Shining Another Light on Spousal Rape Exemptions: Spousal Sexual Violence Laws in the #MeToo Era

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This Note builds on the growing scholarly discourse involving the #MeToo movement and places an importance on discussing the issue of spousal rape in the #MeToo era. It fills a crucial gap in legal scholarship by articulating how sexual violence during marriage persists despite greater attention to sexual violence in the public discourse. There may be a blind spot in the popular discourse surrounding the #MeToo movement. This Note argues that the current conversation around sexual violence in the workplace fails to address the importance of fixing sexual violence in other areas (such as the home). The Centers for Disease Control and Prevention (CDC) reports that 18.3% of women experience some type of sexual violence in their intimate relationships. A majority of states essentially permit these forms of intimate partner violence within state statutes. In response, this Note provides a robust empirical analysis of states’ handling of spousal sexual violence. This Note exposes how loopholes in the law remain and how the #MeToo movement can influence the abolishment of these loopholes.

This Note proceeds in four parts. Part I covers the history of the spousal rape privilege and explains both the historical and modern justifications for spousal sexual violence. Part II explores previous feminist movements’ impact on the eradication of sexual violence. Next, Part III presents the current spousal exemptions in state statutes. Additionally, Part III tracks any #MeToo era repeals of spousal sexual violence statutes. Finally, Part IV recommends eliminating spousal exemptions to provide a legal remedy for spouses who seek one. Part IV also acknowledges that noncarceral approaches are necessary.

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INTRODUCTION

The public exposures of Harvey Weinstein, Bill Cosby, R. Kelly, Donald Trump, and so many others place newfound importance on combating sexual violence. Many credit the #MeToo movement for the public awareness of these issues. The #MeToo movement builds on a program founded by activist Tarana

2. A majority of adults now believe society is not sensitive enough about sexual harassment, whereas twenty years ago a majority of adults believed that society was too sensitive about sexual harassment. Moreover, women are now twenty percent more likely to sue if they believe they experienced sexual harassment. Lydia Saad, Concerns About Sexual Harassment Higher than in 1998, GALLUP (Nov. 3, 2017), https://news.gallup.com/poll/221216/concerns-sexual-harassment-higher-1998.aspx?g_source=Politics&g_medium=lead&g_campaign=tiles [https://perma.cc/6URX-ZE6F].

3. Nora Stewart, The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgement of Those #MeToo Leaves in the Dark, 87 FORDHAM L. REV. 1693, 1694–95 (2019) (“#MeToo has changed the rules surrounding women’s public discourse. As distinct from historical feminist movements, it has rapidly become a way to expose women’s realities beyond the confines of the previously acceptable.”); Sophie Gilbert, The Movement of #MeToo, ATLANTIC (Oct. 16, 2017),
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Burke “to bring resources, support, and pathways to healing where none existed before.” According to Burke, the goal of the #MeToo movement is to “galvanize[e] a broad base of survivors, and work[] to disrupt the systems that allow sexual violence to proliferate in our world.”

By fall 2017, #MeToo had become a nationwide phenomenon. Responding to allegations against Harvey Weinstein, actress Alyssa Milano tweeted “[i]f you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” The tweet achieved Milano’s stated goal: to show the public how prevalent sexual violence is. Within twenty-four hours, there were almost half a million tweets and twelve million Facebook posts and reactions to #MeToo. Within forty-five days,


5. Burke, supra note 4.

6. Riley Griffin, Hannah Recht & Jeff Green, #MeToo: One Year Later, BLOOMBERG (Oct. 5, 2018), https://www.bloomberg.com/graphics/2018-me-too-anniversary/ [https://perma.cc/8VYU-BRCQ] (finding at least 425–800 people accused of sexual misconduct, including allegations against “prominent people across industries” with a “broad range of behavior that spans from serial rape to lewd comments and abuse of power” within the first year of #MeToo).


