MARITAL RAPE: LEGISLATIVE REFORM IN VIRGINIA

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Legal scholars are proud to point to the fact that law evolves over time. As societal values change, the law usually has witnessed a commensurate change. Few would deny that the law as we know it today has changed a great deal from 1736. However, the law has been very slow to depart from the marital rape exemption first articulated by English Chief Justice Matthew Hale, who stated 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 herself in this kind unto her husband, which she cannot retract."[1]

Although "[s]ociety recognizes rape as one of the most serious violent crimes, one which scars its victims emotionally as well as physically,"[2] few states are willing to abandon the common law exemption. As a result, the marital rape exemption "denies a married woman the right, which a single woman has, to legal recourse against her attacker."[3]

Today twenty-eight states continue to recognize the marital rape exemption and prohibit the prosecution of a husband for the rape of his wife. Only eight states (Florida, Kansas, Massachusetts, Nebraska, New Jersey, New York, Oregon and Wisconsin) have statutorily eliminated the marital rape exemption.

The law governing marital rape in Virginia recently has been changed.[4] While Virginia has not abandoned the marital rape exemption completely, it indeed has taken a step in that direction. The significance of the action by the Virginia legislature is still in question.[5] However, Virginia has added itself to the list of jurisdictions that question Chief Justice Hale's vision of the marriage contract.

This article explores the 1986 amendments[6] to the Code of Virginia as they

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[1] M. Hale, Pleas of the Crown, 629 (1736).

[2] Comment, Marital Rape: The Legislative Battle, 15 Colonial Law. 21 (1986).

[3] Note, The Marital Rape Exemption: A Violation of a Woman's Right of Privacy, 11 Golden Gate U. L. Rev. 717, 718 (1981).

[4] Va. Code Ann. §18.2-61 (1986).

[5] Comment, Sexism and the Common Law: Spousal Rape in Virginia, 8 Geo. Mason U. L. Rev. 369, 385-387 (1986).

[6] Va. Code Ann. §18.2-61,67.1,67.2,67.2:1 (Supp. 1986).

relate to the issue of marital rape. Initially, this article will explain the law governing marital rape in the Commonwealth of Virginia. It will examine the language used in the statute to determine the limits of the law. Finally, this article will analyze the barriers to complete statutory elimination of the common law marital rape exemption.

I. The Law Regarding Marital Rape in Virginia.

On January 20, 1986, House Bill 378 was introduced in the Virginia legislature. The bill was passed by the Senate on March 4, 1986, and by the House of Delegates on March 6, 1986. House Bill 378 is now codified as Section 18.2-61 of the Virginia Code. This section reads as follows:

> B. If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape.
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> However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.
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> Additionally, there shall be no prosecution under this subsection unless the spouse or someone acting on the spouse's behalf reports the violation to a law enforcement agency within ten days of the commission of the alleged offense. However, the ten-day limitation shall not apply while the spouse is physically unable to make such report or is restrained or otherwise prevented from reporting the violation.[7]

The enforcement section of the statute contains provisions for violators after they are found guilty as well as provisions for violators before a trial judgment is entered. The enforcement sections reads as follows:

> C. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in the penitentiary for life or for any term not less than five years. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under Section 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.
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> D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under Section 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under Section 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the view of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best

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[7] Va. Code Ann. §18.2-61(B) (Supp. 1986).

interest of the complaining witness.[8]

The Virginia statute quite clearly rejects the common law marital rape exemption. In Virginia it is now possible to prosecute a husband for raping his wife or a wife for raping her husband. However, the statute does not eliminate the marital rape exemption completely. In fact, the Virginia statute only allows prosecution for marital rape in two circumstances. The first situation in which it is possible to prosecute for marital rape is where the spouses were living separate and apart at the time of the violation. The second situation is where the defendant caused serious physical injury to the spouse by the use of force or violence. In either situation, the spouse or someone acting on the spouse's behalf must report the violation to a law enforcement agency within ten days of the commission of the alleged offense, unless the spouse is physically unable to make such a report or is restrained from reporting the violation. Since victims of rape by someone other than their spouse do not have to comply with the ten-day limit, this reporting requirement may violate the equal protection clause of the Constitution.[9] The statute itself seems clear at first glance; however, interpretation of the statute may pose some problems.

II. Interpretation of the Virginia Marital Rape Statute

Since this statute should ultimately be judged by how effective it is at decreasing or eliminating the incidence of marital rape, it becomes imperative to examine the language of the statute and the possible implications of interpretation of the statute.

Requirement of Separate and Apart

Under the Virginia statute, absent a showing of serious physical injury, a marital rape prosecution can occur only if the spouses are living separate and apart. This separate and apart requirement is problematic, and will no doubt be the subject of much litigation.

