

Making Marital Rape A Crime: A Long Road Traveled, A Long Way to Go

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The National Judicial Education Program (NJEP) is a unique, award-winning project which pioneered judicial education about gender bias and was the catalyst for nearly 50 high-level state and federal task forces on gender bias in the courts nationwide. Over the past twenty years, NJEP has utilized a three-fold approach to promote access to the justice system and equality for women and men in the courts: education, publications and supporting the task forces on gender bias in the courts. More information about NJEP and its sexual assault resources is available at: www.legalmomentum.org/njep

As late as 1976,¹ prosecuting charges of marital rape² was legally impossible in any state. While there is no longer a total exemption for marital rape in any state's law, in many states the extant statutes are hardly proactive in promoting a vigorous prosecution of marital rape or overtly condemning marital rape as a crime. Some states simply removed the language that provided the exemption from their rape laws – typically eliminating the phrase “not his wife” from the statutory definition of the crime. These are called “silent” statutes. Other states went further to explicitly state that a marital relationship is not a “defense” to rape. But in many states, marital rape was made illegal in special statutes which impose restrictions on reporting and lesser penalties for the crime. Today twenty-six states still cling to these regressive statutes.

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¹In 1976, Nebraska became the first state to criminalize marital rape (Legislative Bill 38, 1977).

²For purposes of this article, marital rape is defined as unwanted sexual contact perpetrated by one spouse against the other.

Myriad factors affect the prosecution of marital rape, not the least of which are statutory constraints that make it more difficult for a victim to report and the State to prove the crime. Eleven states impose extra requirements on victims reporting these offenses including unusually short time limits to report (in some states as short as 30 days), requirements that the couple be separated or divorced at the time of the rape, or requirements that the victim show that force or the threat of force was used to coerce sexual contact (American Prosecutors Research Institute [APRI], 2006). Thirty states limit the types of crimes that may be prosecuted as spousal rape, often excluding crimes committed when the spouse is rendered incapacitated by mental illness or intoxication, even if the spouse purposely incapacitated the victim (APRI, 2006). Four states maintain separate statutes for marital rape which call for lesser sentences or allow judicial discretion in lowering the charge or sentence (APRI, 2006). Finally, four states – Connecticut, D.C., Iowa and Minnesota – have moved backwards and expanded the definition of “spouse” in their marital rape statutes to include unmarried persons in intimate relationships or cohabiting, which means that the restrictive reporting requirements apply to them as well, or that defendants cannot be charged with certain crimes (APRI, 2006).

The extra requirements and lesser penalties enshrined in these laws are vestiges of the marital rape exemption and are based on the cultural assumptions that propped it up for so long. These assumptions are challenged by current research demonstrating that marital rape is devastating to victims and therefore merits harsher treatment. Professor Evan Stark (2007), a leading researcher on violence against women writes:

[M]arital rape...should be treated differently and more severely than similar crimes committed by strangers. As a result of its unique relation to personal life, sexual assault is far more likely to be repeated when it is committed by partners and almost always occurs amid other forms of violence, intimidation, and control. The level of unfreedom, subordination, dependence, and betrayal associated with marital rape has no counterpart in public life. (p. 388)



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Most victims of marital rape never report the violence for numerous reasons including difficulty recognizing the conduct as rape, economic dependence on their abuser, fear that no one will believe them and ignorance of the law making marital rape a crime. These fears are grounded in persistent and pervasive cultural myths about rape in marital relationships. The myths, and the laws that enshrine them, effectively silence victims and sanction rape in marriage.

Marital Rape Law: The Historical Exemption Theories and Current Myths

Historical Assumption: A woman is a man's property.

Upon marriage, rights to such property are transferred from a woman's father to her husband. Rape is a violation of the man's property. A man cannot violate his own property; therefore, a husband cannot rape his own wife.