#MeToo spanned eighty-five countries with eighty-five million Facebook posts.\textsuperscript{11} Within the first year, nineteen million people had tweeted “#MeToo.”\textsuperscript{12}

This new wave of activism placed sexual violence in the public consciousness. So far, the movement has sparked a conversation around sexual violence in various sectors including entertainment,\textsuperscript{13} academia,\textsuperscript{14} politics,\textsuperscript{15} the judiciary,\textsuperscript{16} the

\textsuperscript{11} Sayej, supra note 9.


sciences,\textsuperscript{17} sports,\textsuperscript{18} the military,\textsuperscript{19} and religion.\textsuperscript{20} Additionally, the virality of #MeToo targeted not only sexual violence but also other pressing concerns like complicity, celebrity culture, pay disparity, power structures, and whisper networks.\textsuperscript{21}

Yet with all of this progress, the public conversation continues to neglect particular subsets of women.\textsuperscript{22} #MeToo in the popular discourse may not be focusing enough on some of the most vulnerable to sexual violence: spouses.\textsuperscript{23}
Because Milano’s #MeToo tweet responded to the conversation around the Harvey Weinstein scandal, the public conversation linked the #MeToo movement to sexual violence in more public-facing arenas such as the workplace. The link between sexual violence and only public-facing arenas is damaging, however, as sexual violence has a much broader reach. Many of the studies on record related to the prevalence of sexual violence were conducted decades ago. However, a recent Centers for Disease Control and Prevention (CDC) study paints a troublesome picture of the lives of those who are in intimate relationships.

Twenty-two years after the supposed repeal of the spousal rape privilege, the CDC reported that sexual violence in intimate relationships happened to around 18.3% of women. The National Institute of Justice found that there were an estimated 322,230 intimate partner rapes committed in one year alone. The preceding numbers roughly amount to over seven million women that have experienced intimate partner rape in their lifetime.


25. Id. at 8, supra note 1.
26. Id. at 8 (including “rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact”).
27. Id., supra note 24, at 25.
28. Id. at 26. Historical justifications for spousal rape were written in the context of heterosexual relationships with abuse happening to the women in those relationships. This Note frames these issues within that context. However, sexual assault can happen in any relationship, to anyone, no matter how they identify. The CDC reported that 8.2% of men experience some type of sexual violence in their intimate relationships. Id., supra note 1, at 9. Additionally, 43.8% of lesbians, 61.1% of bisexual women, 26.0% of gay men, and 37.3% of bisexual men have experienced some form of intimate partner violence. See NAT'L INST. OF JUST., supra note 24, at 9.

#MeToo discourse is harmful: the failure of the public conversation to more critically engage with how sexual violence affects married women undermines women’s movements to combat rapes and sexual assaults. Therefore, the current conversation around sexual violence must place sufficient importance on closing spousal exemptions.29

The continuance of sexual violence toward married women is due to views embedded in our societal fabric.30 The system supports a power asymmetry between husband and wife that manifests in both legal and social subordination. The focus of this Note is the continued existence of spousal exemptions that enables forms of sexual violence. Historical views of the woman’s place in marriage justified spousal rape privileges.31 These justifications seeped into U.S. common law32 and eventually were codified in state laws.33 By 1993, some states had eradicated spousal rape laws.34 Other state legislatures, instead of repealing the exemptions outright, created loopholes that essentially allow husbands to continue the abuse and exploitation of their wives.35 To this day, thirty-eight states have some form of spousal exemption contained in their rape and sexual assault statues.36

By exploring the state statutes with spousal rape exemptions, this Note exposes how loopholes remain. This Note advances in four parts. Part I chronicles the history of the spousal rape privilege. It highlights the subordination that women have endured and the justifications behind allowing spousal sexual violence.37 Part II examines feminist movements that focused on sexual violence and their role in influencing the progression of equality under sexual violence laws.38 Next, Part III


35. See infra notes 160–163.

36. See infra Appendix.

37. See infra notes 41–105.

38. See infra notes 106–170.
explores spousal exemptions in the #MeToo era. It reviews existing spousal sexual violence statutes and answers whether the public conversation around sexual violence has had any influence on repealing or upholding spousal exemptions. Last, Part IV proposes eliminating spousal exemptions and acknowledges the issues faced with doing so.