Because the statute was enacted after the Weishaupt and Kizer decisions, there is a presumption that the legislature was aware of those decisions. Thus, if the legislature had wanted to overrule Weishaupt and Kizer it would have expressly done so. As a result, the statute must be interpreted in light of the existing case law.

The first concern of the separate and apart requirement is what length of time will suffice for the spouses properly being labeled as living separate and apart. The statute is noticeably silent on this issue and as a result it will be left to judicial interpretation. It is quite reasonable to suggest that courts will probably not find that a mere day or week satisfies the living separate and apart requirement. However, after that, it becomes harder to state what constitutes living separate and apart.

The inclusion of the term "living" before the phrase "separate and apart"

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[8] Va. Code Ann. §18.2-61(C)(D) (Supp. 1986).

[9] Constitutional analysis is beyond the scope of this article. See, e.g.,24 J. FAM. L. 87 (1985); Comment, supra note 5; T. Clancy, Equal Protection Considerations of the Spousal Sexual Assault Exclusion, 16 NEW ENG. L. REV. 1 (1980).

provides insight into the intent of this legislation. "Living" implies a certain continuousness of separation.[10] Thus, "living" clarifies the separate and apart requirement, but it does not answer the question of how long the two spouses must actually be living separate and apart to fulfill that requirement. Insight, may be gained by examining what length of time has been deemed by the Virginia courts to satisfy the requirement. Although these cases were decided prior to the enactment of the statute, they provide some guidance/precedent. In Weishaupt[11], the Virginia Supreme Court affirmed the conviction of Ronald Weishaupt who raped his wife after living separate and apart for a little over eleven months. In Kizer[12], the spouses were separate and apart for three weeks prior to the alleged rape (although in Kizer, the spouses had lived separate and apart previously), and the Virginia Supreme Court stated that "the evidence establishes that the parties lived separate and apart".[13] One may conclude that the actual time limit for living separate and apart is relatively brief. This conclusion suggests there may be a related issue that is more important than the time limit of living separate and apart. That issue is consent.

The issue of consent is the foundation underlying the living separate and apart requirement. If the spouses are living together the marital rape exemption still applies (unless the defendant caused serious physical injury) based on the theory that the spouses have consented to marital sex. By living separate and apart, the consent to marital sex has been withdrawn. It is reasonable to equate the separate and apart requirement with a lack of consent in that actually living separate and apart is a manifestation of the withdrawal of consent. There are potential problems with this also, as the two previous court cases have used different standards to measure a manifestation of living separate and apart. In Weishaupt, a unanimous Virginia Supreme Court held:

> A wife can unilaterally revoke her implied consent to marital sex where, as here, she has made manifest her intent to terminate the marital relationship by living separate and apart from her husband; refraining from voluntary sexual intercourse with her husband; and in light of all the circumstances, conducting herself in a manner that established a de facto end to the marriage.[14]

Under this test, the length of time spouses are living separate and apart is not of primary concern. The critical element is whether the spouse intends to end the relationship. Judicial interpretation of the new statute may also require the spouse manifest an intention to end the marriage to fulfill the separate and apart requirement. Unfortunately, this test is complicated; less than six months after Weishaupt, the Virginia Supreme Court modified the Weishaupt rule in Kizer. The Kizer majority held:

> [w]e think it is apparent that the wife subjectively considered the marriage fractured beyond repair when the parties separated in February. Nevertheless, we cannot say that this subjective

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[10] **Black's Law Dictionary**, 843 (5th ed. 1979), defines "living" as "[e]xisting, surviving, or continuing in operation. Also means to abide, to dwell, to eside and literally signifies the pecuniary resources by means of which one exists."

[11] Weishaupt v. Commonwealth, 227 Va. 389, 315 S.E.2d 847 (1984).

[12] Kizer v. Commonwealth, 228 Va. 256, 321 S.E.2d 291 (1984).

[13] Id. at 261, 321 S.E.2d at 294.

[14] Weishaupt, 227 Va. 389, 405, 315 S.E.2d 847, 855.

> intent was manifested objectively to the husband, in view of the wife's vacillating conduct, so that he perceived, or reasonably should have perceived, that the marriage actually was ended.[15]

The significance of this modification of Weishaupt is that the spouse must manifest her intent to end the marriage to her spouse rather than to an objective observer. Unfortunately, this "modification, for which the court offered no rationale, undeniably increases the wife's burden of proof in a spousal rape case."[16] In sum, it appears that the phrase "living separate and apart" will be construed to mean that the spouses are residing separate and apart and that a manifest intent to end the marriage has been communicated to the other spouse.

