309.

³ 1 M. HALE, *HISTORY OF THE PLEAS OF THE CROWN* 629.

⁴ *The Queen v. Clarence*, 22 Q.B.D. 23 (Cr. Cas. Res. 1888).

⁵ *Id.* at 46 (Stephen, J.); *id.* at 64 (Pollock, B.) (quoting Lord Hale).

⁶ *Id.* at 64 (Pollock, B.).

⁷ *Id.* at 51 (Hawkins, J., dissenting).

⁸ *Id.* at 37 (Smith, J.).

necessarily irrevocable as Lord Hale had suggested. Two of the judges were more critical of Lord Hale's position. Mr. Justice Field commented:

The authority of Hale, C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime.⁹

Mr. Justice Wills referred to the proposition that rape between married persons was impossible, as one "to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority."¹⁰

In *R. v. Clark*,¹¹ the first English case in which the issue of marital rape was dealt with directly, the court held that the wife's consent was revoked by the separation order which she had obtained and that therefore her husband could be found guilty of rape. Mr. Justice Byrne followed the judgement of Mr. Justice Hawkins in *Clarence*, stating that consent continued only as long as the "ordinary relations created by the marriage contract subsisted between them."¹² The same line of reasoning was followed in subsequent cases. Although in *R. v. Miller*¹³ the court held that a petition for divorce did not revoke the wife's consent, in *R. v. O'Brien*¹⁴ a decree nisi of divorce served as sufficient revocation. In *R. v. Steele*¹⁵ the court held that a wife who was separated from her husband had effectively revoked her consent.

† These five court decisions reduced the scope of the common law principle. Matrimonial consent, which Hale viewed as irrevocable, became revocable in England under certain limited circumstances. As one commentator has noted, however, "the courts have never acknowledged as valid any withdrawal of the wife's consent to intercourse other than an order by the court or possibly an agreement by the spouses to separate."¹⁶

† In Canada, these cases have had no effect. Rape was first statutorily defined in Canada in 1892.¹⁷ Section 266 of the *Criminal Code, 1892* read: "Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent, which has been extorted by threats or fear of bodily harm" ¹⁸ The legislators codified the state of the law on spousal immunity as it existed in England and Canada at the

⁹ *Id.* at 57 (Field, J., dissenting).

¹⁰ *Id.* at 33 (Wills, J.).

¹¹ [1949] 2 All E.R. 448, 449 (Leeds Assizes).

¹² *Id.*

¹³ *R. v. Miller*, [1954] 2 Q.B. 282, 290.

¹⁴ *R. v. O'Brien*, [1974] 3 All E.R. 663, 665 (Crown Ct. Bristol).

¹⁵ *R. v. Steele*, 65 Crim. App. 22, 25 (C.A. 1976).

¹⁶ Mitra, *For She Has No Right or Power to Refuse Her Consent*, 1979 CRIM. L. REV. 558, 562.

¹⁷ Criminal Code, 1892, ch. 29, § 266, 1892-1893 Can. Stat. 107, 208.

¹⁸ *Id.*

time.¹⁹ The modern version of the Criminal Code also specifically incorporates spousal immunity: "A male person commits rape when he has sexual intercourse with a female person who is not his wife, without her consent"²⁰ By definition a man in Canada cannot rape his wife, regardless of whether they are cohabiting or are separated. The words in the statute are unambiguous. In Canada no cases in which the accused and the complainant were married at the time of the offense have been reported.²¹ Abolition of the spousal exemption or reduction of its scope can only be achieved through statutory amendment.

The status of the law in the United States, prior to reform, was identical to the position taken in Canada. Virtually "no criminal liability on behalf of a husband for an assault to rape, or a rape upon his wife, where he is charged as the prime actor"²² was imposed. This rule developed from the common law and was based on the "mutual matrimonial consent" theory enunciated by Lord Hale. It was first applied in the United States in *Commonwealth v. Fogerty*²³ where the court in dictum stated that the defendant's marriage to the victim was a defense to the charge of rape. The court in *Frazier v. State*²⁴ referred to five other cases following *Fogerty* and concluded:

So far as we are aware, all the authorities hold that a man cannot himself be guilty of actual rape upon his wife. One of the main reasons being the matrimonial consent which she gives when she assumes the marriage relation and which the law will not permit her to retract in order to charge her husband with the offense of rape.²⁵

The marital exemption is specifically adopted by statute in twelve of the American states,²⁶ and in nine others the common law rule is pre-

¹⁹ See generally, PARL. DEB., SEN. (1892); PARL. DEB. H.C., 1, 11 (1892).