I. THE SPOUSAL RAPE EXEMPTION

Marital rape has long been inscribed in history tracing back to the days of William Blackstone and Sir Matthew Hale. Part I addresses these historical roots and their implications. Section I.A traces the historical origins of spousal exemptions. Next, Section I.B explains the historical justifications used to support early legal theories. Last, Section I.C describes the modern justifications used today to uphold the allowance of spousal sexual assault.

A. Historical Origins

A woman’s place in marriage has “been prescribed by culture and by law.” Contrary to modern companionate marriage, in early English common law, the relationship between husband and wife was akin to an economic contract. The marital contract held great deference to husbands, going as far as to “suspend” the rights of the wife. Any benefit to the marital contract, therefore, was “not for marriage as an entity but for the husband as the marital rights bearer.” Scholars trace this notion to English jurist William Blackstone who stated,

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 the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore . . . under the protection and influence of her husband . . . ; and her condition during her marriage is called her coverture.


40. See infra notes 316–336.

41. See infra notes 42–68 and accompanying text.


44. See Ryan, supra note 43, at 953 (“Subsuming her person meant legally appropriating her will, sexually and otherwise, as the legal presumption of coercion reveals.”); BLACKSTONE, supra note 43, at 430. However, Blackstone theoretically believed that “women and men approached marriage as theoretical equals to a civil contract.” Norma Basch, Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America, 5 FEMINIST STUD. 346, 350 (1979).

45. Ryan, supra note 43, at 946.

46. BLACKSTONE, supra note 43, at 430.
Legal scholars also trace the origins of the spousal rape exemption to English barrister Sir Matthew Hale’s theory of implied or irrevocable consent. Hale exclaimed 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 up herself in this kind unto her husband, which she cannot retract.” Thus, the marital contract forced each participant to adhere to a “hierarchy of rights and duties” where “declining matrimonial intimacy and companionship, is per se a breach of duty, tending to subvert the true ends of marriage.” Taken together, these writings influenced the historical justifications for the spousal rape privilege: implied or irrevocable consent, property, and unity of the family. These legal assertions were rarely questioned throughout the nineteenth century.

B. Historical Justifications

There are three historical justifications for the allowance of spousal rape. The first is implied or irrevocable consent. Implicit in the marital contract, the wife gives herself to her husband and, upon giving herself to him, assumes the marital obligation of sex. This implicit consent is present at all times during the marital relationship and is irrevocable unless the contract is null.

49. Ryan, supra note 43, at 946; see also Hasday, supra note 29, at 1400 (“Hale presented a couple’s mutual decision to marry as grounds for subjecting wives and husbands to very different obligations and rights. . . . [W]here this agreement gave the husband a right of sexual access to his wife, it bestowed an obligation on the wife to submit.”).
50. Hasday, supra note 29, at 1396 (“[O]ne of the most striking aspects of the nineteenth-century ‘debate’ over marital rape is how little debate there actually was in terms of direct exchange between the exemption’s legal champions and its critics.”); see also Parker v. Territory, 59 P. 9, 9–10 (Okla. 1899) (“It is intended that the indictment should contain the averment that the prosecutrix was not the wife of the accused.”); State v. Williams, 23 P. 335, 336 (Mont. 1890); People v. Estrada, 53 Cal. 600, 600 (1879) (“It is not necessary to allege that the person who is alleged to have been assaulted was not the wife of the defendant.”).
51. Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489, 491 (1857) (“Of course, it would always be competent for a party indicted to show, in defence of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife.”).
52. One of the core components of #MeToo is the antithesis of this notion. See Kennedy & Hausner, supra note 29, at 59.
Additionally, cultural ideas of the wife’s role support the theory of implied consent. Blackstone wrote about the influence of the social aspect of these roles — roles “founded in nature.” Throughout history, men “have been presumed and encouraged to be the aggressors” while women are painted as “passive receivers of such advances.” Presumed passivity in marriage becomes forced acquiescence to unwanted sexual encounters and also creates difficulties for studies measuring the issue of spousal sexual violence. These difficulties are present because women are socialized to believe that sexual consent is implicit in marriage and therefore do not acknowledge that consent issues fall within a gray area. Despite these difficulties, studies still find that many people in intimate relationships encounter forced acquiescence to sex. Thirty-four percent of women state that some of these instances of sexual violence occur as a result of feeling compelled by their marital duty to have sex with their partners even though they were unwilling. Some women even report that they resort to sexual acquiescence to avoid physical harm.

