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State v. Smith, 401 So. 2d 1126 (Fla. 5th Dist. Ct. App. 1981)

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Criminal Law—SEXUAL BATTERY—NO INTERSPOUSAL EXCEPTION FROM PROSECUTION UNDER FLORIDA SEXUAL BATTERY STATUTE—*State v. Smith*, 401 So. 2d 1126 (Fla. 5th Dist. Ct. App. 1981)

I. INTRODUCTION

Larry Smith and his wife were married in 1975 and separated in 1979.¹ Mrs. Smith filed for divorce and obtained a temporary restraining order which enjoined each party from molesting, interfering with or harassing the other.² After issuance of the order, but before the divorce action became final, Mrs. Smith alleged that she was confronted by her husband in the parking lot of the apartment complex where she resided.³ After being grabbed and ordered to accompany her husband, Mrs. Smith sprayed him with mace. Mr. Smith then knocked his wife to the ground, took the mace from her, dragged her into his car and drove off. While driving, Mr. Smith ordered his wife to undress and threatened to beat her if she refused. Mrs. Smith undressed and was forced to engage in sexual intercourse.⁴

After gaining her freedom, Mrs. Smith charged her husband with kidnapping and sexual battery.⁵ The defendant moved to dismiss the sexual battery count on the ground that he was lawfully married to the victim at the time of the offense and the common law interspousal rape exception precluded his prosecution on the charge.⁶ The circuit court granted the defendant's motion, but the Fifth District Court of Appeal reversed.⁷ In so doing, the district court rejected a common law principle first expressed in the 1600's which presumably was the undisputed law in Florida prior to the *Smith* decision.⁸ The common law exception, as expressed by Sir

1. *State v. Smith*, 401 So. 2d 1126, 1127 (Fla. 5th Dist. Ct. App. 1981).

2. *Id.* at 1127.

3. *Id.*

4. *Id.*

5. *Id.*; see *infra*, text accompanying notes 18-28.

6. 401 So. 2d at 1127.

7. *Id.* at 1129.

8. Although there is no reported Florida decision which holds that marriage of the parties is a valid defense to a rape action, there is likewise no decision prior to *Smith* holding that it is not. In *Blount v. State*, 138 So. 2 (Fla. 1931), the Florida Supreme Court held that *subsequent* marriage of the parties was not a defense to rape.

Despite statutory silence on the issue, it has nevertheless been generally assumed that the exception had been in force in Florida prior to *Smith*. See, e.g., Note, *Florida's Sexual Battery Statute: Significant Reform But Bias Against the Victim Still Prevails*, 30 U. FLA. L. REV. 419, 429 (1978).

In debate before the House Committee on Criminal Justice, Rep. Elaine Gordon proposed an amendment to the present sexual battery statute which would have explicitly eliminated

Matthew Hale, is that "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."⁹ The Fifth District Court of Appeal, by rejecting Hale's assertion and holding that a husband could be prosecuted for the sexual battery of his wife, joined the minority of jurisdictions which have totally rejected the common law exception.

This note will discuss the probable effects of *Smith* and review the justifications for the common law exception. An examination of the statutory and sociological changes which influenced the Fifth District Court of Appeal's decision will be made, followed by a discussion of the trend toward abolishing the interspousal exception.

II. THE COMMON LAW EXCEPTION

Although Hale's exposition of the common law exception was made more than 300 years ago, the reasoning he employed remains a major justification of the rule today. What Hale spoke of as the wife having "given up herself" has developed into the concept of "implied consent" to intercourse.¹⁰ The theory that marriage carries with it the consent to intercourse is employed even today by those who support the exception.¹¹

Aside from the theory of implied consent, three other notions have traditionally been posited in favor of the interspousal rape exception. The first, that a wife is the chattel of her husband, was never accepted in this country,¹² although it was probably a basic underpinning of the rule at the time of its inception.¹³

The exception was also at one time supported by the common law principle that a husband and wife constituted but one legal entity.¹⁴ Therefore, to prosecute a man for the rape of his wife would be identical to prosecuting him for committing a crime against himself.¹⁵

the interspousal exception. Because of vehement opposition, the proposal was dropped. *Id.* at 429 n.83.

9. 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 629 (1736).

10. See, e.g., *State v. Haines*, 25 So. 372 (La. 1899); *Frazier v. State*, 86 S.W. 754 (Tex. Crim. App. 1905).

11. See *Hilf, Marital Privacy and Spousal Rape*, 16 NEW ENGLAND L. REV. 31, 41 (1980).

12. 401 So. 2d at 1128.