²⁰ An Act Respecting the Criminal Law, CAN. REV. STAT., ch. C-34, § 143 (1970).

²¹ In 16 B.C. 229, 19 C.C.C. 47 (1911), the accused had been convicted at trial of raping a young girl. On appeal, defense counsel argued unsuccessfully that the accused had been wrongfully convicted on the ground that the Crown had failed to prove that the girl was not the accused's wife. The court concluded that there was evidence in the Crown's case from which the jury could infer that the complainant and the accused were not married.

²² Annot., 84 A.L.R. 2d 1017, 1019 (1962).

²³ *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264 (1857).

²⁴ *Frazier v. State*, 48 Tex. Crim. 142, 86 S.W. 754 (1915).

²⁵ *Id.* at 143, 86 S.W. at 755.

²⁶ ALA. CODE § 13A-6-60(4)(1975 & 1977 Supp.) (defining "female" as "any female person who is not married to the actor"); ARIZ. REV. STAT. ANN. § 13-1406(A) (1978) ("A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse . . . with any person not his or her spouse . . ."); CONN. GEN. STAT. ANN. §§ 53a-65(3), 67(b) (West Supp. 1981) (defining "sexual contact" as "contact with the intimate parts of a person not married to the actor" and providing that cohabitation, regardless of marital status, is an affirmative defense); ILL. ANN. STAT. ch. 38, § 11-1(a) (Smith-Hurd 1979) ("male person . . . who has sexual intercourse with a female, not his wife . . . commits rape"); KAN. STAT. ANN. § 21-3502(1) (1981) ("Rape is the act of sexual intercourse committed by a man with a woman not his wife . . ."); OHIO REV. CODE ANN. § 2907.02 (Page Supp. 1980) ("No person

sumed to apply.²⁷ The issue of spousal immunity has been litigated in two of the "common law" states: New Jersey and Massachusetts. In *State v. Smith*,²⁸ the New Jersey court held that Hale's common law rule applied despite the statute's silence on spousal immunity. The court concluded that "a statute is not presumed to make any change in the common law beyond that expressed or fairly implied in its provisions."²⁹ In Massachusetts, however, the statute was construed not to comply with the common law notion of spousal immunity. In *State v. Chretien*,³⁰ a husband who raped his wife while they were separated and awaiting the final divorce decree was convicted of rape. This conviction, however, is being appealed to a higher court.³¹

Whether spousal immunity should be retained is a hotly debated question in both countries. Defenders of spousal immunity base their arguments on broad public policy grounds, focusing on five key points. They argue first that abolition of the immunity would unduly invade the sanctity of marriage.³² This argument is partially premised on the need for privacy inside the marital relationship, and partially on the concern that the prohibition against spousal rape might increase the probability of marital collapse.³³

shall engage in sexual conduct with another, not the spouse of the offender . . ."); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1981) ("Rape is an act of sexual intercourse accomplished with a male or female, not the spouse of the perpetrator . . ."); S.D. CODIFIED LAWS § 22-2201 (Supp. 1981) ("Rape is an act of sexual penetration accomplished with any person other than the actor's spouse . . ."); TEX. PENAL CODE ANN. § 21.02(a) (Vernon 1974) ("A person commits an offense if he has sexual intercourse with a female not his wife . . ."); VT. STAT. ANN. Tit. 13, § 3252 (Supp. 1981) ("A person who engages in a sexual act with another person, other than a spouse . . ."); WASH. REV. CODE ANN. § 9A.44.040 (Supp. 1981) ("A person is guilty of rape . . . when such person engages in sexual intercourse with another person not married to the perpetrator . . ."); W. VA. CODE § 61-8B-1(7) (1977) (defining "sexual intercourse" as "any [sexual] act between persons not married to each other").

²⁷ States in this category include Arkansas, Florida, Georgia, Massachusetts, Mississippi, Nebraska, North Carolina, Virginia and the District of Columbia.