The second justification for spousal rape is the theory that a woman was her father’s and then her husband’s property right. In the past, rape was a property crime; therefore, it was impossible for husbands to defile their own belongings.

55. Matthew R. Lyon, Comment, No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape, 95 Crim. L. & Criminology 277, 283 (2004) (“The defense of the [spousal rape] exemption also stems from a ‘cultural need’ to understand the relationship between a husband and wife as ‘consensual and harmonious.’” (quoting Hasday, supra note 29, at 1381)); Katherine M. Schelang, Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape and Stalking, 78 MARQ. L. REV. 79, 84 (1994) (“Society’s traditional view of a woman’s ‘proper’ role was built upon the systematic domination and subordination of women.”).

56. BLACKSTONE, supra note 43, at 410 (“That of husband and wife; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated.”).


58. RUSSELL, supra note 24, at 74, 80.

59. See Harless, supra note 34, at 308. When speaking about consent issues, Burke mentioned the socialization that women go through and how this socialization forces women to believe that we must give into “the whims of men.” She states, “There’s just so many nuances that we don’t cover. . . . [W]hat we’ve been raised on is media giving us the stranger danger, the person that you see in the dark alley ready to jump you. . . . But more often than not, the reality is we live in the gray areas around sexual violence.” Zenobia Jeffries Warfield, Ms Too Creator Tarana Burke Reminds Us This Is About Black and Brown Survivors, Yes! (Jan. 4, 2018), https://www.yesmagazine.org/democracy/2018/01/04/me-too-creator-tarana-burke-reminds-us-this-is-about-black-and-brown-survivors/ [https://perma.cc/L8S9-DCM6].

60. RUSSELL, supra note 24, at 74–75.


63. See Brown, supra note 54, at 658; Siegel, supra note 47, at 356; Morgan Lee Woolley, Note, Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues, 18 HASTINGS WOMEN’S L.J. 269, 275 (2007).

64. See Siegel, supra note 47, at 356.
Similar to the property theory, the third justification for spousal rape is unity of the family.\textsuperscript{65} Blackstone described the family unit as one where the wife suspends her “legal existence,” viewing the familial legal identity as one with the male at the helm.\textsuperscript{66} Under this theory, spousal rape could not exist because a man could not possibly rape himself.\textsuperscript{67} Even though rape laws were “designed to regulate 'competing male interests in controlling sexual access to females,'”\textsuperscript{68} the influences behind this theory affected not only spousal rape but also subordination in the legal system.\textsuperscript{69}

The practice of coverture emerged through a pushback to a “more modern, companionate ideal” of marriage.\textsuperscript{70} Coverture suspended the legal rights of wives.\textsuperscript{71} This suspension included the wife’s inability to (1) retain “any earnings they received,”\textsuperscript{72} (2) “sue [or be sued],”\textsuperscript{73} and (3) make contracts and wills.\textsuperscript{74} Scholars argue that coverture was not “fully realized” in American legal circles.\textsuperscript{75} Nevertheless, while some in the American legal field found the practice of coverture flawed, judges adopted the practice into U.S. common law.\textsuperscript{76} Coverture no longer exists, but its effects linger throughout our legal and cultural spheres.\textsuperscript{77} Even though not directly relating to rape in the plain text, the practice of coverture directly relates to spousal rape as it grants “the husband authority over the wife’s person economically and physically.”\textsuperscript{78}