The spouses need not have commenced divorce proceedings to fulfill the statutory requirement of living separate and apart. Similarly, the statute does not speak to what amount of contact between the spouses will preclude viewing them as living separate and apart. Thus, the court will determine if the spouses were actually living separate and apart at the time of the rape in order to prosecute the spouse under the statute. If the Virginia Supreme Court continues to follow Kizer, it will require that the spouses behavior be unequivocal, definite, and certain[17] to demonstrate an end to the marriage by living separate and apart. At a minimum this would require that the spouse refrain from voluntary sexual intercourse with the defendant[18] and exhibit conduct that establishes an actual end to the marriage.[19] This means that contact between the two spouses is permissible but there can be no ambivalence or uncertainty communicated between the spouses that would suggest that the marriage is not over. Considering the facts of Kizer, the Virginia Supreme Court was very firm regarding the requirement that the behavior be unequivocal, definite and certain.[20]

As a result of these recent Virginia Supreme Court decisions,[21] the statutory language "living separate and apart" should be construed to mean that the spouses are residing separate and apart and that an unequivocal, definite and certain intent to end the marriage has been manifested objectively to the defendant so that the defendant perceived or reasonably should have perceived that the marriage was ended.

Requirement of Serious Physical Injury

Under the Virginia statute, if the spouses are not living separate and apart at

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[15] Kizer, 228 Va. 256, 261, 321 S.E.2d 291, 294.

[16] Comment, supra note 5, at 383.

[17] Kizer, 228 Va. at 262, 321 S.E.2d at 294.

[18] Weishaupt, 227 Va. at 405, 315 S.E.2d at 855.

[19] Kizer, 228 Va. at 261, 321 S.E.2d at 294.

[20] The majority in Kizer characterized the wife's conduct as vacillating; thus, the husband did not know that the marriage was over. However, the husband and wife were on their way to consult a lawyer about obtaining legal separation. They did not see the lawyer because she did not want to put another emotional burden on her husband who was worried about his seriously ill father. Additionally, the husband already had initiated court action to obtain custody of their child, which seems to indicate that in fact he did perceive the marriage to be over. 228 Va. 256, 262, 321 S.E.2d 291, 294 (Thomas, J. and Carrico, C.J., dissenting).

[21] See Weishaupt, 227 Va. 389, 315 S.E.2d 847 and Kizer, 228 Va. 256, 321 S.E.2d 291.

the time of the rape, the spouse may not be prosecuted unless the defendant caused serious physical injury to the spouse by the use of force or violence. Because a significant number of the marital rape prosecutions will arise under this section, it is necessary to explore its meaning in some detail. The issues of consent and serious physical injury must be examined.

Because the spouses may still be living together and presumably no intent to end the marriage has been communicated, the issue of whether the spouse consented to marital sex with the defendant becomes a major concern. If the spouse freely consented to marital sex it would not be characterized as rape; thus, statute applies only in those cases where the wife does not consent to sexual intercourse. Most likely, courts will hold that as long as two spouses are living together; there will be consent to sexual intercourse. Therefore most prosecutions will result in cases involving serious physical injury.

The serious physical injury requirement establishes a formidable hurdle to prosecuting a spouse for marital rape. The language of the statute implies that any harm that occurs to the spouse during marital sex, short of serious physical injury, is not within the scope of this requirement. The statute does not allow marital rape prosecution for minor physical injury.

The use of the phrase "by the use of force or violence" only increases that hurdle. The Virginia legislature clearly wrote a statute that would limit the number of marital rape cases. The use of the word violence[22] signifies a legislative concern that only extreme cases be prosecuted under this statute.[23]

This statute will not allow prosecution of a defendant who rapes his spouse under the threat of serious physical injury. Serious physical injury must in fact occur. This requirement causes obvious problems. Suppose that a defendant rapes his spouse, threatening to harm a child if the spouse does not engage in sexual intercourse. Under the statute, this would not constitute marital rape, because the defendant did not cause serious physical injury. Consider the case where a defendant rapes his spouse at gun point. No one would deny that the spouse was raped, yet the defendant did not cause serious physical injury to the spouse. The language of the statute would indicate that while this behavior is certainly reprehensible, it is also beyond the scope of the statute. These examples clearly establish the inadequacy of the statute. Although there may be reasons for not enacting a more expansive statute, no one can deny that the scope of this statute is clearly limited.

The Virginia statute is silent as to psychological injury caused by the spouse. Because recent studies have indicated that the psychological harm suffered by the victim in a marital rape is significant,[24] this should warrant prosecution.