13. See S. BROWNMILLER, AGAINST OUR WILL 18-28 (1975).

14. E.g., H. CLARK, LAW OF DOMESTIC RELATIONS 219 (1968).

15. Cf. W. HEALE, AN APOLOGIE FOR WOMEN 6 (1609). The "one legal entity" theory, however, ignores the fact that a husband has traditionally been held criminally liable for

The final justification for the interspousal exception was that to allow interspousal prosecutions would divide the home and that judicial intervention would cause more disharmony than it would rectify. This notion, like implied consent, retains vitality even today.¹⁶ A closely related and sometimes indistinguishable concern is that the opening of a judicial avenue of redress would lead to a flood of prosecutions brought by vengeful or retributive spouses. Under this theory, it is thought better to allow husbands and wives to resolve their conflicts within the home than to have the police and courts intrude into that most protected "zone of privacy."¹⁷

III. FLORIDA SEXUAL BATTERY STATUTE

Prior to 1974, the Florida rape statute provided:

(1) Whoever of the age of seventeen years or older unlawfully ravishes or carnally knows a child under the age of eleven is guilty of a capital felony

(2) Whoever ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will, or unlawfully and carnally knows and abuses a child under the age of eleven years, shall be guilty of a life felony

(3) It shall not be necessary to prove the actual emission of seed, but the crime shall be deemed complete upon proof of penetration only.¹⁸

Although the rape statute was upheld against a claim of unconstitutional vagueness in 1974,¹⁹ the Florida Legislature repealed it that same year.²⁰ The current sexual battery statute was enacted in its place.²¹ The practical effect of this exchange was to abolish the crime of rape in Florida and to replace it with the broader crime of sexual battery.²²

Generally, the effect of the sexual battery statute was to bring all

certain crimes committed against his wife. *See generally*, 6 AM. JUR. 2d *Assault and Battery* § 44 (1972).

16. *See generally* Hilf, *supra* note 11.

17. *Id.*

18. FLA. STAT. § 794.01 (1973).

19. *Washington v. State*, 302 So. 2d 401 (Fla. 1974), *cert denied*, 421 U.S. 918 (1975).

20. 1974 Fla. Laws, ch. 74-121, § 1.

21. FLA. STAT. § 794.011 (1981).

22. The scope of this note prohibits an in-depth analysis of the changes brought about by the enactment of the sexual battery statute. For an excellent analysis of this topic see Note, *supra* note 8.

nonconsensual sex crimes under one title.²³ In contrast to the prior definition of rape, "sexual battery" is defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery shall not include acts done for bona fide medical purposes."²⁴

Thus, the Legislature replaced the ambiguous language of the rape statute with a more precise definition of punishable behavior. Additionally, the sexual battery statute is gender neutral, encompassing acts between men or between women as well as between men and women.²⁵

The sexual battery statute divides sexual battery into three grades of offenses, whereas the rape statute allowed only for capital and life felonies. Sexual battery or attempted sexual battery by a person over eighteen committed upon a child eleven or younger, remains a capital felony.²⁶ Nonconsensual sexual battery upon a person over the age of eleven, which is accomplished through the threatened use of a deadly weapon or use of "actual physical force likely to cause serious personal injury," is classified as a life felony.²⁷ Finally, the sexual battery statute includes the classification of first degree felony for nonconsensual sexual battery upon a person over the age of eleven:

(a) When the victim is physically helpless to resist.

(b) When the offender coerces the victim to submit by threatening to use force or violence . . . , and the victim reasonably believes that the offender has the present ability to execute these threats.

(c) When the offender coerces the victim . . . by threatening to retaliate against the victim

(d) When the offender . . . administers . . . to the victim any narcotic . . . which mentally or physically incapacitates the victim.

(e) When the victim is . . . less than 18 years of age and the offender is in a position of familial, custodial, or official authority over the victim and uses this authority to coerce the victim to

23. *Id.* at 421-26.

24. FLA. STAT. § 794.011(1)(f) (1981).

25. 401 So. 2d at 1129.

26. FLA. STAT. § 794.011(2) (1981); *but see* *Coler v. State*, 7 Fla. L.W. 245 (1982) (death penalty for sexual battery of a child eleven years or younger unconstitutional); *Buford v. State*, 403 So. 2d 943 (Fla. 1981) (death penalty for sexual battery forbidden by eighth amendment).

