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Morgan Lee Woolley*

I. INTRODUCTION

Although marital rape has been a pervasive socio-cultural problem for centuries, most activity involving the recognition, criminalization, and reform of marital rape laws has occurred in the past few decades.¹ U.S. courts and legislators have recently revisited the issue of marital rape, and the issue has taken on increasing importance internationally.² However approaches to addressing the global problem of marital rape are often problematic because they easily become tangled and lost within the larger analytical, legislative, and enforcement frameworks of domestic violence and non-marital rape.³ Social attitudes and legislation regarding domestic violence are often caught in a tension between family privacy and victim/survivor protection, whereas non-marital rape is often lodged


Author's Dedication: This Note is dedicated to the many survivors of marital rape, whose struggle is both deeply devastating and personal, but also courageous and fervent.

Acknowledgements: I would like to thank Lois A. Weithorn and Richard Nelson for their reviews and guidance in preparation of this note. I would also like to thank the editorial board and staff of the Hastings Women's Law Journal for all of their assistance and support.

1. In fact, it was not until 1993 that marital rape became a crime in all fifty states. See Raquel Kennedy Bergen, Marital Rape, Nat'l Electronic Network on Violence Against Women (1999), http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_mrape.pdf (“Despite the prevalence of marital rape, this problem has received relatively little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole.”).


between problems of consent and evidentiary proof. However marital rape is a unique problem that encompasses both physical violence and the psychological trauma of being raped by someone who has taken marriage vows to love and honor his or her spouse. Thus a comprehensive framework for marital rape must include aspects of the emotional and physical cruelty, as well as the exposure of family privacy, that often accompanies domestic violence. Additionally marital rape laws must include a reassessment of traditional notions that marriage represents implied consent and the unique difficulties of evidentiary proof in prosecuting marital rape.

This Note will argue that in order to adequately address the fundamental issues of marital rape, social, judicial, legislative and enforcement networks must draw upon a hybrid framework that encompasses concerns relevant to both domestic violence and non-marital rape. Subsuming marital rape under either paradigm, to assess marital rape as we would treat domestic violence or non-marital rape, fails to account for the unique circumstances and consequences of rape that is perpetrated by one’s own spouse. Specifically, this Note will address the domestic and international treatment of marital rape and the inadequacies of responding to marital rape solely within the rubric of domestic violence or non-marital rape. Part II will analyze the historical and social paradigms surrounding domestic violence and non-marital rape. Part III will address current legal developments in marital rape in the United States and explore the ways in which the marital rape exemption still exists in some form today. Part IV will focus on the treatment of marital rape on an international level by looking at developments by the United Nations and the European Parliament. Part V will analyze the gross inadequacies and difficulties of effectively addressing marital rape as a separate framework outside of the paradigms of domestic violence and non-marital rape. In addition, this final section will present a policy argument for the need for uniquely tailored legislation and enforcement mechanisms as well as a shift in social attitudes in order to effectively comprehend and repudiate marital rape today.

II. A DISTINCTION IN FRAMEWORKS

This section will analyze the historical underpinnings of domestic violence and the treatment of non-marital rape as well as the legal and social conflicts that arise when dealing with these problems. It will then address the historical and legal treatment of marital rape and explore its unique characteristics and their distinct economic, social, physical, and psychological effects.
A. DOMESTIC VIOLENCE: TENSION BETWEEN FAMILY PRIVACY AND PROTECTION FROM THE STATE

Domestic violence occurs when an abuser uses threats and/or acts of physical violence in an effort to control and intimidate the victim.\footnote{Marya Lucas, An Invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable as Accomplices When They Invite Violations of Their Own Protective Orders, 5 GEO. J. GENDER & L. 763, 766 (2004).} Domestic violence most frequently occurs between intimates, spouses, former spouses, family members, or household members.\footnote{U.S. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cvictc.htm#relate (last visited March 3, 2006). See generally Katherine E. Volovski, Crime and Punishment Law Chapter: Domestic Violence, 5 GEO. J. GENDER & L. 175 (2004) (discussing different aspects of domestic violence).} Women are typically the victims of violence perpetrated by intimates.\footnote{U.S. Dept. of Justice, supra note 5. ("Female victims are more likely to be victimized by intimates than male victims. In 2004, of those offenders victimizing females, 21% were described as intimates and 34% as strangers. By contrast, of those offenders victimizing males, 4% were described as intimates and 50% as strangers.").} The United Nations (UN) defines domestic violence in a way that encompasses gender-based violence and sexual violence: "[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."\footnote{Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993), available at http://www.un.org/documents/ga/res/48/a48r104.htm [hereinafter UN Declaration].}

The roots of domestic violence in the western world can be found in traditional Roman and Christian notions of the right of men to physically and socially dominate women in their familial, social, and marital capacities.\footnote{Caroline Dettmer, Comment and Casenote, Increased Sentencing for Repeat Offenders of Domestic Violence in Ohio: Will This End Suffering?, 73 U. CIN. L. REV. 705, 708 (2004) ("More specifically, the right of a man to beat his wife began with the development of marriage as an institution. After marriage, husband and wife became one—that one was the husband. The woman lost her separate legal status under the marriage: the husband was legally obligated to support his wife, and in return, the wife was legally obligated to obey her husband.").} Fathers regulated their entire households and men dominated women in social settings.\footnote{Id.} "In early Rome, a husband was legally vested with the power to discipline his wife as the law enforcer within the family structure. The authority of the male was so broad that the husband could call a family council and sentence the woman to death with no public trial." Social support and acceptance reinforced the disciplinary power that men had over their wives and daughters, creating a shroud of privacy within the home that no outsider would dare to penetrate. The institution of marriage propelled and reinforced traditional justifications for this
arrangement, including (1) women lost their separate identity and legal status once married; (2) husbands could be held liable for the illegal actions of their wives and had the responsibility and power to discipline accordingly; and (3) domestic chastisement with a rod or stick was socially and legally condoned for centuries by the "rule of thumb." The institution of marriage and the veil of family privacy sanctioned these practices.

Marital rape was protected from societal scrutiny or prosecution for similar reasons. Sarah Harless, a marital rape researcher, noted that nineteenth century judges did not need to resort to privacy considerations because there were no laws against marital rape at the time. She further stated, "Most Americans in the nineteenth century probably could not comprehend the notion that a man could rape his wife. Indeed, society viewed men as the protectors of women." These attitudes remained and were largely accepted in social and legal spheres well into the nineteenth century.