The historical notion that a woman is a man's property, and that rights to this property are transferred from father to husband, dates to the biblical era. Quoting Florence Rush, one of the first feminist theorists to discuss sexual abuse in families, Lisa Eskow (1996) writes in her Stanford Law Review Note:

Judaism ordained that a bride could be legally acquired by contract, money or sexual intercourse, but since the [Christian] church eschewed materialism, sexual intercourse emerged as the validating factor. As early as the sixth century, Pope Gregory decreed that "any female taken by a man in copulation belonged to him and his kindred." And since copulation with or without consent established male possession of the female, vaginal penetration superseded all impediments. (Rush, 1980, p. 32)

Ironically, this understanding of sex between men and women is precisely how rape is primarily defined today – an act of power and violence against a person to subjugate and own them. While today this theory is not as germane to the law and stereotypes about marital rape, it is a refrain many women hear from their batterer/rapist. Perpetrators of marital rape are often described as jealous, domineering individuals who feel a sense of entitlement to have sex with their "property." In her book, *Wife Rape*, Raquel Kennedy Bergen describes the following victim experiences:

Wanda remembered that her husband told her repeatedly, "That's my body – my ass, my tits, my body. You gave that to me when you married me and that belongs to me."

Emily recalled that on the night her husband raped her he was saying something like "I'm his wife and I'm supposed to have sex with him and by law I was his or something like that – his possession."

Pam told me, "I remember one time he [her husband] told the judge, 'That's my wife, you can't tell me what to do with her.'" (Bergen, 1996, p. 20)

Similarly, in a case where a man forced his wife to have sex with him at gunpoint, he claimed upon arrest, "You mean I can go to jail for having sex with my wife?" (People v. Johnson, 2005) While this will not stand up in court, such misconceptions about a man's "rights" with respect to his wife fuel a marital rapist's sense of entitlement to complete access to his partner and may give a sense of impunity. In 1979, in the midst of a conversation with a lobbyist from the National Council of Jewish Women who was seeking support for an end to California's marital rape exemption, California State Senator Bob Wilson is quoted saying "If you can't rape your wife, who can you rape?" (Eskow, 1996, p. 689)

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These attitudes and victims' own misconception about what is consent and what is rape in an intimate relationship make it extremely difficult for victims to report these crimes. Eskow (1996, p. 689) asserts that such misconceptions create a "false consciousness of consent" in marital rape victims, making it even more difficult for them to recognize sexual assault. In study after study, women do not label the actions perpetrated against them as rape, or even sexual assault. Only behaviorally-based questions, such as "Has your spouse forced you to have sex when you did not want to?" elicit information about the abuse (McFarlane & Malecha, 2005).³ This, along with victims' fear that they will not be believed, poses as much of a barrier as any statutory marital rape exemption.

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³Judith McFarlane and Ann Melecha (2005) stated 69% of battered women in their sample experienced sexual abuse and only 6% of these reported to the authorities.

**Historical Assumption:
The marriage contract is a guarantee
of ongoing consent to sexual relations.**

Legal scholars agree that this contract theory has had the most enduring impact on the marital rape exemption. However, it is important to note that this theory flows naturally from the assumption that women are men's property. If a woman is her husband's property, it flows logically that she cannot retract her consent to sexual relations after signing the marriage contract, at which point she is officially "deeded" to him. A famed fifteenth-century British jurist, Sir Matthew Hale (1609-1676), articulated the now-called "ongoing consent" theory in his *History of the Pleas of the Crown* published after his death in 1736. Without any legal basis, he unilaterally declared:

[T]he husband cannot be guilty of 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.⁴

At one time in history, sex within marriage was the only kind of legal sex. Extramarital sexual relations were considered either adultery or fornication and therefore illegal. The contract theory arose in this context. Sex with her husband was the only sex a woman could consent to – otherwise she transgressed against the law. Once married, she was part and parcel of her husband so her consent was a given.⁵

Matthew Hale's theory, along with his other infamous assertion that "rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho' never so innocent" has left an indelible mark on all rape laws and trials. Hale's assertion gets at the crucial issues of victim credibility and the paranoia men and the courts feel about false rape allegations. In the case of marital rape laws, these notions underlie restrictions on the amount of time a victim has to report and the need for corroborating evidence demonstrating force or threat of force.