27. *Id.* § 794.011(3).

submit.

(f) When the victim is mentally defective²⁸

Comparison of the past and present sexual offense statutes reveals two alterations critical to the *Smith* decision. First, the sexual battery statute omits language requiring that the offender act "unlawfully."²⁹ Although the "unlawful" language was present only in the definition of offenses against children under eleven, it was assumed that this language was employed to assert the existence of the interspousal exception.³⁰ Since sexual intercourse between husband and wife is not "unlawful," a husband could not be prosecuted for the rape of his wife under the rape statute.³¹

Second, inclusion in the sexual battery statute of the lesser offense of first degree sexual battery may have influenced the Fifth District Court of Appeal's reversal of the trial court as well as the state attorney's initial decision to prosecute. The dearth of previous case law in this area may be attributed as much to each assistant state attorney's discretion as it is to the presumed existence of an interspousal exception. The inclusion in the rape statute of only two grades of offenses—capital and life felony—required a state attorney to carry a heavy burden of persuasion to prove guilt beyond a reasonable doubt.³² In the case of interspousal rape, that burden may well have been seen as virtually insurmountable. As a result, the complaining spouse probably found that no charges were filed at all or that the offense was downgraded to something in the nature of simple assault and battery.

The enactment of the sexual battery statute in 1974 and a changing societal awareness of the legal rights of married women are two of the factors which led the Fifth District Court of Appeal to abandon any presumption of an interspousal exception in Florida.

IV. THE FIFTH DISTRICT'S REJECTION OF THE COMMON LAW EXCEPTION

On appeal, the defendant's main contention in support of the trial court's dismissal of the sexual battery count was the "implied

28. *Id.* § 794.011(4)(a)-(f).

29. FLA. STAT. § 794.01(1) (1973).

30. *See, e.g.,* Note, *supra* note 8.

31. *Id.* at 429; *see generally* 65 AM. JUR. 2d *Rape* § 39 (1972).

32. *See* Note, *supra* note 8, at 425.

consent" theory first expressed by Hale.³³ The court summarized the defendant's argument by stating:

The exception argued by appellee does not affect the definition of the crime but rather challenges the existence of an element of that crime, lack of consent. In other words, the statute may apply to any person but the husband's forcible sexual intercourse with his wife would not constitute a violation thereof because an element of the crime, lack of consent, could not be established.³⁴

To term the Fifth District's rejection of this contention unqualified would hardly be an exercise in overstatement. Borrowing from a New Jersey case coincidentally styled *State v. Smith*,³⁵ the court refutes the logic and historical basis for the common law principle.

Quoting in part from the New Jersey decision, the court illustrates how changes in the nature of marriage have undermined any validity which Hale's principle may once have enjoyed:

[The] implied matrimonial consent theory was formulated under vastly different conditions, when the matrimonial vow and hence concomitantly implied consent to conjugal rights were not retractable. However, concepts of marriage and divorce have clearly evolved and in *Smith* the court declared:

The rule may simply not have been applicable to revocable marriages, which exist today as a result of changes in divorce laws. The fact that many jurisdictions have mechanically applied the rule, without evaluating its merits under changed conditions, does not mean that such blind application was part of the principles of the common law adopted in this State. Without deciding whether an exemption existed in any situations at all, we think it was not meant to exist during the entire legal duration of a marriage. Therefore, we decline to apply mechanically a rule whose existence is in some doubt and which may never have been intended to apply to the factual situation presented by this case.³⁶

The Fifth District Court of Appeal did not limit its holding to those factual situations where a divorce action is pending, the couple is separated and judicial decrees are imposed to control

33. See text accompanying *supra* note 9.

34. 401 So. 2d at 1127.

35. 426 A.2d 38 (N.J. 1981).