Once chastisement began to face considerable criticism, and with a growing nineteenth-century feminist movement that repudiated violence, courts found a new (and some argue an even more resilient) justification in the notion of privacy. A dichotomy emerged between public spheres, encompassing activities of the state, and private spheres, including all activities within the family home. "The home is in the private sphere where the state does not interfere." In State v. Hussey, one judge expressed a concern that prosecuting domestic violence as analogous to other forms of assault would "throw open the bedroom to the gaze of the public, and spread discord and misery, contention and strife, where peace and concord ought to reign." The public/private dichotomy created a tension between state protection of domestic violence victims and the state's historical reluctance to interfere in familial privacy. However

11. Dettmer, supra note 8, at 709-10; See also Volovksi, supra note 5, at 175 ("Prior to the twentieth century, the criminal law condoned domestic violence by granting a man the right to beat his wife, so long as the stick he used was not wider than the width of his thumb.").
13. Id.
14. Dettmer, supra note 8, at 709 ("Even with legal prohibitions of violence, patriarchal ideologies still persisted in the criminal justice system. Even today, beliefs persist that domestic violence is a private matter and less serious than other violent crime.").
16. Dettmer, supra note 8, at 711.
17. Id.
19. Dettmer, supra note 8, at 710-12; Harless, supra note 3, at 313-14.
notions of privacy and defending the unity of the family seemed to have stronger social and legal support, becoming one of the hallmark arguments for not aggressively prosecuting acts of domestic violence.  

Caroline Dettmer, a researcher and advocate against domestic violence, argued, "the eradication of domestic violence was not as important as keeping the home life free from state interference. That is, preventing violence was not as important as maintaining long-held beliefs in the husbands' duty and obligation to maintain control over their wives." Even today, there are some residual beliefs amongst lawmakers, police and the public that domestic violence should be treated as a private matter and as a less serious crime than similar assaults.  

B. NON-MARITAL RAPE: TENSION BETWEEN CONSENT AND PROOF

At common law, rape is defined as "unlawful carnal knowledge of a woman forcibly and against her will." The UN's definition, discussed above in Section II.A., includes rape as a form of domestic violence against women. Overall, the social and legislative framework of non-marital rape is quite different from that of domestic violence. A U.S. Department of Justice study showed that while domestic violence usually involves female victims, rape cases often reveal a more defined gender correlation to illustrate that wife-rape occurs more often than rape by a stranger. Furthermore, while domestic violence may include a range of physical and sexual assaults, common law rape requires the elements of non-consent, show of resistance by the victim, use of force by the perpetrator and some degree of penetration.

The standard of U.S. courts is to recognize that an individual is innocent until guilt can be proven beyond a reasonable doubt. However, archaic laws and beliefs surrounding rape often afforded the perpetrator a layer of protection by placing a heavy focus on consent and forcing the victim to prove her innocence. The Model Penal Code (MPC) originally stated: "A male who has sexual intercourse with a female not his

20. Dettmer, supra note 8, at 711.
21. Id.
22. Id. at 712 ("Police officers and other agents of the law often treat violence against women lightly by directing attention to the woman as provocateur.").
24. UN Declaration, supra note 7.
wife is guilty of rape." There is no presumption of belief in the victim's account, so the focus shifts from the perpetrator on trial to the victim. A victim must then justify sexual history, dress, lifestyle, and attitude to repudiate any hint of invitation. Furthermore, the MPC may infer a lack of consent if there is a showing of force that overcomes resistance, results in great or immediate bodily harm or death, or if the consent is obtained from one who does not have the capacity to consent. The MPC also has an additional hurdle of showing recklessness with regard to non-consent or negligence if the perpetrator is voluntarily intoxicated.

Until very recently, most states also had other requirements such as filing a prompt complaint (usually within 3 months), providing corroborative evidence of the assault, and cautionary instructions to jurors to review facts with suspicion. The MPC currently states that in any sexual assault prosecution, "the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged activities carried out in private." Thus the legal framework for rape focuses on consent and evidentiary proof, which become even more complex issues when the act occurs between spouses.

C. MARITAL RAPE: A UNIQUE PROBLEM

In addition to deeply entrenched social and legal customs, as well as justifications traditionally associated with domestic violence, marital rape encompasses a distinct paradigm that draws upon elements of the tensions found in domestic violence (family privacy versus protection) and non-marital rape (consent and issues of proof). Marital rape is a distinctive problem that must recognize the convergence of issues of domestic violence and non-marital rape to create a separate analytical framework. Domestic violence is often considered a private matter, much like sexual relations within a marriage. Since women who are raped by their husbands are exposed to attacks by someone they presumably loved and trusted, many marital rape survivors suffer severe and long-term psychological consequences. Michelle Anderson, a professor of law and scholar on marital rape, summarized several wife-rape studies conducted by researchers such as Diana Russell, M. Randall and L. Haskell, and David

29. Id.
30. Id.
32. MODEL PENAL CODE § 213.6(5) (1962).
33. Bergen, supra note 1, at 4 (Bergen takes a close look at the psychological impacts of marital rape).
Finkelhor and Kersti Yllo. She concluded that wife-rape "often evokes a powerful sense of betrayal, deep disillusionment, and total isolation... [which] can be even more extreme for victims of wife-rape." In addition, both domestic violence and marital rape occur within the bounds of the family and thus, victims are especially reliant upon outside protection from the police and courts. The problem is that law enforcement and the courts often withhold protection when it is most crucially needed out of respect for family privacy. Notably not all marital rape survivors are battered wives. Raquel Bergen, a researcher and scholar on marital rape, noted that assimilating marital rape survivors into the category of other domestic violence victims "ignores the reality that some women are raped by their husbands but do not experience other forms of violence... [and] to categorize marital rape only as an extension of domestic violence excludes these women and their experiences."