The ongoing consent theory also feeds into the notion that marital rape is "not that bad" since wives

⁴Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736), p. 628.

⁵For a more in-depth discussion of the proscription against extramarital relations, see Michelle Anderson (2003).

are "used to" having sex with their husbands anyway. This stereotype blinds jurors and the courts to the fact that time and again studies have shown that marital rape is far more injurious psychologically, physically, and emotionally than stranger rape. Studies with populations of college students (Monson, Langhinrichsen-Rohling, & Binderup, 2000; Whatley, 2005; Auster & Leone, 2001) demonstrate that traditional notions about gender and victim dress influence beliefs about whether or not a woman has a right to refuse sex from her husband. In these studies, men are less likely than women to think that marital rape should be a crime.⁶

Women who are victims of marital rape are more likely to suffer from severe post-traumatic stress disorder, have suicidal thoughts, and report an inability to trust or get involved in emotional relationships than women who are physically but not sexually abused (MacFarlane & Malecha, 2005; Bennice, 2003). In the famous words of pioneer researchers in this field David Finkelhor and Kersti Yllo (1985):

When you are raped by a stranger you live with a frightening memory. When you are raped by your husband you have to live with your rapist. (p. 138)

Marital rape can happen with or without other types of violence in the relationship. In fact, marital rape is often part of a larger cycle of physical and emotional violence. In *Wife Rape*, Raquel Bergen (1996) reports that 70% of the women in her sample experienced brutal "battering rapes" (i.e., where rape follows a physically violent attack). Victims often acquiesce to sex with their partners, not by choice, but to avoid physical violence. When physical violence accompanies rape, the injuries are particularly brutal.

Moreover, unlike rape by a date or stranger, marital rape is often not an isolated incident. Because the victim lives with the assailant, marital rape is more likely to be completed and multiple assaults are common. In a study published in 2000 by the National Institute of Justice, just over half of women raped by an intimate partner said they were victimized repeatedly by that partner. Overall the average was 4.5 rapes by the same partner (Jaden & Thoenes, 2000). In their book *License to Rape*, Finkelhor and Yllo report,

⁶This study showed that less than half of the men studied believed that marital rape should be a crime, while over 60% of the women studied thought it should.



► “Skirmishing for better laws, and the right to vote, will yet be swallowed up, in the real question, viz, has woman, as wife, a right to herself? It is very little to me to have the right to vote, to own property &c. if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, & so long as she suffers this bondage, all other rights will not help her true position.”

--Lucy Stone, 1855

For most marital rape victims, rape is a chronic and constant threat, not an isolated problem. The battered women, of course, were the most vulnerable of all to such repeated sexual abuse. Twice as many battered women suffered from chronic rapes (twenty times or more) as the other raped women. (Finkelhor & Yllo, 1985, p. 138)

In the study of 40 women reported by Raquel Kennedy Bergen (1996), 22 women, 55% of the sample, were raped 20 times or more during marriage.

Historical Assumption:

When a man and woman marry they are united as one under the law, and the one is the husband. As one entity, it is a logical impossibility for one half of the entity to rape the other.

In the sixteenth century, Sir William Blackstone (1723-1780), a British jurist who wrote the first defining treatise on common law, included in his *Commentaries* the following analysis of the marital contract:

By marriage the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband: under whose protection and cover, she performs everything...and her condition during her marriage is called her coverture.⁷

In other words, upon marriage the wife's existence as a separate being under the law ceased. As such, her interests and her husband's were merged. The caveat, of course, is that really only the husband's interests were preserved, since upon marriage women relinquished to their husbands all rights to their person, their wages, and their property.