²⁸ 148 N.J. Super. 219, 230-33, 372 A.2d 386, 392-93 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981). The current New Jersey Code of Criminal Justice provides that a person "shall not be presumed to be incapable of committing a crime under this chapter [Sexual Offenses] because of . . . marriage to the victim." N.J. STAT. ANN. § 2C:14-5(b) (West 1981).

²⁹ 148 N.J. Super. at 231, 372 A.2d at 392 (citing *Blackman v. Isles*, 4 N.J. 82, 71 A.2d 633 (1950)). The New Jersey Supreme Court analyzed the three major justifications for the common law marital exemption, finding that each rationale was inappropriate to the *Smith* case, and reinstated the rape count of the indictment.

³⁰ 1981 Mass. Adv. Sh. 661, 417 N.E.2d 1203.

³¹ 417 N.E.2d at 1210.

³² *See, e.g.*, *State v. Smith*, 148 N.J. Super. at 225, 372 A.2d at 389.

³³ The latter concern was recently articulated in an editorial published by the International Christian Communications. The editorial argues:

The spouse rape concept will put a barrier between husband and wife in the marriage bed! . . . In instances where a marriage rift is growing, it will guarantee the "right" of one spouse to deprive the other of sexual satisfaction within

Opponents of the spousal immunity doctrine regard this position as unpersuasive. They question whether any further damage can result from legal action, once the relationship has deteriorated to the point where intercourse is coerced.³⁴ They contend that the preservation of marriage relationships characterized by violence and sexual abuse is not acceptable.

The second argument raised against the abolition of spousal immunity focuses on the potentially increased risk of fabricated accusations and blackmail between spouses. In *State v. Smith* the court noted that if a wife was able to charge her husband with rape, she might gain an unfair advantage over an estranged husband in a future property settlement.³⁵ The court itself, however, recognized that "the law already furnishes an arsenal of weapons to a woman bent on revenge" and that the criminal justice system is designed to test the validity of all accusations.³⁶ The court asserted that the requirement of proof beyond a reasonable doubt and the use of the jury should be sufficient safeguards to prevent falsified complaints from resulting in convictions.³⁷

The third argument against the abolition of the immunity is the contention that spousal rape is somehow less traumatic than other forms of rape. One commentator has criticized the continuing consent doctrine as an unreasonable inference that married women intend to be sexually accessible to their husbands at all times,³⁸ yet the commentator differentiates between what he calls classic rape, "perpetrated by a stranger in a deserted place at night,"³⁹ and rape within a marriage relationship. Classic rape, he contends, is "the expression of an unprovoked, unpredictable, and highly brutal impulse."⁴⁰ Where rape occurs within marriage, he argues, "the possibilities of serious social, physical, or mental harm from a familiar if unwanted conjugal embrace are rather small."⁴¹

Recent studies have shown, however, that we have vastly underestimated the incidence and severity of interspousal violence.⁴² Sexual abuse

marriage.

It will deepen the rift at the very point where it might best be bridged. It will drive men and women to obtain sinful sexual satisfaction outside of marriage.

New Bill Threatens the Family and Public Morality, CHRISTIAN INQUIRER, Feb. 1981 (copy on file at the office of the Canada-United States Law Journal).

³⁴ See Comment, *Rape in Marriage: The Law in Texas and the Need for Reform*, 32 BAYLOR L. REV. 109, 115 (1980).

³⁵ 148 N.J. Super. at 225, 372 A.2d at 389.

³⁶ *Id.*

³⁷ See Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 337-38 (1973).

³⁸ Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 722 (1954).

³⁹ *Id.* at 723-24.

⁴⁰ *Id.* at 724.

⁴¹ *Id.*

⁴² See, e.g., L. MACLEOD, *WIFE BATTERING IN CANADA: THE VICIOUS CIRCLE* (Canadian Advisory Council on the Status of Women 1980).

is often an integral part of wifebattering. In Lenore Walker's, *The Battered Woman*, the majority of women questioned admitted having been raped by their batterers.⁴³ Rape perpetrated by the husband of the victim has not been shown to be any less violent or emotionally traumatic than rape perpetrated by a stranger. As Susan Brownmiller points out in *Against Our Will*, sexual assault is an "invasion of bodily integrity and a violation of freedom and self-determination wherever it happens to take place, in or out of the marriage bed."⁴⁴ She notes that rape within marriage is not likely to be an isolated occurrence and that the woman's situation is often complicated by her financial and emotional dependence upon her rapist-husband.⁴⁵ While some victims of rape by a stranger direct their anger externally, victims of marital rape often become angry with themselves.⁴⁶ Spousal immunity reinforces the woman's feelings of anger, guilt and humiliation.⁴⁷ "The ensuing self-disgust is increased when the victim wonders if she provoked the degrading behavior. She may feel she was an accomplice in her own humiliation."⁴⁸