36. 401 So. 2d at 1128, quoting in part from 426 A.2d at 43.

their interaction.³⁷ The court determined that "to rest the decision on this factor alone would require an assumption that the common law exception still exists. We reject such a contention."³⁸

The court's rejection of the second and third historical justifications for the exception was equally absolute. The court noted that the ancient principle that the wife is merely a chattel of her husband was never given credence in the United States.³⁹ Likewise, the court pointed out, the concept that a husband and wife are but one legal entity and are therefore immune to accusation by each other was judicially abrogated in Florida.⁴⁰

The defendant also raised the fourth and final articulated justification for the rule—the venerable floodgate argument. That is, rejection of the common law exception would result in a flurry of prosecutions brought by vengeful wives seeking to obtain better bargaining positions in impending divorce settlements.⁴¹ The court in rejecting this contention interpreted the sexual battery statute as evidence that:

[T]he people of this state no longer will tolerate a violent assault, sexual or otherwise, upon one another. Clearly, no person in this state can justifiably claim a legal right to impose his or her sexual will upon another person, including his or her spouse, over that person's unmistakable objection.⁴²

Implicit in the floodgate argument raised by the defendant is the notion that judicial intervention in the affairs of husband and wife violates the penumbral right of marital privacy guaranteed by the United States Constitution. Although not raised by the defendant nor addressed by the court, the use of this principle to support an immunity from criminal liability for spousal sexual battery is a misguided application of this judicially recognized constitutional right. In acknowledging the right to marital privacy in *Griswold v. Connecticut*,⁴³ Justice Douglas stated:

We deal with a right of privacy older than the Bill of Rights

37. 401 So. 2d at 1129.

38. *Id.*

39. *Id.* at 1128.

40. *Id.*, citing *Gaston v. Pittman*, 224 So. 2d 326 (Fla. 1969); *State v. Herndon*, 27 So. 2d 833 (Fla. 1946).

41. 401 So. 2d at 1129.

42. *Id.*

43. 381 U.S. 479 (1965).

. . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life . . . , a harmony in living . . . , a bilateral loyalty⁴⁴

It is critical to note that the marital privacy right recognized in *Griswold* was designed to prevent state intrusion upon "the freedoms of married persons" to make *choices* concerning their home life.⁴⁵ There is no "freedom" to sexually batter one's spouse, and to assert "marital privacy" as justification for immunity from prosecution is erroneous for two reasons. First, the right to privacy is based on a determination by each partner to the marriage that certain matters should not be subject to disclosure or interference. In a sexual battery case, however, the right to privacy is claimed by one spouse over the objection of the other.⁴⁶ Flowing from this, the second erroneous and rather cavalier assumption is that the assaulting spouse's right to privacy is superior to the injured spouse's right to protection.⁴⁷

Aside from being distinguishable from the privacy right recognized in *Griswold*, the real fallacy of attempting to apply this right to the area of spousal sexual battery is that such application in no way "promotes . . . a harmony in living . . . [or] a bilateral loyalty."⁴⁸ It does, however, promote a "way of life"—a way of life in which intrafamily violence sets in motion a chain of violence within and beyond the family.⁴⁹ Therefore, the argument that the interspousal exception is supported by the right to marital privacy is as erroneous and inapplicable as those arguments expressly rejected by the court.

The *Smith* decision unequivocally rejects the interspousal sexual battery exception. Unlike many jurisdictions, the Fifth District Court of Appeal does not limit its holding to cases involving legal separation of the parties or impending divorce.⁵⁰ Pending the Flor-

44. *Id.* at 486.

45. *Id.* at 507 (White, J., concurring).

46. *Cf. Trammel v. United States*, 100 S. Ct. 906 (1980) (in dealing with the marital facts testimonial privilege, the Court held that apart from confidential communications, the witness spouse alone holds the privilege to refuse to testify and that privilege may not be asserted for her by the accused spouse).

47. *See, Marcus, Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657, 1658-63.

48. 381 U.S. at 486.

49. R. GIL, SOCIETAL VIOLENCE IN FAMILIES, FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY (J. Elkelaar & S. Katz eds. 1978).

50. *See infra* notes 55-58.

ida Supreme Court's treatment of the issue, the *Smith* decision establishes Florida as a member of the progressive minority of jurisdictions which have rejected this antiquated and unwarranted principle of the common law.

V. THE TREND TOWARD ABOLISHING THE INTERSPOUSAL EXCEPTION

The New Jersey and Florida *Smith* decisions indicate a trend toward abolishing the common law exception. Interspousal sexual assault first gained national attention in *State v. Rideout*, where Greta Rideout brought charges against her husband John under the Oregon sexual assault statute, which had been amended in 1977 to omit the spousal immunity clause.⁵¹ Although John Rideout was acquitted, the case sensitized the general public and state legislatures to the previously concealed problem of marital rape.