Unique legislative and social attitudes perpetuated by society are supported by certain traditional justifications for marital rape. Prior to the twentieth century and under English common law, a man could not be prosecuted for raping his wife. Most rape statutes, including the MPC, stipulated that rape was forced sexual intercourse with a woman not his wife, thus creating a marital rape exemption for husbands. The four main justifications for such statutes were: (1) according to biblical and Roman law, a woman was the legal property of her husband, or father if unmarried; (2) the feudal doctrine of coverture stipulated that a woman's independent legal identity was consolidated or subsumed into that of her husband, holding the married couple as one at law; (3) the reluctance of courts and law enforcement to interfere with private matters within a marriage; and (4) as Sir Matthew Hale, the Chief Justice in seventeenth-

34. Michelle Anderson, Marital Immunity, Intimate Relationships, and Improper References: A New Law on Sexual Offenses by Intimates, 54 Hastings L.J. 1465, 1512 (2003) ("One reason that wife rapes are so traumatic is that victims are less likely to tell family members, rape crisis counselors, or police officers about their experiences, and they are less likely to receive support when they do."). See also Diana Russell, RAPE IN MARRIAGE 9 (Macmillan Press 1990); David Finkelhor & Kersti Yllo, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 6-7 (Adam Bellow ed., The Free Press 1985); M. Randall & L. Haskell, Sexual Violence in Women's Lives, VIOLENCE AGAINST WOMEN 1(1), 6-31 (1995).


36. Bergen, supra note 1, at 3.

37. Anderson, supra note 34, at 1465.

38. Id. at 1477.


40. Schelang, supra note 39, at 86; Deborah Bell, Family Law at the Turn of the Century, 71 Miss. L. J. 781, 822 (2002).

41. Seigel, supra note 18, at 2120 (discussing a reluctance to interfere in private matters in cases of wife-beating); Andreea Vesa, International and Regional Standards for Protecting Victims of Domestic Violence, 12 Am. U. J. Gender Soc. Pol'y & L. 309, 317 (2004).
century England, proposed, marriage granted a wife’s ongoing and unbreakable consent to sexual intercourse. Thus courts and society in general were extremely reluctant to acknowledge that rape of a spouse was the same criminal violation as rape of a stranger and deserved equal (or perhaps more severe) punishment.

Under traditional property theories, women were considered the property of their husbands, or fathers if unmarried. First, the concept of marital rape was a legal nullity analogous to the inability to steal what one already owns. “The rape of a married woman by her husband himself was not a transgression at all because a man was allowed to treat his chattel as he deemed appropriate.” Thus women who were forced to have sex in their marriage did not even have the option of seeking criminal prosecution.

Second, the marital rape exemption was defended under the assertion that a husband and wife acted in concert and the wife had no separate rights apart from her husband. The husband was legally responsible for his wife’s conduct. Sir William Blackstone expounded upon the English common law notion that “by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband.” This doctrine of coverture gave husbands physical and legal control over their wives. Once married, women lacked legal standing apart from their husbands to enter into contracts, own their own property, or defend themselves in court. Consequently, a husband would be unlikely to go to court on behalf of his wife to allege he had raped her.

The third justification for the marital rape exemption is that the courts and police are often reluctant to pierce the veil of privacy regarding sexual matters as they are seen as at the heart of marital and familial relations. Kapila Juthani, a scholar and researcher on police treatment of domestic violence, argued that domestic violence is “largely unacknowledged by the public or legal system due in part to the lingering beliefs that the husband and wife become legally one upon marriage... the law did not reach

43. Anderson, supra note 34, at 1478.
45. Id. at 1478.
47. Hasday, supra note 44, at 1389.
48. Schelong, supra note 39, at 86.
49. Juthani, supra note 15, at 56 (“Police are particularly susceptible to the influence of persisting norms of marital and sexual privacy because they retain the discretion that is inherent in evaluating probable cause for search or arrest.”).
domestic violence largely because it occurred in the private sphere.\textsuperscript{50} While the shield of family privacy overlaps both marital rape and domestic violence in general, courts treated the offense of marital rape as less serious than domestic violence, reasoning that institution of marriage further protects the sexual nature of the act. In Shaw v. Shaw, a nineteenth-century case, the wife petitioned for divorce on the grounds of intolerable cruelty through her husband’s forced sexual demands.\textsuperscript{51} However, a husband raping his wife was not considered conclusive evidence of cruelty and marital rape was not held to be sufficient grounds for divorce.\textsuperscript{52} Thus the court in Shaw dismissed the petition, determining that although the husband had endangered his wife’s health with his sexual demands, there was no evidence that he actually had knowledge of the endangerment.\textsuperscript{53} Again, the court denied the legitimacy of marital rape as a cause of action.

The fourth (and perhaps most popular) justification for the marital rape exemption was the notion that a woman’s marriage vows provided ongoing consent to her husband’s sexual demands.\textsuperscript{54} Sir Matthew Hale wrote, “[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual and matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”\textsuperscript{55} From the seventeenth through the nineteenth centuries, English and American courts adhered to Hale’s decree despite the fact that societal norms and beliefs, not recognized legal authority, created this rule.\textsuperscript{56}

The domestic violence framework may leave some issues unaddressed in an adequate marital rape analysis, but the same problem occurs when one tries to analyze marital rape through the framework of non-marital rape. While any rape is a violation of personhood, marital rape results in distinctive sexual violence and trauma due to a violation of trust and love associated with the marital bond. Moreover, wife-rape is more common than rape by a stranger.\textsuperscript{57} While proving marital rape may involve the same elements used in non-marital rape, the consent defense may be even more difficult when augmented and supported by the traditional notions of

\textsuperscript{50} Dettmer, supra note 8, at 710-11.
\textsuperscript{51} Shaw v. Shaw, 17 Conn. 189, 196 (1845).
\textsuperscript{52} Hasday, supra note 44, at 1469.
\textsuperscript{53} Shaw, 17 Conn. at 196.
\textsuperscript{54} Anderson, supra note 34, at 1479-80; Weitzel, supra note 27, at 1039 (noting that courts presumed sex was consensual if a woman becomes pregnant).
\textsuperscript{55} Hale, supra note 42.
\textsuperscript{56} Anderson, supra note 34, at 1480.
\textsuperscript{57} Finkelhor & Yllo, supra note 34, at 7. See also Russell, supra note 34, at 9 (In interviews with more than 900 women, Russell found that eight percent had experienced rape by a husband. She also noted, “the term wife-rape is preferred over ‘marital rape’ or ‘spousal rape’ because it is not gender neutral. The term ‘spousal rape’ in particular seems to convey the notion that rape is something that wives do to husbands, if not as readily as husbands do it to wives, at least sufficiently often that a gender neutral term should be used.”).
implied consent as discussed above. Furthermore, proof is often more difficult in a case of marital rape because the act is likely to occur within the privacy of the home — an area that law enforcement, courts, and legislators have been reluctant to enter. Thus, analyzing issues of consent and proof in marital rape, with only an understanding of non-marital rape, provides an inaccurate picture. Marital rape incorporates distinct aspects of family privacy, protection from the state, consent and proof. Therefore, the problems associated with marital rape cannot fully be explored, addressed, or explained by either the framework of domestic violence or that of non-marital rape.