Proponents of spousal immunity also argue that the right of the wife to press criminal charges of assault and battery⁴⁹ is an adequate substitute for her inability to press rape charges. In *R. v. Miller*⁵⁰ the court held that although the husband could not be found guilty of rape, he could be found guilty of assault if the act resulted in either physical injury to the wife or in an "hysterical or nervous condition."⁵¹

This view, however, fails to address the basic violation.⁵² A sexual assault is by nature a greater invasion than other types of physical assault.⁵³ Consequently, the penalties are more severe for rape than for battery. A British writer, Peter English, further contends: "The label attached to the conduct should be the appropriate label. So long as rape remains a separate crime, not simply one form of assault, conduct which is in reality, rape, should be so charged."⁵⁴

Finally, it is argued that evidentiary problems "reach their zenith"

⁴³ See L. WALKER, *THE BATTERED WOMAN* 108 (1979).

⁴⁴ S. BROWNMILLER, *supra* note 1, at 381.

⁴⁵ *Id.*

⁴⁶ Griffin, *In 44 States, It's Legal to Rape Your Wife*, *STUDENT LAW.*, Sept. 1980, at 21, 59.

⁴⁷ *Id.* at 59-60.

⁴⁸ *Id.* at 60.

⁴⁹ Comment, *supra* note 38, at 726.

⁵⁰ [1954] 2 Q.B. 282.

⁵¹ *Id.* at 292.

⁵² S. BROWNMILLER, *supra* note 1, at 381.

⁵³ See Comment, *The Marital Exception to Rape: Past, Present and Future*, 1978 *DET. C.L. REV.* 261, 275. One rape victim, comparing rape with non-sexual assault, has stated: "There's something worse about being raped than just being beaten. It's the final humiliation, the final showing you that you're worthless and that you're there to be used by whoever wants you." D. RUSSELL, *THE POLITICS OF RAPE* 77 (1975).

⁵⁴ English, *The Husband who Rapes His Wife*, 126 *NEW L.J.* 1223, 1225 (1976).

with marital rape.⁵⁵ Admittedly the offense may be extremely difficult to prove. Where the complainant and the accused have voluntarily engaged in consensual sexual intercourse in the past, the issue of consent becomes a difficult obstacle.⁵⁶ This difficulty is compounded if the parties are married and have engaged in consensual sexual intercourse many times.⁵⁷ The wife must produce strong evidence that she did not consent. Indeed, a conviction in many jurisdictions probably requires evidence not only that she resisted, but that force was used against her. Evidentiary difficulties do not justify maintaining spousal immunity, however, where it denies justice to women who are able to meet the burden of proving they have been raped.

Criticism of the spousal exemption by legal writers and feminist groups has resulted in changes in the law. Reform in the United States has consisted largely of incremental changes while in Canada, the broad implications of pending reform have not yet fully been realized. By 1980, 30 American states had enacted legislation to abolish or limit the common law spousal immunity rule.⁵⁸ Although the situation in many of these states has improved markedly for married women who have separated from their husbands, in all but seven states, the spousal exemption still applies to spouses who are cohabitating and who have not taken legal steps to end their marriage.⁵⁹ In four of these seven states, however, the wife must be physically injured or, threatened with serious injury before the husband can be charged with first degree rape.⁶⁰ Only three states, New Jersey, Oregon and California, have effectively abolished the spousal immunity.⁶¹

Despite recent reforms, few men have been prosecuted for raping their wives.⁶² In 1978, however, much media coverage was given to *State v. Rideout*,⁶³ the first marital rape case tried in Oregon since the passage

⁵⁵ Comment, *supra* note 38, at 724.

⁵⁶ See Griffin, *supra* note 46, at 57.

⁵⁷ *Id.*

⁵⁸ See *id.* at 58-59.