While present in the early application of spousal exemptions, by the twentieth century, these historical justifications were no longer adhered to.\textsuperscript{79} Courts within the United States found the unity of the person and irrevocable consent to be antiquated notions.\textsuperscript{80} For example, in \textit{Trammel v. United States}, the Supreme Court disavowed the unity theory in stating,

\begin{itemize}
\item\textsuperscript{65} Jackson, \textit{supra} note 53, at 187.
\item\textsuperscript{66} See \textit{id}.
\item\textsuperscript{67} Lisa Dawgert Waggoner, \textit{New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption}, 22 N.M. L. REV. 551, 553 (1992); Jackson, \textit{supra} note 53, at 187.
\item\textsuperscript{68} Lyon, \textit{supra} note 55, at 282.
\item\textsuperscript{69} See \textit{infra} notes 70–78.
\item\textsuperscript{70} Basch, \textit{supra} note 44, at 351.
\item\textsuperscript{71} Baxter, \textit{supra} note 42, at 18.
\item\textsuperscript{72} \textit{id}.
\item\textsuperscript{73} Basch, \textit{supra} note 44, at 347.
\item\textsuperscript{74} \textit{id}.
\item\textsuperscript{75} \textit{See Claudia Zaher, When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture, 94 LAW LIBR. J. 459, 462 (2002).}
\item\textsuperscript{76} \textit{See Basch, \textit{supra} note 44, at 352.}
\item\textsuperscript{77} Zaher, \textit{supra} note 75 (“But the social and legal consequences of the doctrine of coverture were pervasive and have carried over into the present.”); Basch, \textit{supra} note 44, at 346 (noting the “patriarchal construct underpinned all of Anglo-American domestic relations law, and [it] continued to exist long after the enactment of the married women’s property acts of the mid-nineteenth century”).
\item\textsuperscript{78} Ryan, \textit{supra} note 43, at 953.
\item\textsuperscript{79} See Waggoner, \textit{supra} note 67, at 554.
\item\textsuperscript{80} See Jackson, \textit{supra} note 53, at 188–89.
\end{itemize}
Nowhere . . . in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside.81

Social expectations of the role of marriage shifted as “companionate marriage” began to create a “cultural expectation of equality in marriage.”82

C. Modern Justifications

As historical justifications for spousal exemptions gave way to more progressive thinking, the practices that ultimately resulted in women’s subordination persisted. Scholars like Lalenya Siegel note that this is due to “patriarchal notions about women in marriage.”83 Similarly, scholars such as Linda Jackson and Jill Hasday offer four compelling theories to explain the continued prevalence of marital rape: (1) marital privacy, (2) marital reconciliation, (3) evidentiary issues, and (4) the belief that stranger rape is more severe.84

Proponents of the first theory, marital privacy, believe that the couple should solve marital disputes within the home.85 Directly influenced by coverture rationales, this belief also stems from the importance placed on the home and private relations in U.S. common law.86 The drafters of the Model Penal Code supported this theory, stating that the allowance of spousal rape was due to an “unwanted [sic] intrusion of the penal law into the life of the family.”87 Common law defines “the home as the institution, the sanctity of which ought not to be disturbed by the state.”88 The home is often referred to as the man’s “castle” where he is “free from arbitrary intrusion by government or others.”89

Like supporters of the marital privacy theory, proponents of the second theory, marital reconciliation, believe that the couple should be free from legal interference. If the victim reports her husband and legal institutions interfere, then marital reconciliation is much more difficult.90 But, as scholars have noted, both the marital privacy and reconciliation theories “protect the middle and upper classes from public scrutiny and shame.”91 This, in effect, places the right to privacy above

82. Ryan, supra note 43, at 953.
83. Siegel, supra note 47, at 358.
85. Jackson, supra note 53, at 190.
87. Lyon, supra note 55, at 282 (quoting MODEL PENAL CODE & COMMENTARIES § 213.1(c) (AM. L. INST. 1980)).
88. Young, supra note 86, at 142.
90. See Jackson, supra note 53, at 190.
91. See Harless, supra note 34, at 314.
the right to safety.\textsuperscript{92} Alternatively, feminist scholars note that there are situations where the right to privacy and safety are the same. The home can be a “site of refuge” for those who “face discrimination and oppression outside the home.”\textsuperscript{93}