III. A LOOK AT CURRENT MARITAL RAPE LAWS IN THE UNITED STATES

While an accurate picture of the prevalence of marital rape in the United States today is difficult to achieve, one prominent researcher, Diana Russell, found that of more than 900 women she interviewed, approximately eight percent had been raped by a husband. In the United States, marital rape must be recognized as a criminal offense and treated separately from domestic violence and non-marital rape. However, in 2003, Professor Michelle Anderson showed that only twenty-four states and the District of Columbia have completely removed the marital rape exemption afforded to husbands. She asserted that the remaining twenty-six states retain some form of the common law by either providing exemptions or spousal immunity for sexual offenses other than forcible rape, maintaining spousal sexual offense statutes that carry less serious sanctions for the recognized form of marital rape, and/or imposing additional procedural requirements that serve as hurdles for prosecution of marital rape.

The first United States case to recognize the existence of a marital rape exemption was the 1857 case of Commonwealth v. Fogerty, in which the

58. Anderson, supra note 34, at 1497.
60. Harless, supra note 3, at 324-25 (discussing the emotional, procedural, and judicial hurdles specifically faced by victims of marital rape).
61. Russell, supra note 34, at 9. For further statistical estimates of the prevalence of marital rape, see also U.S. Dept. of Justice, supra note 5; Finkelhor & Yllo, supra note 34; Randall & Haskell, supra note 34, at 23-24.
Supreme Judicial Court of Massachusetts recognized that evidence of marriage to the victim would be a defense to rape.\textsuperscript{64} Jill Elaine Hasday, a professor of law and scholar on marital rape, reviewed nineteenth century cases involving marital rape and observed, “[t]here was not the slightest suggestion in nineteenth-century case law and treatises that a husband could be prosecuted for raping his wife.”\textsuperscript{65} In the early twentieth century, there were a few unsuccessful prosecutions for marital rape in the United States.\textsuperscript{66} However serious attempts to abandon outdated justifications by challenging the marital rape exemption did not become prevalent until the mid-1970s, when Nebraska became the first state to legislatively abolish the marital rape exemption.\textsuperscript{67}

In 1984, the Court of Appeals of New York critically examined the marital rape exemption in the pivotal case of People v. Liberta.\textsuperscript{68} In Liberta, the husband-defendant claimed that he could not be prosecuted for rape or sodomy in the first degree under the New York Penal Law rape statute, arguing that the term “female,” for purposes of the statute, was defined as any female not married to the actor.\textsuperscript{69} He also claimed that the rape statute violated equal protection under the U.S. Constitution because it burdened only males not within the marital exemption and applied only to males and not females.\textsuperscript{70} Generally, when faced with an under-inclusive statute, the court may either strike it down or enlarge the scope of the statute to include those formerly exempted.\textsuperscript{71} The Court of Appeals recognized that in 1978, the legislature had expanded the definition of “not married” to include spouses who were living apart pursuant to a court order, and thus found the defendant to not be married for purposes of the rape statute.\textsuperscript{72} The Liberta court applied a rational basis test and held that there was no rational basis for distinguishing between marital rape and non-marital rape and found the marital rape exemption to be unconstitutional.\textsuperscript{73}

The court also rejected the defendant’s equal protection claim that the

\textsuperscript{64} Commonwealth v. Fogerty, 74 Mass. 489, 489 (8 Gray 1857).
\textsuperscript{65} Hasday, \textit{supra} note 44, at 1392.
\textsuperscript{66} See State v. Rideout, 5 Fam. L. Rep. 2164 (Marion County Cir. Ct., Or. 1979) (first prosecution for a man raping his wife, but the man was acquitted); Frazier v. State, 86 S.W. 754, 755 (Tex. 1905).
\textsuperscript{68} People v. Liberta, 474 N.E.2d 567, 576 (N.Y. 1984).
\textsuperscript{69} \textit{Id}. at 570. Specifically, he claimed that the rape statute was under-inclusive and that he should be considered married for purposes of the statute and exempt from prosecution.
\textsuperscript{70} \textit{Id}. at 569.
\textsuperscript{72} \textit{Liberta}, 474 N.E.2d at 571 (the defendant was, in fact, living apart from his wife pursuant to a Family Court Order).
\textsuperscript{73} \textit{Id}. at 573.
statute unfairly mandated that only males could be guilty of spousal rape and concluded that the marital and gender exemptions must be removed from the statute entirely.74 Furthermore, the court specifically addressed and denounced the traditional Hale doctrine of implied consent as justification for the marital rape exemption:

Any argument based on a supposed consent . . . is untenable. Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. Other than in the context of rape statutes, marriage has never been viewed as giving a husband a right to coerced intercourse on demand. Certainly, then, a marriage should not be viewed as a license for a husband to forcibly rape his wife with impunity.75

Today, the Liberta decision stands as the current case law.76 Almost all state marital rape exemptions have been revised within the past twenty-five years to be gender-neutral, regulating the rape of a spouse rather than a female.77 The solution has generally been to abolish the distinction between married and non-married persons entirely in order to prosecute the crime of rape regardless of marital status.78 However some scholars argue that the majority of states retain some form of the marital rape exemption, suggesting that traditional norms remain to some extent.79 Proponents of the exemption assert that there is value in retaining separate statutes for sex crimes committed by spouses and continue to defend the