The “unity theory” of the marital rape exemption, as it is often called, was central to nineteenth century feminists' theory that a woman's place in society would never be equal to man's so long as she could not even have control over her own person. Jill Hasday, in her article *Contest and Consent*, details the fervor with which nineteenth century feminists railed against the marital rape exemption. In an 1855 letter to Antoinette Brown Blackwell, prominent feminist Lucy Stone wrote:

[I]t is clear to me that [the marriage] question underlies this whole movement and all our little skirmishing for better laws, and the right to vote, will yet be swallowed up, in the real question, viz, has woman, as wife, a right to herself? It is very little to me to have the right to vote, to own property &c. if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, & so long as she suffers this bondage, all other rights will not help her true position. (cited in Hasday, 2000, p. 1425)

⁷Sir William Blackstone, *Commentaries on the Laws of England* (1765), p. 430.

These early feminists understood that shifting the power imbalance at the core of the marital relationship was key to redefining women's role in society. While they would not live to see the marital rape exemption repealed, they did successfully change the laws so that married women could own property. They also forced courts to recognize some cases of marital rape as "extreme cruelty" and therefore grounds for divorce.

While the notion of coverture is no longer officially enshrined in law, the idea that marriage is a sacred entity holding the best interest of both parties is alive and well. Jill Hasday (2000) explains,

One of the most remarkable characteristics of the modern defense of the marital rape exemption...is that it presupposes the aligned interests of husband and wife. ... [The] assumption of conjoined interests in marriage is so absolute that proponents do not concede that a marital rape exemption might inflict harm on wives. Their argument assumes that a wife's interests, like her husband's, are always and wholly served in a marital relationship where her husband cannot be prosecuted for raping her. (p.1485)

Indeed, this assumption underlies the impulse of many jurors today to acquit marital rapists so as to maintain the integrity of the marriage. Current state statutes that separate "spousal rape" from "regular rape" only perpetuate the notion that spousal rape is less harmful to women, and that lesser penalties are in the interest of husband, wife, and the institution of marriage. The institution of marriage casts a mitigating light on the crime of rape. A prosecutor quoted in Eskow's article (1996) mentioned above even suggests giving jurors specific instructions that "All spouses have a right to control their bodies. Spousal status in [sic] no defense to rape." (p. 702)

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Conclusion

In 1976, an Oregon jury acquitted John Rideout of raping his wife Greta. News articles reported on the expert testimony offered at trial about the marital rape exemption, including Sir Matthew Hale's theory of "implied consent." The case sparked the feminist movement to lobby for the abolition of the marital rape exemption. The last state to fall was North Carolina in 1993. The first four states to eliminate the exemption did so by case law. In striking down this exemption, the New York Court of Appeals wrote:

We find that there is no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny. We therefore declare the marital exemption for rape in the New York statute to be unconstitutional.

Lord Hale's notion of an irrevocable implied consent by a married woman to sexual intercourse has been cited most frequently in support of the marital [rape exemption]. Any argument based on a supposed consent, however, is untenable. Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. Other than in the context of rape statutes, marriage has never been viewed as giving a husband the right to coerced intercourse on demand. Certainly, then, a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman. If a husband feels "aggrieved" by his wife's refusal to engage in sexual intercourse, he should seek relief in the courts governing domestic relations, not in "violent or forceful self-help." (People v. Liberta, 1984, pp. 163-164)

The twenty-six states that maintain exceptions and restrictions in their marital rape law have yet to acknowledge what the New York Court of Appeals



recognized with such forceful clarity. We must be active in our individual states to change these laws and create a climate in which victims can disclose and be treated with respect by the justice system and the community. ◉

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◀ For information about the marital rape laws in your state see the AMERICAN PROSECUTORS RESEARCH INSTITUTE (APRI), SUMMARY OF SPOUSAL RAPE LAWS (2006). For a copy, email ncpvaw@ndaa.org.

The National Judicial Education Program has posted a web course and resource for judges and others addressing all aspects of rape in intimate relationships, which includes a discussion of the marital rape exemption. You can register for and view the course for free at www.njep-ipsacourse.org.