⁵⁹ The seven states where the spousal exception does not apply even though spouses are cohabiting are: Alaska, ALASKA STAT. § 11.41.445 (1978); California, CAL. PENAL CODE § 262 (West Supp. 1980); Delaware, DEL. CODE ANN. tit. 11, §§ 763-64 (1979); Hawaii, HAWAII REV. STAT. §§ 707-700(10), 707-730 (Supp. 1981); Iowa, IOWA CODE ANN. § 709.2 (West 1979); New Jersey, N.J. STAT. ANN. § 2C:14-5(b) (West 1981); Oregon, OR. REV. STAT. § 163.375 (1981).

⁶⁰ ALASKA STAT. § 11.41.445 (1978); DEL. CODE ANN. tit. 11, §§ 763-64 (1979); HAWAII REV. STAT. §§ 707-700(10), 707-730 (Supp. 1981); IOWA CODE ANN. § 709.2 (West 1979).

⁶¹ CAL. PENAL CODE § 262 (West Supp. 1980); N.J. STAT. ANN. § 2C:15-5(b) (West 1981); OR. REV. STAT. § 163.375 (1981).

⁶² Joanne Schulman of the National Centre on Women and Family Law reports that as of June 1981 only 23 cases of spousal rape have gone to trial in the United States. *Rape of Spouse Legal in Canada, Most U.S. States*, Toronto Globe & Mail, June 3, 1981, at 14, col. 1.

⁶³ No. 108,866 (Or. Cir. Ct. Dec. 27, 1978).

of legislation abolishing spousal immunity.⁶⁴ John Rideout was acquitted of raping his wife Greta when the prosecution was unable to prove her lack of consent. Since the case turned on the evidentiary issue, the decision is not considered a rejection of the Oregon reforms.⁶⁵ After the trial, the Rideouts reconciled and appeared on television giving a number of newspaper interviews. They have since been divorced, however, and in September of 1979 John Rideout was convicted of criminal trespass for breaking into his ex-wife's home.⁶⁶ In February 1980, he was convicted of harassing his ex-wife and received a jail sentence.⁶⁷ Greta Rideout has been described as a "battered wife caught in a destructive cycle of rebellion against and reconciliation with her abusive husband."⁶⁸ Unfortunately, the couple's behavior and the "carnival atmosphere"⁶⁹ which characterized the trial trivialized the serious problem of marital rape and Oregon's attempt to criminalize it.

In Canada, bill C-53, the most recent rape reform bill, is to be introduced into the House of Commons in September 1, 1981.⁷⁰ Statements from the Minister of Justice indicate that spousal immunity will be abolished.⁷¹ One of the proposed amendments will apparently "spell out in law that a spouse can be the victim of a sexual assault by his or her marriage partner." Section 244 of the draft bill reads:

- 1) A person commits an assault when
 - a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly
- 2) This section applies to all forms of assault, including sexual assault and aggravated sexual assault.⁷²

By not specifically adopting spousal immunity, this new section is an improvement. However, the new bill does not unequivocally state that spousal immunity is to be abolished. An additional section stating that the new provisions are to apply without regard to the gender and marital relationship of the actor and the victim is needed. Without such language the common law spousal immunity rule could still be incorporated into the new law. The wording of the proposed reforms must be more specific

⁶⁴ See Note, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 J. FAM. L. 565, 578 (1980).

⁶⁵ *Id.*

⁶⁶ Griffin, *supra* note 46, at 23.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ House of Commons C-53, 32d Parl., 1st Sess. (1981) [hereinafter cited as Bill C-53] (copy on file in the Canada-United States Law Journal office).

⁷¹ See J. Chretien, Information Paper: Sexual Offenses Against the Person and the Protection of Young Persons 15 (Dec. 1980). Early news reports indicated that the proposed legislation would "[s]pell out in law that a spouse can be the victim of a sexual assault by his or her marriage partner." Goar, *Chretien to Get Tough on Child Porn*, Toronto Star, Dec. 20, 1980, at A6, col. 6.

⁷² Bill C-53, *supra* note 70, § 244.

to be at all effective in eliminating spousal immunity.