74. Id. at 576.
75. Liberta, 474 N.E.2d at 573 (citation omitted).
76. For subsequent cases that refer to the Liberta case as precedent, see Merton, 500 So. 2d at 1303; People v. Stefano, 121 Misc.2d 113 (N.Y. 1983), State v. Rider, 449 So. 2d 903 (1984).
77. See Amicus Brief in Support of Petitioners, U.S. v. Morrison, 991 F.2d 112 (4th Cir. 1993), available at http://www.binghamton.edu/womhist/vawa/doc18.htm ("Like domestic violence, rape is a form of assault that States have traditionally defined and punished in explicitly sex-based terms. . . . While most States have now repealed or revised that marital rape exemption, the record before Congress showed that, even after these reforms, many States still refuse to protect women from husbands who rape or assault them. . . . In short, until quite recently, States often denied and regulated rape and domestic violence in overtly sex-based terms; some States still do. Even if a State revises its rape law in gender-neutral language, legislators, police, prosecutors, judges, assailants and victims still understand rape as a form of assault by men against women.").
79. Anderson, supra note 34, at 1486; Michelle Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51 (2002); Weitzel, supra note 27, at 1042.
doctrine by arguing that: (1) legal intervention into the private marital domain is inappropriate;\(^8\) (2) spousal sexual offenses are not as harmful as other rapes, so they do not warrant harsh criminal sanctions;\(^9\) (3) the exemption promotes marital reconciliation and the resumption of normal marital relations;\(^10\) and (4) there is a need to prevent vindictive wives from pursuing false charges.\(^11\) However the past few decades have illuminated some fierce opposition to retaining these legal distinctions. Opponents argue that women deserve legal protection from unwanted sex regardless of marriage status, that the psychological consequences of wife-rape are often more serious and devastating for a spouse-victim than for a non-spouse victim, and that marital rape is a violation of women's autonomy, sexual liberty, and integrity.\(^12\)

A. REMNANTS OF SPOUSAL IMMUNITY

Despite the milestone abolition of the marital rape exemption in \textit{Liberta}, legal distinctions between marital rape and non-marital rape still exist in states that continue to grant immunity to spouses for sex offenses other than forcible rape.\(^13\) Twenty states currently grant or imply spousal immunity from sexual offense charges if the spouse-victim is mentally incapacitated or physically helpless.\(^14\) Researcher Michelle Anderson found that in Oklahoma, Ohio, and South Carolina, husbands are immune from rape charges "when they themselves administer the drugs, intoxicants, or controlled substances to render their wives mentally incapacitated."\(^15\) Additionally, twelve states continue to grant spousal immunity for various nonconsensual sexual offenses such as gross sexual imposition, sexual abuse, sexual battery, sexual contact, and sexual misconduct.\(^16\) For example, Kansas allows marriage as a defense for sexual battery,\(^17\) while

\(^{80}\) Dettmer, \textit{supra} note 8, at 711-12; Harless, \textit{supra} note 3, at 313; Hasday, \textit{supra} note 44, at 1486.

\(^{81}\) Anderson, \textit{supra} note 34, at 1500; COLLEEN WARD, ATTITUDES TOWARDS RAPE: FEMINIST & SOCIAL PSYCHOLOGICAL PERSPECTIVES 74 (Sage Publications 1995).

\(^{82}\) In \textit{People v. Brown}, the Colorado Supreme Court stated, "the marital exemption may remove a substantial obstacle to the resumption of normal marital relations." \textit{People v. Brown}, 632 P.2d 1025, 1027 (1981); Hasday, \textit{supra} note 44, at 1487-88.

\(^{83}\) Hasday, \textit{supra} note 44, at 1488.

\(^{84}\) \textit{Liberta}, 474 N.E.2d at 575; \textit{Merton}, 500 So. 2d 1305 (opposing any marital distinction regarding the treatment of rape); Dorf, \textit{supra} note 78 (illustrating that the trend is to abolish any marital distinction in rape charges); Hasday, \textit{supra} note 44, at 1491-93 (discussing the legal history of marital rape and the consequences it has on the victims).

\(^{85}\) Anderson, \textit{supra} note 34, at 1486.

\(^{86}\) Anderson, \textit{supra} note 34, at 1486-87.

\(^{87}\) \textit{Id.} at 1486-88. For specific codes researched by Anderson, see \textit{OHIO REV. CODE ANN.} \S 2907.02 (a) (West 2002); \textit{OKLA. STAT. ANN. tit. 21, \S 1111} (West 2002); \textit{S.C. CODE ANN.} \S 16-3-652 (2002).

\(^{88}\) \textit{Id.} at 1489.

\(^{89}\) \textit{KAN. STAT. ANN.} \S 21-3517 (2005) ("[s]exual battery is the intentional touching of the person of another who is 16 or more years of age, who is not the spouse of the offender.").
Hawaii exempts spouses from sexual assault in the third degree. These spousal exemptions to sexual offenses other than forcible rape are remnants of traditional notions that marriage included implied consent to sexual intercourse. “The marital exemption for mentally incapacitated rape, unconscious rape, and sexual offenses without extra force... rests on the assumption that, because of the 'implied authorization' granted by marriage, spousal sexual offenses that do not involve serious physical force are not important enough or harmful enough for the justice system to criminalize.” These laws are examples of the failure to recognize that rape is a violent and serious offense regardless of one's marital status, and consent to any unwanted sexual contact should never be implied. Critics and feminists alike emphatically maintain that a marriage license should never be viewed as a license for a husband to have any sexual rights over his wife and that a married woman has the same right to control her own body as an unmarried woman.

B. MARRIAGE: A TICKET TO A LESSER PENALTY

Specific marital rape statutes and/or lesser penalties for sexual offenses committed by spouses also indicate that the marital rape exemption still exists to some degree. North Carolina had an express marital rape exemption, which was not repealed until 1993. As of 2003, six states had amended their statutes to include a specific spousal rape section, which some argue is still a way of differentiating sexual crimes between spouses as opposed to non-spouses. Of these six, Arizona, South Carolina, Tennessee, and Virginia downgraded the severity of the crime by mandating lesser penalties for spousal rape than for rapes committed by others. However, Arizona, Tennessee, and Virginia have repealed these