In summary, the serious physical injury requirement imposes a heavy statutory

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[22] **Black's Law Dictionary**, 1408 (5th ed. 1979), defines "violence" as an "[u]n-just or unwarranted exercise of force, usually with the accomplishment of vehemence, outrage or fury."

[23] The Virginia legislature could have enacted a statute requiring that the defendant cause physical injury to the spouse by the use of force. This wording would have expanded the scope of protection afforded by the statute.

[24] Marital rape victims, like their nonspousal rape counterparts, must live with the effects of being raped and the psychological torture that follows. Additionally, marital rape victims usually are faced with the devastating circumstances of living with their rapist and their betrayal. See **D. Russel, Rape In Marriage** (1982).

burden on a prosecutor seeking conviction under the Virginia marital rape statute. It is likely that only a limited number of cases will surmount that hurdle.

Penalties of the Virginia Statute

Under the enforcement section of the statute, a court may sentence a violator to five years to life in the state penitentiary. In cases where the court deems it appropriate, all or part of the sentence can be suspended and the defendant may be recommended for counseling or psychological therapy instead. This alternative punishment is inappropriate in a rape statute.

The substitution of counseling or therapy for violation of the statute conveys the attitude that the offense is not serious. Nonspousal rape defendants are not afforded the luxury of having a court decide to let them forego a prison term and instead be placed in counseling.[25] In addition, the counseling statute[26] does not contain any durational requirements, though presumably the court would impose a specified period of treatment.

A second concern with the enforcement section of the statute is the emphasis it attaches to the promotion and maintenance of the family unit. It would be difficult to imagine a statute allowing a convicted murderer or one convicted of fraud to forego prison simply to preserve the family unit. Yet in a case where the defendant engages in an activity that is itself destructive of the family unit, the court is given the option of placing the defendant in counseling or therapy in order to promote or maintain the family unit. The statute treats marital rape as a social problem rather than a crime. The counseling or therapy option is a remnant of the common law attitude towards marital rape.

It is obvious that the option of counseling or therapy should not be available where the spouses are in the process of divorce, as there is no family unit to preserve. Similarly, the option of counseling or therapy should be unavailable in cases where the rape occurred while the spouses were living separate and apart.

The psychological counseling statutorily available to the court is an obvious escape clause in the enforcement of the marital rape statute. Given the destructive nature of the crime, "[j]udges should construe the counseling and therapy provisions narrowly and recognize that only the strongest of mitigating factors could justify the substitution of treatment for criminal penalties in this area of the law."[27]

The extent of the Virginia marital rape statute is limited, due in part to continuing allegiance to outdated common law ideas. While the statute is a step toward reform, it is not the giant step which is necessary.

Even after the passage of the Virginia statute, many spouses are not protected from the horrors of marital rape. The statute defines marital rape too narrowly. The statute must be amended to completely eliminate the marital rape exemption.

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[25] Section 18.2-61(c)(6) of the Virginia Code only allows counseling if the defendant is prosecuted under Section B of the statute, which deals with marital rape; thus nonspousal rape defendants are not permitted to go through counseling under 18.2-61. VA. CODE ANN. §18.2-61 (Supp. 1986).

[26] VA. CODE ANN. §19.2-218.1.

[27] Comment, supra note 5, at 386.

Several states have already adopted statutes which prohibit all marital rape.[28] Although these states have experienced considerable success, it is important to discuss the possible reasons for rejecting a similar marital rape statute in Virginia.

III. Barriers to Reform

Opposition to the complete elimination of the marital rape exemption generally revolves around three arguments. First is the inherent evidentiary problems presented by a marital rape prosecution. Second, legislators fear vindictive spouses who might use a claim of marital rape as a tool for coercion. Finally, some commentators argue that prosecution hinders marital reconciliation.

Because the major difference between marital sex and marital rape is the lack of spousal consent, many opposed to elimination of the exemption suggest it is difficult to determine consent when dealing with marital rape. This argument is illogical and hypocritical. If it were followed to its logical conclusion, this argument would not permit prosecution for crimes that are difficult to prove. Many crimes are difficult to prove [however] and no one has suggested removing them for that reason.[29] In addition, "[d]ifficulties with evidence and proof in rape cases are not unique in the marital setting, but are characteristics of several crimes in general".[30] Nevertheless, every state allows prosecutions for nonspousal rape. Although it is true that in a marital rape prosecution it is one spouse's word against the other's, the same is true outside of the marital context.[31] Generally, the courts are not forced to rely merely on the spouse's testimony, "[t]he presence of bruises and contusions on the victim militates against the conclusion that the intercourse was consensual."[32] The marital rape exemption should not be retained simply because of evidentiary difficulties.

