

# MARITAL RAPE: THE LEGISLATIVE BATTLE

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### Introduction

Society recognizes rape as one of the most serious violent crimes, one which scars its victims emotionally as well as physically. Despite its seriousness, it has been only recently that state lawmaking bodies have given attention to the widespread crime of marital rape.

Marital rape has the potential to be even more traumatic to a victim than rape by a stranger. Indeed, "when you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist."<sup>1</sup> Although there are few statistics reporting the incidence of marital rape, it is believed that 14% of all married women are victims of this crime.<sup>2</sup> There is no consensus among sociologists as to why marital rape occurs; however, it is agreed that state statutory marital rape exemptions may contribute to the acceptance of this conduct.

Legislatures have been reluctant to change or abolish the traditional marital rape exemptions of state law. As recently as 1980, 44 states through their marital rape exemption statutes recognized the right of a husband to force his wife to have

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<sup>1</sup> Dr. David Finkelhor in testimony supporting New Hampshire H.B. 516, eliminating the marital rape exemption to sexual offenses, to the Judiciary Committee, New Hampshire State Legislature (Mar. 25, 1981).

<sup>2</sup> D. Russell, Rape in Marriage, 2 (1982); this author received funding from the National Institute of Mental Health to conduct a study on the incidence of marital rape.

sexual relations. In the past six years, however, in response to both judicial decisions struggling with the implications of marital rape exemptions and increasing public recognition of the problem of marital rape, more than 17 states have modified their rape statutes to allow for prosecution of spousal rape.

#### Historical Justifications of the Marital Rape Exemption

Marital rape exemptions in this country were adopted from the English common law exemption, first articulated in 1736 by English Chief Justice Matthew Hale in History of the Pleas of Crown:

:"[T]he 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.... [I]n marriage she hath given up her body to her husband..."<sup>3</sup>

This matrimonial consent theory was justified by common law assumptions that upon marriage, a wife became the property of her husband or that the spouses became one entity. Legally, then, a husband could not be guilty of assaulting or raping chattel, or in the latter case, himself. Although these assumptions were effectively invalidated by the Married Women's Property Acts adopted in the 1800's, marital rape exemptions were not contemporaneously abolished. In addition, proponents began to advance more practical arguments in support of the marital rape exemption.

The possibility of fabricated complaints is an often cited reason for retaining the exemption, however, the danger of false charges is apt to arise in the context of any statutory crime.

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<sup>3</sup> 1 Hale, Pleas of the Crown, 628-29 (1736).

Furthermore, the stigma associated with rape discourages marital rape victims in particular from fabricating complaints. Practitioners favoring the exemption also point to the evidentiary problems associated with proving lack of consent, but this difficulty is inherent to all rape prosecutions, not just those of marital rape. Courts have similarly dismissed these legal rationales for the marital rape exemption.<sup>4</sup>

Defendants of the exemption have also attempted to justify it based on the argument that allowing prosecution of husbands for rape would disrupt or impede reconciliation of troubled marriages.<sup>5</sup> As the Virginia Supreme Court observed, [i]t is hard to imagine how charging a husband with the violent crime of rape can be more disruptive to marriages than the violent act itself."<sup>6</sup>

As commentators have noted, both the antiquated notion of male supremacy in marriage and the various policy arguments advanced in support of the marital rape exemption cannot be accepted in contemporary American society.<sup>7</sup>

#### Toward Nationwide Reform

State courts have only recently challenged the arguments for

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<sup>4</sup> See e.g. People v. Stefano, 467 N.Y.S.2d 506, 515, 121 Misc. 2d 113 (1983).

<sup>5</sup> Comment, Rape and Battery Between Husband and Wife, 6 Stan. L. Rev. 719, 725 (1954).

<sup>6</sup> Weishaupt v. Virginia, 227 Va. 389, 315 S.E.2d 847 (1984).

<sup>7</sup> See e.g. S. Barry, Spousal Rape: The Uncommon Law 66 A.B.A. J. 1088 (1980).

retaining the marital rape exemption and state legislatures have been slower to take the cue. State rape laws presently run the gamut from barring prosecution of "voluntary social companions" to total abolition of the marital rape exemption. [See North Dakota Code XXXXX and New Jersey Code XXXXX.]

A majority of amended statutes allowing prosecution of the crime of marital rape include requirements of separation or "living apart" at the time the offense was committed. [See Colorado Code XXXXX.] Some of these states have gone a step further, and require that one party have made a filing for divorce. [See Wisc. Stat. Ann. 940.225(6).] Other states have combined these requirements and have taken the approach that prosecution may be had if the parties were living apart or if one party had filed for divorce when the alleged rape occurred.

The various statutes allowing prosecution of marital rape also impose time limitations for reporting of the crime by the victim, and in some cases, require that the complainant prove serious bodily injury. [See California Code XXXXX and W. Va. Code Ann. 61-8B-6 (1984).]

Although these statutory requirements are intended to circumvent the problems with marital rape prosecutions, they operate in some cases as severe prosecution limitations and may also cause interpretation problems for the courts. However, this progress in modifying the statutory bar to marital rape prosecutions is a step toward the larger goal of ensuring that rape laws protect a woman's bodily autonomy.