Despite the obvious weaknesses of the proposed reforms, some fear that the new provisions will be criticized as too radical by members of Parliament and that the bill will not be passed if perceived as abolishing spousal immunity. Should such opposition develop it is speculated that a more specific clause would be enacted which would abolish immunity only with respect to spouses who are living separate and apart. Such a compromise would be consistent with English case law⁷³ and statutory reform in most of the American states,⁷⁴ and would reduce opposition to the reform package. Only total abolition of spousal immunity, however, is an adequate response to the serious harms resulting from marital rape. As commentator Dennis Drucker concludes, spousal immunity is a "barbaric anachronism" which "has no place in a society which recognizes women as equal human beings and wives as more than the property of their husbands."⁷⁵

The laws of Canada and the United States concerning spousal immunity for rape are significantly similar. Historically, both countries trace the rationale for the immunity to Lord Hale's theory that irrevocable consent to sexual relations was assumed through the marriage contract. The codification of criminal law, which occurred in both Canada and the United States, resulted in the statutory enactment of the Lord Hale position. Although English common law narrowed the scope of spousal immunity, immunity remained securely entrenched in Canadian and American law. Reform in both countries has thus become dependent upon statutory amendment.

III. THE STANDARDS OF FORCE, RESISTANCE AND CONSENT

Although Anglo-Canadian and American definitions of the crime of rape vary historically, they are characterized by three distinct elements: force, resistance and nonconsent. These elements are emphasized in the case law and the relevant statutes. Force, resistance and lack of consent have been described as "standards." A chronological comparison reveals that the applicable standard has shifted a number of times. The force standard focuses on the physical actions of the accused while the resistance standard focuses on the complainant's physical response. To establish either element, evidence of physical violence is required. In contrast, the consent standard focuses on the complainant's subjective state of mind. The crucial element of the crime is her lack of consent, while evidence of force and resistance are highly relevant but not essential. A fourth element, the mens rea, focuses on the subjective state of mind of

⁷³ See *supra* notes 11-15.

⁷⁴ See Griffin, *supra* note 46, at 58-59.

⁷⁵ Comment, *The Common Law Does Not Support a Marital Exception for Forcible Rape*, 5 WOMEN'S RTS. L. REP. 181, 200 (1979).

the accused.

Historically, the common law in England viewed the elements of force and resistance as determinative in proving the crime of rape. Sir William Blackstone's definition of rape in the 18th century specifically included the use of force as a requirement, and also incorporated the phrase "against her will." The latter implied that the victim's resistance was also necessary.⁷⁶ Clear dissent, not merely a lack of assent was required.⁷⁷ Early English case law also supported the view that force and resistance were required. In *R. v. Jackson*⁷⁸ the court held that having carnal knowledge of a woman who consented, upon the mistaken belief that the accused rapist was her husband, did not amount to rape. The court distinguished between compelling a woman "against her will" and "beguiling her into consent."⁷⁹ In a similar case reported 15 years later, the accused was found guilty of assault but not rape;⁸⁰ this decision was affirmed in *R. v. Williams*.⁸¹ Fraud was sufficient to support the assault charge whereas resistance and lack of consent were required to prove rape.

By 1845, however, an apparent shift towards the lowering of the resistance standard had taken place. In *R. v. Camplin*⁸² the accused was convicted of rape after he gave a 13-year-old girl liquor, and proceeded to have intercourse with her after she had become intoxicated. Lord Denman, Chief Judge, stated: "It is put as if resistance was essential to rape, but that is not so, although proof of resistance may be strong evidence in the case."⁸³ Several other judges referred to the 13th century Statute of Westminster⁸⁴ as authority for the view that rape was defined as ravishing a woman "where she did not consent" rather than ravishing her "against her will," thus implying that physical resistance was not a critical element of proof for rape.

This definition was also applied in *R. v. Fletcher*⁸⁵ where the victim, a 13-year-old retarded girl, was found to be incapable of consenting. Lord Campbell also referred to the Statute of Westminster⁸⁶ which required force and lack of consent, but did not require intercourse to be against

⁷⁶ 4 W. BLACKSTONE, COMMENTARIES 210 (Lewis ed. 1897).

⁷⁷ *But see* J. SMITH & B. HOGAN, CRIMINAL LAW 326 (3d ed. 1973) (indicating that since the middle of the 19th century the use of the consent standard has relieved the Crown of the burden of proving a positive dissent by the victim).

⁷⁸ 168 Eng. Rep. 911 (1822).

⁷⁹ *Id.*

⁸⁰ 173 Eng. Rep. 488 (1838).