The second argument against eliminating the marital rape exemption is the "vindictive spouse" theory. This argument suggests that a spouse would use the charge of marital rape to harm the other spouse. Those opposed to statutory reform suggest that the marital rape charge would become a tool of coercion to be used in bargaining for alimony, child custody and property settlements. The fear of fabricated charges from vindictive spouses contradicts the argument concerning a lack of evidence. Certainly a spouse would be in a better bargaining position if she fabricated a charge that would be more readily accepted by our courts. If lack of evidence for a marital rape charge renders a conviction difficult, then a vindictive spouse

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[28] See **Fla. Stat. Ann.** §794.011 (West Supp. 1985); Kan. Stat. Ann. §21-3502 (Supp. 1984); **Mass. Gen. Laws Ann.** ch 265, §22 (West Supp. 1985); **Neb. Rev. Stat.** §§163.355-.375 (1985); **Vt. Stat. Ann.** tit. 13 §3252 (Supp. 1985); **Wisc. Stat. Ann.** §940.255(6) (West Supp. 1985). In People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984), New York removed its marital rape exemption. In Warren v. State, 255 Ga. 151, 336 S.E.2d 221, Georgia did not allow the marital rape exemption.

[29] M. Freeman, But If You Can't Rape Your Wife, Whom Can You Rape? The Marital Rape Exemption Re-examined, 15 **Fam.** L. Q. 1, 18 (1981).

[30] Comment, Rape in Marriage: The Law in Texas and the Need for Reform, 32 **Baylor L. Rev.** 109, 114 (1980).

[31] Comment, The Marital Rape Exemption in Pennsylavania: "With This Ring...", 86 **Dick. L. Rev.** 79, 109 (1981).

[32] Id. p. 109.

could be expected to use other more effective false charges for coercion. Additionally, if the vindictive spouse argument is true, excluding marital rape charges would do little to stop a spouse who could claim charges of assault,[33] false imprisonment, child abuse, severe emotional distress, fraud, or other charges. If this argument were true, court should be inundated with claims by vindictive spouses and their fabricated charges. Quite the contrary occurred in Oregon where the marital rape exemption was eliminated. Peter Sandrock, an Oregon district attorney, testifying before the Senate Judiciary Committee in the California legislature, said that Oregon had no problems after passage of a bill allowing wives to press charges against their husbands.[34] The Georgia Supreme Court was adamant in its skepticism of this argument when it stated: "[t]here is no other crime we can think of in which all of the victims are denied protection simply because someone might fabricate a charge; there is no evidence that wives have flooded the district attorneys with revenge filled trumped-up charges."[35] This may be due to the fact that a marital rape charge is very embarrassing for the victim,[36] and most victims elect to privatize the experience.[37] The misplaced fear of vindictive spouses should not stand in the way of legislative reform to afford married persons the same protection offered their unmarried counterparts.

The third argument advanced against elimination of the marital rape exemption is that allowing prosecutions for marital rape would undermine or prevent marital reconciliation. This argument neglects the fact that when rape occurs in a marriage the spouses very well may be better off apart.[38] This argument does not justify denying a spouse a remedy when a rape has occurred. If the legislature truly believes that marital reconciliation is more important than prosecuting a spouse for rape, they should deny other causes of action that might be disruptive to marital reconciliation. Yet, spouses may still bring actions against each other on a variety of charges. There must be a weighing of concerns and statutory protection from the abuse of marital rape should outweigh the unlikely chance of marital reconciliation.

Conclusion

Virginia's new statute allowing prosecution for marital rape in a limited number of circumstances is a step in the right direction. One must realize however, that the scope of the Virginia statute is narrow, and it is only the first step on the road to reform. Virginia has cast aside the outdated common law view of Chief Justice Hale. Now is the time to statutorily eliminate the marital rape exemption, and afford everyone the same protection from rape. It should make no difference in

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[33] Comment, Spousal Exemption to Rape, 65 Marq. L. Rev. 120, 126 (1981).

[34] S. Barry, Spousal Rape: The Uncommon Law, 66 A.B.A.J. 1088, 1091 (1980).

[35] Warren v. State, 255 Ga. 151, 336 S.E.2d 221, 225 (1985).

[36] Comment, supra note 31, at 107.

[37] Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev. 1255, 1269 (1986).

[38] Weishaupt v. Commonwealth, 227 Va. 389, 405, 315 S.E.2d 847, 855 (1984). "[I]f the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile." Id. See also, Comment, supra note 30, at 115.

the eyes of the law whether the victim of rape is a stranger or a spouse. Rape is a violent crime that should be prosecuted.