91. Anderson, supra note 34, at 1497.
92. Id.
93. Liberta, 474 N.E.2d at 573; Merton, 500 So. 2d at 1303; Hasday, supra note 44, at 1417 (“[w]omen’s economic, legal, and bodily vulnerabilities in marriage were all intricately connected. In demanding a woman’s right to her own person, feminists fought all of these inequalities simultaneously.”).
95. N.C. GEN. STAT. § 14-27.8 (2005); Harless, supra note 3, at 318.
96. For example, the California legislature amended the Penal Code to eliminate the marital exemption for forcible spousal rape. CAL. PEN. CODE § 262 (West 2005). Arizona, Connecticut, South Carolina, Tennessee, and Virginia also have spousal rape statutes. Anderson, supra note 34, at 1490.
97. Anderson, supra note 34, at 1490-91 (“[a]ggravated rape is a Class A felony, but aggravated spousal rape is a Class B felony; rape is a Class B felony, but spousal rape is a Class C felony.”). See, e.g., ARIZ. REV. STAT. ANN. § 13-1406.01 (2002) (prior to 2005, in Arizona, sexual assault was considered a Class 2 felony, but spousal sexual assault was a Class 6 felony and a judge had discretion to treat it as a misdemeanor); TENN. CODE ANN. §
statutes within the past two years. Mississippi still provides a marital exemption for sexual battery if the spouses are living together at the time of the incident unless use of force and lack of consent can be shown. Critics argue that treating marital rape or other sexual offenses as less serious crimes than the non-spousal equivalents will lead to a decrease in convictions and reporting by sending a message to women that the state is unwilling to intervene in marital privacy regardless of the consequences.

C. ADDITIONAL REQUIREMENTS TO PROVING MARITAL RAPE

In addition to establishing the elements of non-marital rape, proving marital sexual offenses in several states has additional requirements. These restrictions frequently come in the form of a statute of limitations for reporting, living arrangements of spouses at the time of incident, and additional showings of force or violence. In Oklahoma, the crime of spousal rape requires the showing of force or violence by the perpetrator. Four states still require prompt complaint (usually within three months) for spousal sexual offenses but not for other rape victims. For example, in California, the spouse-victim must report the incident within one year, but this requirement can be overcome with corroborating independent evidence. In South Carolina, spouse-victims of criminal sexual battery must report the incident within thirty days. Researcher Michelle Anderson noted that three states continue to require corroboration for spousal sexual offenses: “Texas requires corroboration unless the complainant makes a prompt outcry to authorities, New York requires corroboration when a complainant’s mental incapacity forms the basis of her non-consent, and Ohio requires corroboration for the crime of sexual imposition.” The prompt complaint and extra corroboration requirements do not protect the many women who do not report within that

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99. MISS. CODE ANN. § 97-3-99 (West 2006); Bell, supra note 40, at 828.
100. Harless, supra note 3, at 323-24.
101. Bell, supra note 40, at 828; Harless, supra note 3, at 323.
103. OKLA. STAT. tit. 21, § 1111(B) (2006).
104. See, e.g., CAL. PEN. CODE § 262 (West 2005); 720 ILL. COMP. STAT. ANN. 5/12-18(c) (West 2004) (amended 2004 replaced with 2004 Ill. Legis. Serv. page no. 93-958 (West); S.C. CODE ANN. § 16-3-615 (2004); TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon 2006).
time and/or are unable to provide any independent evidence or testimony that the sexual assault occurred. Furthermore the spouse-victims of marital rape face similar domestic violence obstacles in reporting due to “emotional hurdles, prosecutors who ignore their wishes, and a general lack of understanding regarding the seriousness of their situation.”

Some commentators also claim that progressive legislation advocating no-drop policies ignores the wishes of and further disadvantages the spouse-victim. For example, Kentucky law as of 2000 admitted circumstantial evidence against a perpetrator if the spouse was unwilling to testify so that the prosecution could proceed without the complainant’s consent. While the legislative intent behind such no-drop policies (or prosecutors’ motive for adopting them) may have been to vigorously prosecute perpetrators, the reality is that women are afforded no choice or control over the prosecution. This may instill greater fear of reporting incidents and discourage women or the spouse-victim from reporting due to a loss of financial support if they are financially dependent on their spouse and enforce the message that a woman has no control over her life.

Many states require that a couple be legally separated and living apart and/or divorced at the time of the assault before certain criminal prosecutions for sexual assault can proceed. Furthermore a handful of states refuse to prosecute spousal rape and sexual assault without an additional showing of force, violence, duress, or threat of bodily harm by the perpetrator. Mississippi is even more restrictive, with a requirement that the couple be living apart to prosecute a marital rape, unless there is a showing of force. Some states exempt spouses from non-forcible crimes, thus implying a required showing of physical force, whereas other forms of coercion would suffice to prove a rape between unmarried parties.

IV. MARITAL RAPE LAWS ON AN INTERNATIONAL LEVEL

Internationally, marital rape is starkly subsumed in directives targeting domestic violence. This section will analyze the treatment of marital rape in the European Union’s Resolution on the Report from the Commission to

108. Id. at 978.
109. Harless, supra note 3, at 324.
110. Id. at 331–32.
111. Id.
112. Id. at 330.
113. Anderson, supra note 34, at 1494.
115. MISS. CODE ANN. § 97-3-99 (West 2006).
the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the State of Women’s Health in the European Community. The UN’s 1993 Declaration on the Elimination of Violence Against Women and the 1995 Beijing Declaration and Platform for Action, a product of the UN Fourth World Conference on Women, will also be examined for the European Union’s attention to marital rape. In addition, this section will analyze several Country Reports on Human Rights Practices that the U.S. State Department presents to Congress each year. This analysis will illustrate how various countries address marital rape through the framework of domestic violence and/or non-marital rape and show that treating marital rape as a private problem is part of traditional cultural norms on an international level, as well as in the U.S.

A. A REPORT FROM THE EUROPEAN UNION

While there are countless international organizations and committees dedicated to women’s rights and stopping violence against women, there are few, if any, legislative directives that specifically address the issue of marital rape outside the context of domestic violence. In 1986, the European Parliament adopted a Resolution on Violence Against Women, in which it called for legal recognition of marital rape. More notably, on June 21, 1999, the European Parliament took a collective look at various international reports and conferences on women’s health, such as a report from the 1995 UN Beijing Conference and a report of the Committee on Women’s Rights, and issued the Resolution on the Report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the State of Women’s Health in the European Community. This Resolution called for the criminalization of domestic violence in general and included marital rape as domestic violence against women, but contained no separate initiative or suggestion for prosecuting marital rape. The Resolution contains twenty-seven objectives under the topics of general concerns, reproductive health, diseases that affect women differently, violence against women, and the health needs of aging women. Of the twenty-seven objectives, only two (Number 22 and 23) are related to violence against women. Objective 22 states that the European Parliament “calls on the Commission to add into the programmes of health promotion coping with violence against women, which is a serious physical and psychological public health problem having damaging effects also on concerned children’s healthy development, and to promote research of and to incorporate health aspects into Community financed campaigns on violence

117. 1986 O.J. (C 176) 73, 75.
119. Id. at 71.
against women." Objective 23 states that the European Parliament "calls on the member states to make domestic violence against women, including rape within marriage and sexual mutilation, a criminal offence and to set up services to help women who are victims of this kind of violence." Thus marital rape is included in the fight against domestic violence, but it is not addressed separately. Additionally the Resolution is not legally binding. Some scholars argue that these mere suggestions do not have any actual effect, while other scholars maintain that "domestic violence standards have become part of customary international law, which is binding in nature." This resolution is just one example of how marital rape is subsumed within the framework of addressing domestic violence in general and is provided no separate recognition of its urgency, uniqueness, and pervasiveness as a societal problem.