⁸¹ 173 Eng. Rep. 497, 498 (1838).

⁸² 169 Eng. Rep. 163 (1845).

⁸³ *Id.* at 164 (Denman, C.J.).

⁸⁴ *Id.* The Statute of Westminster provided "if a man from henceforth do ravish a woman married, maid, or others, where she did not consent, neither before or after, he shall have judgement of life." Statute of Westminster II, 1285, 13 Edw. 1, ch. 34.

⁸⁵ 169 Eng. Rep. 1168 (1926).

⁸⁶ The statute was apparently repealed. 9 Geo. 4, ch. 31, 1828.

the woman's will.⁸⁷ As Lord Campbell noted, prior to *Camplin*, the definition contained in the statute was apparently never referred to in the cases. Although the Statute of Westminster was ignored by early writers such as Hale and Blackstone and criticized by Stephen,⁸⁸ its resurrection in the case law effectively shifted the emphasis in rape cases from resistance to lack of consent. The consent standard thus replaced the resistance standard in mid-19th century England, although evidence of resistance still retained some significance.⁸⁹

Defined as "unlawful and carnal knowledge of a woman by force, and against her will" by an early Canadian writer,⁹⁰ rape was not statutorily defined in Canada until 1892,⁹¹ although it had been considered a felony for more than 50 years prior to codification.⁹² When the crime of rape was finally codified in 1892 the consent standard was adopted with the language "rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent."⁹³ This statutory definition has remained largely unaltered to the present day.

The common law consent standard was adopted in the modern criminal law statutes in both England and Canada. The sections pertaining to the offense of rape in the Canadian Criminal Code⁹⁴ and the Sexual Offences Act⁹⁵ of Great Britain specifically refer to intercourse without consent. In Canada, rape is also defined to include intercourse with the woman's consent if that consent is "extorted by threats or fear of bodily harm."⁹⁶ At least in theory, lack of consent need not be proven where consent is extorted by threat of violence. Conversely, if lack of consent can be proven by the prosecution, it is not necessary, as it is in many American states, to prove that force was used or serious harm threatened.

Although not statutorily required in either England or Canada, as a matter of practice, some evidence of force by the assailant and resistance by the victim is usually necessary. Unless the victim is completely helpless or incapacitated, lack of consent must be physically manifested before the accused will be convicted.⁹⁷ The victim is generally expected to show "good faith resistance," or resistance reasonable under the circum-

⁸⁷ 169 Eng. Rep. at 1171 (1926).

⁸⁸ J. STEPHEN, A DIGEST OF THE CRIMINAL LAW 190 n.1 (1877).

⁸⁹ Scutt, *Study of Consent in Rape*, 1976 NEW ZEALAND L.J. 462.

⁹⁰ S. CLARKE, A TREATISE ON CRIMINAL LAW AS APPLICABLE TO THE DOMINION OF CANADA 264 (1872).

⁹¹ Criminal Code, 1892, ch. 29, § 266.

⁹² An Act for Consolidating and Amending the Statutes in this Province Relative to Offenses against the Person, 1841, 4 & 5 Vict., ch. 27, § 16 (Canada).

⁹³ Criminal Code, 1892, ch. 29, § 266.

⁹⁴ Criminal Code, CAN. REV. STAT. ch. C-34, § 143 (1970).

⁹⁵ The Sexual Offences (Amendment) Act, 1976, ch. 82.

⁹⁶ Some commentators argue that consent so obtained is not consent in the true sense but merely submission. See Boyle, *Married Women—Beyond the Pale of the Law of Rape*, 1 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 192, 201 (1981).

⁹⁷ See Scutt, *supra* note 89, at 465.

stances to signify she did not consent.⁹⁸ While the central substantive issue is consent, British and Canadian courts rely primarily upon evidence of force and resistance in making their determination.⁹⁹ While theoretical distinctions remain, in practice the British and Canadian positions do not differ significantly from the American position.

In the United States, the applicable standard varies from state to state.¹⁰⁰ The phrases "by force," "against her will," and "without her consent" are used interchangeably in the state criminal codes and are not always treated as distinctly different standards by the courts.¹⁰¹ In the majority of states force is required, although threats of serious bodily harm have been held in a number of cases to satisfy this requirement.¹⁰² Force may be constructive or implied as well as actual.¹⁰³ In some parts of the United States, the resistance standard focuses entirely on the physical resistance of the victim as a manifestation of her lack of consent.

