



SPOUSAL RAPE LAWS: 20 YEARS LATER

Introduction

Until the late 1970's, 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."¹ In the late 1970's, 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 which 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 The law was repealed in 1995 to remove any language which indicated that the relationship between victim and offender was relevant, so that now in Pennsylvania "rape is rape."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.”² 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, in general, no person is immune from prosecution for a sex offense “because of marriage or cohabitation with the victim.”³ While under earlier editions of the D.C. Code the law did not differentiate between spousal rape and non-spousal rape, this statute was specifically added in order to address the societal presumption that rape cannot 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, California the offenses of rape and spousal rape largely parallel each other.⁴ There are some differences in the way these offenses are treated.⁵ 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.⁶ 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, there are ways in which spousal rape is treated differently than non-spousal rape. For example, some states have a shorter reporting period for complaints of spousal rape than for other sexual offenses. 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.”⁷

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).⁸ 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.⁹

Force or Threat Required

Many state laws require a higher degree of force, threat, or injury in cases of spousal rape than in cases of non-spousal rape. For instance, in Tennessee, rape or sexual battery of a spouse requires that the perpetrator be armed with a weapon or credible decoy, or cause serious bodily injury to the victim, or that the spouses live separate apart and one of them has filed for a divorce or separation.¹⁰ In contrast, non-spousal rape can be prosecuted where the victim does not consent

and the perpetrator knows or has reason to know that the victim does not consent.¹¹ 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.”¹²

Offenses Precluded for Spouses

While every state allows the prosecution of rape of spouses in some circumstances, there are other sexual offenses which cannot be prosecuted where the victim is married to the offender¹³. In some states, 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.”¹⁴ In Ohio, the offense of “sexual battery” does not apply to a spouse, and the 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.¹⁵

Conclusion

The states have 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 typically include: more stringent reporting requirements, requirements that the offender use force or threat of force, and the existence of spousal exemptions for certain offenses. States should consider the status of their spousal rape laws and amend them to ensure that victims of spousal rape are protected under the law.

Thanks to the following people for giving time and lending expertise to the development of this article: Nancy Lemon of the Boalt Hall School of Law and the California Alliance Against Domestic Violence; Nancy Hoffman of the West Virginia Foundation for Rape Information; Denise Snyder of the Washington, D.C. Rape Crisis Center; Marty McIntyre of the Sexual Assault Crisis Center of Lewiston; and Deanna Ferraino of the Pennsylvania Coalition Against Rape.

¹ Russel, Diana E.H. (1990). Rape in Marriage: Expanded and Revised Edition With a New Introduction. Bloomington and Indianapolis: Indiana University Press. Page 17.

² North Carolina Code § 14-27.8 (2003).

³ Washington, D.C. Code § 22-3019 (2003). Note, this law does not apply to statutory rape offenses, i.e., for those offenses based solely on the age of victim and offender there is no crime if the parties are married.

⁴ California Penal Code §§ 261 and 262 (2003). In addition, the law provides that in determining the issue of consent in a prosecution for rape, spousal rape, or certain other offenses, “a current or previous dating or marital relationship shall not be sufficient to constitute consent.” California Penal Code § 261.6 (2003).

⁵ When the spousal rape law was first passed in 1979, there were even more differences between the two offenses. The rape offense could be prosecuted as a misdemeanor or a felony, but non-spousal rape was always a felony. In 1993, the law was amended, so that now the penalty is the same for spousal and non-spousal rape.

⁶ California Penal Code § 1203.065 (2003).

⁷ 720 ILCS § 5/12-18. The section does not specify what could be “good cause”.

⁸ California Penal Code § 262 (2003).

⁹ Russel, Diana E.H. (1990). Rape in Marriage: Expanded and Revised Edition With a New Introduction. Bloomington and Indianapolis: Indiana University Press. Page xx.

¹⁰ Tennessee Code § 39-13-507 (2003).

¹¹ Tennessee Code § 39-13-503 (2003).

¹² Nevada Code § 200.373 (2003).

¹³ In addition, in many states “statutory rape” offenses or other sexual assault offenses defined by the victim’s legal inability to consent, rather than actual non-consent still contain spousal exclusions. However, minors and disabled persons may still have their spouses prosecuted for other forms of rape.

¹⁴ Kansas Code § 21-3517 (2002).

¹⁵ Ohio Code §§ 2907.02 and 2907.03 (2003).