The third theory, regarding evidentiary concerns, is the “most common basis” supporting the continuance of spousal exemptions.\textsuperscript{94} Hale influences this theory. In his writings, he stated that rape “is an accusation easily to be made and hard to be proved.”\textsuperscript{95} Proponents believe that spousal rape cases are difficult to prove because it would be difficult to figure out which acts were and were not consensual due to the nature of the marital relationship.\textsuperscript{96} Further, this theory portrays the women as vindictive, having “something to gain, either in divorce, custody, or finance.”\textsuperscript{97}

The fourth theory states spousal rape is less harmful than stranger rape.\textsuperscript{98} On the contrary, society’s insistence that spousal exemptions remain in state statutes harms married women in multiple ways. The laws reinforce the notion that women are their husbands’ property.\textsuperscript{99} The laws “depriv[e] women of control over their reproductive capacity.”\textsuperscript{100} Additionally, spousal exemptions inhibit women’s

\textsuperscript{92.} See Hasday, supra note 29, at 1491; McClain, supra note 89, at 210–11 (“Women’s formal constitutional rights to privacy against the state mean little, the argument goes, if what women really need is protection by the state against men in private.”).

\textsuperscript{93.} McClain, supra note 89, at 212.

\textsuperscript{94.} Jackson, supra note 53, at 191.

\textsuperscript{95.} Hale, supra note 48, at 634. #MeToo’s critics have similar misgivings about the movement and argue that it has gone too far. Some state that the movement’s inability to explain the nuances between rape, sexual harassment, and uncomfortable situations does a disservice and aids in these types of justifications. See Daphne Merkin, Opinion, Publicly, We Say #MeToo. Privately, We Have Misgivings, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html [https://perma.cc/9ZVC-RPJ3] (“These are scary times, for women as well as men. There is an inquisitorial whiff in the air, and my particular fear is that in true American fashion, all subtlety and reflection is being lost.”).

\textsuperscript{96.} See Siegel, supra note 47, at 360. Nevertheless, this has not stopped legislatures from enacting laws criminalizing stranger rape. One must make an illogical inference to only codify these justifications at the expense of spouses. LeGrand, supra note 31, at 926 (“If a woman suffers no less pain, humiliation, or fear from forcible sexual penetration by her husband than by a relative, a boyfriend, or a stranger, the difference is not great enough to warrant the total insulation of the former but not the latter from legal sanction.”).

\textsuperscript{97.} Klarfeld, supra note 34, at 1836.

\textsuperscript{98.} Keith Burgess-Jackson, Il’fie Rape, 12 PUB. AFFS. Q. 1, 6 (1998) (explaining proponents state “though the wife may suffer indignity and shock as a result of [her husband’s] action her suffering is incomparably less than that of the victim of the typical rape”).

\textsuperscript{99.} See Brown, supra note 54, at 658–59.

\textsuperscript{100.} Hasday, supra note 29, at 1493. Though less of a concern when contraception and abortion are an “alternate means of limiting fertility.” Id. Nevertheless, states that continue to permit spousal rape have some of the most restrictive abortion access in the country. See Jessica Glenza, Ohio Bill Orders Doctors to ‘Reimplant Ectopic Pregnancy’ or Face ‘Abortion Murder’ Charges, GUARDIAN (Nov. 29, 2019, 3:54 AM), https://www.theguardian.com/us-news/2019/nov/29/ohio-extreme-abortion-bill-reimplant-ectopic-pregnancy [https://perma.cc/L6MP-7Q6V].
autonomy over their bodies and their expression of their sexual identities. Moreover, women who experience spousal rape can develop post-traumatic stress disorder and experience severe physical issues. Furthermore, spousal rape “is more susceptible to repeated occurrences” because of the nature of the offender and victim’s relationship.

Even though the historical justifications are no longer cited, as evidenced above, the modern justifications are just as unfounded. With varying success, women’s movements have pushed back on both sets of theories throughout the nation’s history. These movements, explained in Part II, did progress statutes in the spousal rape space, but it may not have been enough to fully repeal spousal exemptions.