Along with Oregon, seven other states have legislatively abolished the interspousal exception.⁵² Seventeen states retain the exception, either explicitly in their statutes,⁵³ or simply by codifying the common law definition of rape (and consequently the common law interpretation of the crime).⁵⁴

Between the two extremes, the presumption of immunity disappears at different times during the marriage dissolution process. Eleven states⁵⁵ follow the Model Penal Code approach wherein the

51. No. 108,866, Marion County Circuit Court (Or. 1979); OR. REV. STAT. § 163.335 (1977).

52. ARK. STAT. ANN. § 41-1803 (1977); CAL. PENAL CODE § 262 (West 1980); DEL. CODE ANN. tit. 11, § 772(b) (1974); MASS. GEN. LAWS ANN. ch. 265 § 22 (1980); NEB. REV. STAT. § 28-319.02.04 (1979); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1981); N.J. STAT. ANN. 2C:14-5(b) (West 1981).

53. ALA. CODE § 13-A-6-60(4) (1975); ARIZ. REV. STAT. ANN. § 13-1406(A) (1978); CONN. GEN. STAT. ANN. § 53(a)-67(b) (West 1975); ILL. REV. STAT. ch. 38, § 11-1(a) (1975); KAN. STAT. ANN. § 21-3502 (1978); ME. REV. STAT. ANN. tit. 17-A, § 252 (1975); MO. REV. STAT. § 566.030 (1979); OHIO REV. CODE ANN. § 2907.02 (Page 1980); OKLA. STAT. tit. 21, § 1111 (1981); S.D. COMP. LAWS ANN. § 22-22-1 (1979); TEX. PENAL CODE ANN. tit. 5 § 21.02(a) (Vernon 1974); VT. STAT. ANN. tit. 13, § 3252 (1977); WASH. REV. CODE § 9A.44.040 (1981); W. VA. CODE § 61-8B-1(7) (1977).

54. GA. CODE § 26-2001 (1978). MISS. CODE ANN. § 97-3-65 (1972); VA. CODE § 18.2-61 (1981).

55. KY. REV. STAT. § 510.010(3) (1975); LA. REV. STAT. ANN. § 14-41 (West 1978); MD. CRIM. LAW CODE ANN. § 464(d) (1982); MONT. REV. CODES ANN. § 94-5-506(2) (1973); N.Y. PENAL LAW § 130.00(4)(b) (McKinney 1978); N.C. GEN. STAT. § 14-27.8 (1981); N.D. CENT. CODE § 12.1-20-01(2) (1973); 18 PA. CONS. STAT. § 3103 (1973); S.C. CODE ANN. § 16-3-658 (1977); UTAH CODE ANN. § 76-5-407 (1978); WYO. STAT. § 6-4-307 (1977).

exception remains until a decree of separation has been issued.⁵⁶ Seven states apply the exception until an action for divorce or separation has been filed.⁵⁷ In five other states the immunity is dispelled if the parties are living apart.⁵⁸ Perhaps the most perverse example of legislative line drawing is in Hawaii, where first degree rape excludes from its coverage victims who in the previous thirty days had permitted their attacker "sexual contact."⁵⁹

Overall, these figures indicate that a majority of American jurisdictions recognize that the interspousal exception should not be mechanically applied without regard to the circumstances of the parties. Even though only eight jurisdictions have totally abolished the exception,⁶⁰ twenty-four have limited its application to certain circumstances. The efforts of these jurisdictions represent an attempt to balance the injured spouse's right to a remedy with the admittedly legitimate concerns for marital privacy and the possibility of false prosecutions. Unfortunately, seventeen jurisdictions continue to cling to a 300-year-old common law rule which long ago lost its applicability and logical underpinnings.

VI. PROBLEMS OF ENFORCEMENT

Although the judicial and legislative abrogation of the common law interspousal exception is a critical step toward protecting married individuals from violent sexual assault by their spouses, enforcement of sexual battery statutes in interspousal cases remains difficult. Conceding that the importance of the *Smith* decision should not be underplayed, the successful application of the newly imposed criminal liability depends on the resolution of two obstacles.

First, the victim of spousal rape will be faced with many of the same problems as is the victim of extrafamilial rape.⁶¹ Societal pressures and the threat of personal embarrassment militate

56. MODEL PENAL CODE § 213.6(2) (1956).

57. IND. CODE § 35-42-4-1(b) (1979); MICH. STAT. ANN. § 750.520(L) (1975); MINN. STAT. § 609.349 (1980); NEV. REV. STAT. § 200.373 (1977); R.I. GEN. LAWS § 11-37-1 (1981); TENN. CODE ANN. § 39-3709 (1979); WIS. STAT. § 940.225(6) (1979).

