

# Spousal Rape Laws: 20 Years Later

by Marnie Rothschild Shields, Esq.\*

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Until the late 1970s, most states did not consider spousal rape a crime. Typically, spouses were exempted from the sexual assault laws. For example, until 1993 North Carolina law stated that "a person may not be prosecuted under this article if the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart." These laws are traceable to a pronouncement by Michael Hale, who was Chief Justice in England in the 17th century, that a husband cannot be guilty of rape of his wife "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract." In the late 1970s, feminists began efforts to change these laws. Currently, rape of a spouse is a crime in all 50 states and the District of Columbia.

The states used three different techniques for criminalizing spousal rape. The majority of states simply removed the marital rape exemption, without adding any other language. Other states replaced the exclusionary language with text specifying that marriage to the victim is not a defense. A few states created a separate offense of "spousal rape."

While spousal rape is now considered a crime, victims often have to overcome additional legal hurdles to prosecution not present for other victims of rape. These include time limits for reporting the offense, a requirement that force or threat of force be used by the offender, and the fact that some sexual assault offenses still preclude spousal victims.

## Exemption Removed, No Language Added

The most common approach states took to eliminate the spousal rape exemption was to simply remove the language that provided it. Pennsylvania initially had a separate offense of spousal

rape, which was a lower level offense than non-spousal rape. The law was repealed in 1995 to remove any language that indicated that the relationship between victim and offender was relevant, so that now in Pennsylvania "rape is rape."

Maine is another state which removed its exemption. During the legislative battle to change the law, one legislator even stated, "Any woman who claims she has been raped by her spouse has not been properly bedded." While the law has been revised, attitudes have been slower to change. Advocates report that many people still do not recognize spousal rape as rape.

## Marriage Explicitly Excluded as a Defense

Several states have amended their laws to specify that marriage is not a defense to certain crimes. For example, the North Carolina law mentioned above was amended to read: "A person may be prosecuted under this Article whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense." This law makes it clear that sexual offenses by spouses should be treated the same as sexual assault by others.

Another example is from Washington, D.C., where the law states that a person can be prosecuted for sexual assault against a spouse. Even though prior to the enactment of this law, the law did not differentiate between spousal rape and non-spousal rape, this approach was chosen as a way to address the societal presumption that rape can not happen in marriage.

## Spousal Rape as a Separate Crime

In seven states, rape of a spouse is a separate crime from rape where the victim and offender are unmarried. For example, in West Virginia, spousal sexual assault is defined as unconsented sexual penetration or sexual intrusion of the perpetrator's spouse. In addition, the perpetrator must use forcible compulsion or a deadly weapon or inflict serious bodily injury upon anyone. This offense is a felony, punishable by imprisonment for two to ten years. The same acts against a person who is not married to the perpetrator result in a sentence of ten to thirty-five years.

An example of a similar statute comes from California. The offenses of rape and spousal rape mostly parallel each other, but with some differences. For instance, a person who commits non-spousal rape by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury may not be sentenced to probation or suspended sentence. However, this prohibition does not apply to those who use the same means to commit spousal rape.

## Additional Barriers for Spousal Rape Victims

**Reporting Requirement.** While all states recognize spousal rape as a crime, still, there are ways in which spousal rape is treated differently than non-spousal rape. One difference in some states is a reporting period which is shorter for spousal rape than for other crimes. In Illinois, "prosecution of a spouse of a victim under this subsection . . . is barred unless the victim reported such offense to a law enforcement agency or the State's Attorney's office within 30 days after the offense was committed, except when the court finds good cause for the delay."

Prior to 1993, California victims were required to report the offense to a peace officer or prosecutor within 90 days of the crime. In 1993, the State's law was amended to expand the reporting period to one year (as opposed to at least three years for non-spousal rape). The amendment also broadened the professionals to whom the report could be made to include medical personnel, clergy, attorneys, shelter representatives, counselors, judicial officers, rape crisis agencies, and firefighters. The reporting requirement does not apply if the victim's allegation is corroborated by independent evidence that would be admissible during trial. A suggested reason for this and other restrictions on spousal rape victims is that the legislators are afraid people will make up stories of rape for use in a custody proceeding, or to harm their spouses.

**Force or Threat Required.** Another way that some states treat rape of a spouse differently than non-spousal rape is the requirement that force or threat of force

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orders on state and federal constitutional grounds. Given the **Troxel** decision, they should consider asking for attorney fees in cases where "frivolous" visitation cases are filed against their clients. Legal services attorneys may not have all of these options, but can either try to refer the case to an attorney who can pursue more aggressive remedies, or can at least request

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must be used by the spouse. For instance, in Tennessee a person only commits rape or sexual battery of a spouse when the person is armed with a weapon or credible decoy, causes serious bodily injury to the victim, or when the spouses live separate and apart and one of them has filed for a divorce or separation. Similarly, in Nevada, marriage is a defense to sexual assault of a spouse except where "the assault was committed by force or by the threat of force." In contrast, many non-spousal sexual assault laws refer to lack of consent, rather than the use of force.

**Offenses Precluded for Spouses.** Still, in many states, there are some offenses that are unavailable to victims who are married to the offender. In some, offenses which involve sexual acts other than penetration are precluded for spouses. For example, in Kansas, sexual battery consists of "the intentional touching of the person of another who is 16 or more years of age, who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another." In Ohio, the offense of "sexual battery" does not apply to a spouse, and the

the dismissal of the case.

The **Troxel** case could even be used to bolster a challenge to friendly parent statutes or caselaw where courts impermissibly place the burden on the attacked parent of disproving an allegation. Although friendly parent accusations typically arise in disputes between the two parents, be prepared to see denials of grandparent visitation as evidence of an unfriendly parent. ■

offense of "rape" by the use of a drug or intoxicant which impairs the victim's ability to resist only applies to a spouse who is living separate and apart from the victim.

**Conclusion**

The states made progress in the past 20 years toward eliminating exemptions for sex offenders who are married to their victims. However, differences in the treatment of rape of a spouse from that of non-spousal rape remain. These include: reporting requirements, requirements that the offender use force or threat of force, and the fact that some offenses contain exemptions for spouses. States may want to consider the status of their spousal rape laws and amend them to create protections for victims of spousal rape equal to those for other victims of sexual assault.

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