II. FEMINIST MOVEMENTS TARGETING SPOUSAL RAPE, THEIR EFFORTS, AND THEIR SUCCESSES

As Part I illustrated, spousal rape has been present and legitimized throughout American history. However, during the time of Blackstone and Hale, the period of coverture, and while experiencing coverture’s effects, women consistently fought for bodily autonomy and equality. Part II analyzes this dynamic. Section II.A recounts women’s movements in the nineteenth century and explains the movements’ fight to eliminate rape in the women’s communities and to repeal the practice of coverture. Section II.B describes women’s movements in the twentieth century. It follows activists’ and scholars’ work to push rape into the public consciousness and the difficulty that these groups faced when dealing with spousal rape. Last, Section II.C explains the results from the previously mentioned activism and loopholes created under the guise of legal reform.

A. Nineteenth Century Feminist Movements

Serious movements to combat rape began in the nineteenth century with activists concerned about the brutality inflicted against enslaved Black women. During enslavement and Reconstruction, white men were able to rape Black women

101. People v. De Stefano, 467 N.Y.S.2d 506, 514 (Cnty. Ct. 1983) (inferring that the allowance of spousal exemptions would interfere with a “wife’s bodily integrity”).

102. Hasday, supra note 29, at 1493–94 (“[A] marital rape victim loses the ability to determine her sexual ‘actions, pleasures, and desires free from external influence.’” (quoting Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 Fla. L. Rev. 45, 69 (1990))).

103. Erin K. Jackson, To Have and to Hold: Protecting the Sexual Integrity of the World’s Married Women, 49 U. Tol. L. Rev. 71, 74 (2017) (stating that 45.9% of the women from a study of battered women who had experienced spousal rape developed the disorder and that women experience “[a]bsdominal cramping and pain,” “higher rates of cervical cancer,” and “sexually transmitted infections”).


without penalty.\textsuperscript{107} Rape was punishable by law, but because the law considered Black women to be chattel, they legally could not be victims.\textsuperscript{108} Consider Celia, a slave girl who killed the man who purchased and then continuously raped her.\textsuperscript{109} Due to her legal status as chattel, she could not claim self-defense.\textsuperscript{110} Thus, she was not covered by the defense statute, which stated that women could defend themselves from “every person who shall take any woman, unlawfully, against her will, with intent to compel her by force, menace or duress . . . to be defiled.”\textsuperscript{111} Infuriated by these constant sexual assaults, Black activists tried to place rape in the public conversation.\textsuperscript{112} These women focused on the lack of accountability society afforded white men for raping Black women.\textsuperscript{113} Activists set their sights on criminalizing “the licentious man” and received a victory when seduction by an acquaintance became criminalized.\textsuperscript{114}

Around the same time, women criticized certain aspects of a woman’s place in the home.\textsuperscript{115} They declared that coverture laws were a serious issue plaguing the nation and stated that coverture was essentially a woman’s civil death.\textsuperscript{116} They further criticized violence in the home, such as the practice of administering “chastisement.”\textsuperscript{117} Suffragists argued that aspects of the government were male dominated—even juries—and were to blame for rampant sexual assault.\textsuperscript{118} They believed that if women had certain rights of citizenship, they could infiltrate power structures and “undermine rape by influencing the law.”\textsuperscript{119} Spousal rape became a specific issue of concern. For example, in 1871, a suffragist questioned what “makes obligatory the rendering of marital rights and compulsory maternity.”\textsuperscript{120}

The culmination of these movements placed sexual violence in the public domain. Throughout the nineteenth century, women’s rights movements continued to fight for the elimination of coverture laws and “contested a husband’s right to