In the past, the victim was required to "resist to the utmost" even in situations where such resistance would clearly be futile or would endanger her life. In *Morrow v. State*,¹⁰⁴ this requirement was clearly articulated by Chief Justice Hill: "[Resistance] must not be a mere pretext, the result of womanly reluctance to consent to intercourse, but the resistance must be up to the point where it is overpowered by actual force."¹⁰⁵ The victim must demonstrate "the utmost reluctance and the utmost resistance" to prevent the jury's inference that the act was not against her will.¹⁰⁶ The modern view is less strict, requiring only that resistance should be reasonable or proportionate under the circumstances. Such a requirement still

⁹⁸ *Id.* at 466.

⁹⁹ *Beaudoin v. The King*, 5 Can. Rep. 88, 94 (1948).

¹⁰⁰ Compare CAL. PENAL CODE § 261 (West Supp. 1980) ("person's resistance is overcome by force or violence or . . . person is prevented from resisting by threats of great and immediate bodily harm"); ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd 1979) ("by force and against the will"); LA. REV. STAT. ANN. § 14.41-42 (West Supp. 1981) (Rape—"without the person's lawful consent"; Aggravated Rape—"victim resists to the utmost but whose resistance is overcome by force or . . . is prevented from resisting the acts by threats of great and immediate bodily harm accompanied by apparent power of execution"); MASS. GEN. LAWS. ANN. ch. 265, § 22 (West Supp. 1981) ("compels such person to submit by force and against his will, or compel such person to submit by threat of bodily injury"); N.Y. PENAL LAW § 130.05 (McKinney Supp. 1981) ("without consent of the victim . . . lack of consent results from . . . forcible compulsion . . . physical force . . . capable of overcoming earnest resistance or a threat expressed or implied that places a person in fear of immediate death or serious physical injury").

¹⁰¹ Harris, *Toward a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 618 (1976).

¹⁰² See generally *id.* at 613, 615.

¹⁰³ *McQuirk v. State*, 84 Ala. 435 3 So. 775 (1887).

¹⁰⁴ 13 Ga. App. 189, 79 S.E. 63 (1913).

¹⁰⁵ *Id.* at 194, 79 S.E. at 66 (per Hill, C.J.)

¹⁰⁶ Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 56 (1952).

places a duty of self-defense on rape victims.¹⁰⁷

Comparisons can be drawn between the American emphasis on force and resistance rather than lack of consent, and rape law as it existed in England at the time of the American Revolution. It was not until 1845 that the shift to the element of nonconsent began in England. Canada recognized this shift and adopted it in the 1892 criminal law codification. Similar developments did not occur in the United States, and it is only in recent years that rape has begun to be redefined. Although modern statutory provisions tend to maintain the emphasis on force, in a growing number of states, resistance, particularly resistance "to the utmost," is no longer required.¹⁰⁸

The direction of modern rape law reform in Canada is clear from bill C-53. It retains the consent standard and incorporates the force standard, yet places less emphasis on the resistance standard. The new provisions are modeled after the old assault provision:

(1) A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose

(2) This section applies to all forms of assault, including sexual assault and aggravated sexual assault.¹⁰⁹

The language of the statute does not clearly indicate whether the physical act of sexual intercourse itself constitutes sufficient use of force, or whether some additional evidence of violence is required. If intercourse itself is insufficient, those women who are incapable of consent or resistance due to either physical or mental helplessness are no longer protected unless unnecessary force is used.

The consent provisions in the new law attempt to distinguish between true consent and mere submission. For example, Section 224(3) provides that:

For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of:

- (a) the application of force;
- (b) threats or fear of the application of force;
- (c) fraud; or
- (d) the exercise of authority.¹¹⁰

¹⁰⁷ Scutt, *supra* note 89.

¹⁰⁸ Beinen, *Rape III—National Developments in Rape Legislation*, 6 WOMEN'S RTS. L. REP. 170, 182 (1981). A number of reform states, most importantly Michigan, have adopted a strategy of defining criminal sexual conduct without using the terms "consent" or "resistance." *Id.* at 102 n.67.

¹⁰⁹ See Bill C-53, *supra* note 70, § 244, at 8.

¹¹⁰ *Id.*