However, the European Parliament’s Committee on Women’s Rights and Gender Equality in 2005 issued a report encouraging measures to specifically criminalize marital sexual violence and marital rape. The committee urged the Member States to "recognize marital sexual violence as a crime and to make rape within marriage a criminal offense [and] not to accept any reference to cultural practice as an extenuating circumstance in cases of men’s violence against women." The Committee declared that outdated cultural norms and legal barriers facilitate an intolerable general acceptance of a marital rape exemption.

B. VIOLENCE AGAINST WOMEN AS DEFINED BY THE UNITED NATIONS

In December of 1993, the UN’s High Commissioner published the Declaration on the Elimination of Violence Against Women, which established marital rape as a human rights violation. The declaration also stated that "the term violence against women means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." Significantly, Article 2 of the declaration specifies that

Violence against women shall be understood to encompass, but not

\[\text{References}\]

120. Id.
121. Id.
122. Vesa, supra note 41, at 338.
124. Id.
125. Id.
126. UN Declaration, supra note 7.
127. Id.
be limited to, the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.\(^{128}\)

Both the UN declaration and the report from the European Parliament specifically mention and include marital rape in the general prohibition against domestic violence, but there is no separate treatment or legal doctrine to address the unique issues associated with marital rape. Also, the UN does not have the authority to bind unwilling members to such legal doctrine. Therefore the declaration merely urges all member states to recognize and adhere to its recommendations. However not all member states fully recognize it.

The UN used this definition of violence against women when it held the UN Fourth World Conference on Women in Beijing, China in 1995.\(^{129}\) The UN issued the *Beijing Declaration and Platform for Action*, which not only included the definition of violence against women, but specifically recognized that:

Violence against women is a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women’s full advancement. Violence against women throughout the life cycle derives essentially from cultural patterns, in particular the harmful effects of certain traditional or customary practices and all acts of extremism linked to race, sex, language or religion that perpetuate the lower status accorded to women in the family, the workplace, the community and society. Violence against women is exacerbated by social pressures, notably the shame of denouncing certain acts that have been perpetrated against women; women’s lack of access to legal information, aid or protection; the lack of laws that effectively

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128. *Id.*

prohibit violence against women; failure to reform existing laws; inadequate efforts on the part of public authorities to promote awareness of and enforce existing laws; and the absence of educational and other means to address the causes and consequences of violence.\textsuperscript{130}

While the Beijing declaration also merged marital rape into the definition of violence against women, it is significant that the UN specifically connected violence against women to socio-cultural norms that reinforce and suggest an acceptance, justification, and tolerance for practices that should not and cannot be tolerated any longer. Further, in 1996, the Commission on Human rights issued a report called \textit{Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms: A Framework for Model Legislation on Domestic Violence}. The report stipulated that there should be “no restrictions on women bringing suits against their spouses and that evidence, criminal, and civil procedure codes should be amended to provide such remedy.”\textsuperscript{131}

\section*{C. COUNTRY OVERVIEWS: CLINGING TO CULTURAL NORMS}

Marital rape remains a pervasive problem in many countries and, despite many strides of progress towards its criminalization and effective prosecution, it is often shielded by the veil of family and marital privacy.\textsuperscript{132} “Insufficient awareness of the consequences of domestic violence, how to prevent it and the rights of victims still exists.... [T]he legal and legislative measures, especially in the criminal justice area, to eliminate different forms of violence against women... are weak in many countries.”\textsuperscript{133} For example, the “Mexican penal code did not consider marital rape a crime,” and the Mexican Supreme Court stated in 1994 that “violently forcing a spouse to have sex was merely an ‘abusive exercise of a conjugal right,’” supporting the notion that marriage is a license for sexual relations.\textsuperscript{134} However in November of 2005 the Mexican Supreme Court overturned the 1994 decision and found “that forced sex within marriage is considered rape and punishable by law.”\textsuperscript{135} Similarly,
Human Rights Commission of Malaysia, Suhakam submitted a penal code amendment to the Parliamentary Select Committee to include marital rape as a penal offense. 136 One article highlighted that the recommendation had been attacked by Muslim religious intellectuals who saw the amendment as contrary to Islam and the institution of marriage. 137 A religious advisor argued that marital rape “is relevant only to non-Muslims [because] Islamic law is adequate to check a husband’s abuses” and they can turn to the Syariah Court for redress. 138

The U.S. Department of State submits an annual report entitled Country Reports on Human Rights Practices to Congress, which covers internationally recognized individual, civil, political, and worker rights as set forth in the Universal Declaration of Human Rights. The reports are segmented into geographic locations such as Europe and Eurasia, Africa, the Near East, North Africa, and East Asia and the Pacific. Each segment contains an overview of various countries' current state of affairs on domestic violence and rape laws. In Macedonia, for example, legal recourse is available for marital rape victims, but cultural norms that discourage reporting and a lack of internal practical police training in domestic violence have made criminal charges on the grounds of domestic violence very rare. 139 “Victims of family violence often were reluctant to bring charges against perpetrators because of the shame it would inflict on the family, and police were limited in their ability to respond to allegations of domestic violence and spousal rape if the crime did not occur in police presence.” 140 Similarly, the 2004 report for Ethiopia stated that there is no specific law addressing domestic violence (which includes wife beatings and marital rape) and societal norms prevented women from seeking legal redress and obstructed investigations and prosecutions in rape cases. 141 Furthermore the common, yet illegal, practice of abducting women and girls as a pathway to forced marriage often left women in forced sexual relationships, but courts recognized such marriages as a valid defense of abduction and/or rape. 142 “In cases of abduction by marriage, the perpetrator was not punished if the victim agreed to marry him (unless the marriage was annulled); even after a perpetrator was convicted, the