58. ALASKA STAT. § 11.45.445(1) (1980); COLO. REV. STAT. § 18-3-409(2) (1973); IDAHO CODE § 18-6107(2) (1977); IOWA CODE § 709.4 (1979); N.M. STAT. ANN. § 30-9-10(E) (1977).

59. HAWAII REV. STAT. § 707-30 (1981).

60. Florida is not included in this total pending resolution of the issue by the Florida Supreme Court.

61. See generally L. HOLMSTROM & A. BURGESS, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* (1978).

against disclosure by the victim.⁶² Police and prosecutors are reluctant to aggressively enforce the laws because of the poor prospects for conviction and the difficulties of proof,⁶³ and trial of the assailant may often seem like trial of the victim.⁶⁴ These disincentives to enforcement are compounded in the context of interspousal sexual battery by the difficulty of disproving consent. Studies demonstrate that the defense of consent is raised almost as a matter of course in extrafamilial rape cases.⁶⁵ It would seem safe to assume that the defense would be almost universally asserted, and in many cases successfully so, in interspousal cases.

Furthermore, the victim of interspousal sexual battery will be forced to confront the myriad of fears and difficulties which prevent victims of other types of spousal abuse from seeking and obtaining remedies through the criminal justice system.⁶⁶ The reluctance of police and prosecutors to interfere with "family matters" is well documented.⁶⁷ Another exacerbating factor is that the decision by an abused spouse to seek legal assistance is made almost universally only after all hope for preserving the marriage has vanished.⁶⁸ Few marriages can be expected to survive a criminal charge brought and prosecuted by one spouse against another. This must certainly be a negative consideration for any spouse considering filing charges.

The problem of initial disclosure by an abused spouse is often further complicated by the presence of children in the home. The decision to leave an abusive husband, difficult in any case, is often impossible for an otherwise unskilled housewife with children. In such cases, the only viable alternative may be to accept the abuse, perhaps rationalizing it by balancing the relative security of the marriage against the uncertainties of abandoning it.⁶⁹

Additionally, studies show that an abused spouse's failure to even report her plight is often caused by her own expectations of abuse.⁷⁰ In some cases, abused spouses feel that their treatment is deserved, that it is the only form of acknowledgement available,

62. *Id.* at 30-34.

63. *Id.*

64. *Id.* at 157-220.

65. *Id.* at 171-75.

66. See generally, R. LANGLEY & R. LEVY, WIFE BEATING: THE SILENT CRISIS (1977).

67. *Id.*; see also, J. FLEMING, STOPPING WIFE ABUSE (1979); T. DAVISON, CONJUGAL VIOLENCE (1978).

68. LANGLEY & LEVY, *supra* note 66, at 111-25.

69. *Id.* at 113.

70. *Id.* at 112-14.

and that it is normal behavior. These studies further indicate that a pattern of violence within a marriage makes disclosure to the proper authorities unlikely.⁷¹

It seems clear then that although the *Smith* decision is the *sine qua non* for equitable enforcement of the sexual battery statute in interspousal cases, it is not in itself a cure for the problem. A truly meaningful resolution depends on fundamental changes in the way society and the legal system envisions and treats women, and a recognition of the fact that violent sexual assault is neither the "right" of the attacker nor the fault of the victim.⁷² Until these basic changes are made, sexual battery in all cases remains essentially a wrong for which there is no real remedy. Notwithstanding the noble aspirations of the Fifth District, the *Smith* decision serves only to raise spousal rape victims to the level of injustice suffered by all victims of sexual assault.

VII. CONCLUSION

In *Smith*, the Fifth District Court of Appeal recognized that the purpose of the sexual battery statute was to prevent and punish "a crime of violence, not a crime of sex."⁷³ Assuming, *arguendo*, that marriage carries with it an implied consent to submit to sexual intercourse, it does not imply consent to forcible, violent sexual assault. Although the decision is by no means a cure-all for the problem of spousal rape, the Fifth District Court of Appeal should be applauded for refusing to blindly apply an outdated common law principle.

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71. *Id.* at 113-14.

72. For an interesting comparative study, see MAIDMENT, *THE LAW'S RESPONSE TO MARITAL VIOLENCE: A COMPARISON BETWEEN ENGLAND AND THE U.S.A.*, FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY (J. Eekelaar & S. Katz eds. 1978).

73. 401 So. 2d at 1129.