137. Id.
138. Id.
140. Id.
141. Id. at 224.
142. Id. at 224-25.
sentence was commuted if the victim married him.” The 2004 State Department report for China (including Tibet, Hong Kong, and Macau), explained that the 2002 Statute Law Bill specifically criminalized marital rape. In 2003, the Chinese legislature passed an amendment to the Crimes Ordinance to clarify that unlawful sexual intercourse could be applied both outside and inside the bounds of marriage. The Near East and North Africa report on Jordan stated that marital rape is currently not illegal and acknowledged that religious, familial, and societal pressures and norms play a large role in discouraging victims from seeking medical or legal help. “Wife-battering technically was a grounds for divorce, but a husband may seek to demonstrate that he has authority from the Koran to correct a perceived irreverent or disobedient wife by striking her.” This is starkly akin to the old theories of coverture and unity (as discussed above in Part II) dating back to pre-twentieth century English common law. These Country Reports provide a small insight into the global perspective on marital rape and illustrate that many countries still hold socio-cultural norms similar to those that supported the marital rape exemption in the British and U.S. tradition.

V. CHALLENGES IN LEGISLATING AND ENFORCING MARITAL RAPE LAWS

A significant barrier to addressing the problem of marital rape effectively is that it is often subsumed within the legislation concerning either domestic violence or non-marital rape, even though marital rape has unique features that place it somewhere in between the two. Domestic violence encompasses a tension between family privacy and protection by the state. Rape, however, is caught in a tension between consent and evidentiary proof. The statutory schemes and legal history of domestic violence and marital rape have progressed along similar lines and present similar problems. Marital rape presents distinct issues that warrant unique solutions. Primarily, marital rape legislation, prosecution, and survivor rehabilitation must specifically address the issues that can collectively be drawn from the frameworks of domestic violence and non-marital rape. “The nature of violence in an intimate relationship creates some distinct

143. Id. at 225.
144. Id. at 714. See also Liberta, 474 N.E.2d 567 (In comparison with the U.S. as a whole, the 1984 decision of People v. Liberta abolished the distinction between marital and non-marital rapes in the state of New York, but marital rape did not become a crime in all fifty states until 1993.).
146 Id.
147. Schelong, supra note 39, at 86.
148. Harless, supra note 3, at 308.
social and psychological problems that affect the victim’s position in the legal system. The criminal justice system treats rape that involves strangers as more serious than rape involving an intimate. Marital rape victims also face unique emotional and economic barriers to leaving their husband-batterer. Survivors often feel particularly violated by someone with whom they shared marriage vows and may be financially unable to leave their spouses and children. Both internationally and domestically, governments, judicial courts, and law enforcement need to recognize these differences and build a framework for specifically treating victims and prosecuting perpetrators of marital rape.

Secondly, treating marital rape as a crime will require more than legislation. Simply declaring that marriage will not be a defense to rape will not end these offenses. Adequately addressing the issue must encompass public awareness of a victim’s rights, a responsive and trained police force, a supportive network of agencies and organizations to assist in the treatment of victims, and a court system of prosecutors, judges and juries that will legitimize marital rape claims and send a message that marital rape will not be tolerated. In addition to the slow and reluctant legal recognition that a marriage license is not a license to rape, women are often reluctant or reticent to report marital rape. In a recent issue of the South China Morning Post, one headline read: “Marital Rape Victims Ignorant of Law Change; Not One Case Has Been Prosecuted Since Amendment Took Effect in 2002.” This headline demonstrates the gulf between newly made legislation and the implementation of that legislation by prosecutors. Thus an effective remedy requires that women have knowledge of their rights and the encouragement to report incidents of marital rape.

Thirdly, a significant barrier to global enforcement of marital rape prosecutions is that countries will adhere to their respective governmental dictates, and no international declaration or initiative is legally binding upon all countries. “While declarations and international conferences are pertinent for pointing out such issues of wide concern and for suggesting solutions, they do not create binding obligations that require states to enforce these solutions . . . [they] carry political weight, but they are not, on their own, legally binding instruments unless they are seen as embodying notions of customary human rights law, which has a legally binding effect.

149. Id. at 308-09.
150. Id. at 310; Lucas, supra note 4, at 786-87.
151. Anderson, supra note 34, at 1554.
153. Harless, supra note 3, at 308.
Consideration of marital rape laws as binding customary norms requires opinio juris and a general universal practice of regarding it as a crime. However marital rape laws currently have seen no such global consistency of legislative treatment. The reports and recommendations of various international committees and organizations strongly urge countries to follow their initiative, but the reports alone cannot mandate that member states or countries fully incorporate such suggestions.

VI. CONCLUSION

Effectively addressing marital rape will require specific attention to its unique problems and consequences without subsuming them solely within the frameworks of domestic violence or non-marital rape. There is a domestic and international need for judicial and systemic reform to remove the procedural barriers that accompany the reporting and prosecutorial obstacles of marital rape cases. There must be more comprehensive research and statistical data on the specific effects and prevalence of marital rape on a global scale. Furthermore there is a strong need for legislative consistency between the states in the United States and other countries and a global recognition of the seriousness of marital rape as a violent crime with serious impacts on its spouse-victims.

While the past three decades have seen significant strides towards the abolition of the marital rape exemption, as we begin the twenty-first century, much more legislative and socio-cultural reform is needed. The failure to criminalize marital rape in some countries, or exemptions for lesser sexual offenses or imposition of less serious sanctions for perpetrators in the United States, shows that remnants of the marital rape exemption exist. Furthermore implementing and changing legislation “on the books” can sometimes be very different from the “law in action.” It may be decades before countries that have only recently criminalized marital rape show significant progress in reporting, prosecuting, and minimizing marital rape. Adequately addressing marital rape will require public awareness and encouragement to report these crimes, an effective law enforcement network, a comprehensive network of agencies and organizations to assist in treatment for marital rape victims and a court system that takes these cases seriously. A global consensus must recognize

155. Harless, supra note 3, at 318.
156. The Paquete Habana, 175 U.S. 677, 700 (1900)("Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.")
that marital rape is a violent and serious crime that can never be accepted, rationalized or justified.