\textsuperscript{108} See King, supra note 107, at 173.
\textsuperscript{109} Id. at 179.
\textsuperscript{110} Id.
\textsuperscript{111} Id. (quoting MO. REV. STAT. § 47.029 (1845)).
\textsuperscript{112} FREEDMAN, supra note 106, at 79–80.
\textsuperscript{113} See id. at 76–77.
\textsuperscript{115} See Hasday, supra note 29, at 1413.
\textsuperscript{116} See id. at 1413 n.132; Zaher, supra note 75.
\textsuperscript{117} Sally F. Goldfarb, Violence Against Women and the Persistence of Privacy, 61 OHIO ST. L.J. 1, 14 (2000).
\textsuperscript{118} FREEDMAN, supra note 106, at 54.
\textsuperscript{119} See id. at 54.
\textsuperscript{120} DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 4 (1985).
determine the terms of marital intercourse vociferously and profoundly.” 121 Activists were able to claim victory when states began to pass the Married Women’s Property Act, essentially abolishing coverture.122 However, as time passed, women at the forefront of the suffragist movement did not believe it was politically expedient to continue addressing spousal rape.123

B. Twentieth Century Feminist Movements

It was not until the 1970s when feminist activists such as Laura X began targeting rape laws that male-dominated legal institutions began to make a more meaningful legal change.124 These activists had various goals. They wanted to “improv[e] the legal response to rape, provid[e] services for rape victims, and reform[ ] states’ rape laws” for all forms of rape.125 In response “to growing public concern about increases in reports of rape,” activists placed increased importance on tackling the nation’s rape crisis.126 To effectively effect reform, these women tried to “broaden the crime of rape.”127 To do so, some feminist activists found unlikely allies and worked with “conservative law-and-order groups.”128 Other feminist activists worked in tandem with the battered women’s movement.129 This group framed rape as a “means of male control over women and the product of a patriarchal society.”130 This framing challenged the traditional importance placed on the sanctity of the home and pushed rape into the public domain.131 Within this framing, the elimination of spousal rape became one of the principal issues of the feminist campaign.132

Laura X was one of the driving forces behind the efforts to repeal the spousal rape privilege. She led the National Clearinghouse on Marital and Date Rape, which claims to have “transform[ed] the attitudes” in the United States through a “20-year

121. See Hasday, supra note 29, at 1413–14.
122. See Klarfeld, supra note 34, at 1826.
123. FREEDMAN, supra note 106, at 63–71; see Hasday, supra note 29, at 1482 (“As the feminist movement increasingly turned its attention to suffrage in the early twentieth century and then lost much of its organizational spark after suffrage was won, debate over marital rape dwindled.”).
125. McMahon-Howard et al., supra note 125, at 507.
126. Spohn, supra note 124, at 120–21.
127. McMahon-Howard et al., supra note 125, at 507.
128. Id.
129. See Schelong, supra note 55, at 95–96.
130. Abrams, supra note 31, at 753; see Spohn, supra note 124, at 121 (noting that, with this framing in mind, activists lobbied legislatures to change “the definition of rape and the evidentiary rules applied in rape cases [as a means of] . . . symboliz[ing] a rejection of this patriarchal view and . . . embody[ing] in law the notion that rape is a crime of violence”).
131. See Abrams, supra note 31, at 753.
campaign[] to change customs, policies, behaviors, and laws." 133 In this role, X also worked as a consultant for state campaigns to eliminate the spousal rape exemption. 134

Additionally, feminist scholars highlighted the role of male domination in the private sphere and the connection with spousal rape. 135 The scholars displayed how an insistence on privacy made “violence against women legally and politically invisible.” 136 In the 1980s, Finkelhor and Yllo published License to Rape, which studied marital rape, its effects, and the husband’s motives for committing sexual violence. 137 Diana Russell further deepened academic understanding of spousal rape when she published a comprehensive study of women who have experienced it in Rape in Marriage. 138

C. Legislative and Judicial Repeal

The elimination of spousal exemptions occurred through legislative and judicial repeal. 139 The first state to legislatively change its spousal rape laws was Nebraska in 1976, 140 followed by Oregon in 1977. 141 The following year, Oregon charged John Rideout with spousal rape, the first husband so charged in the United States. 142 Greta Rideout stated that John had told her she should “do what [he] want[s]” since she was “[his] wife.” 143 When she refused, he began to physically and sexually abuse her. 144 Even though John Rideout was ultimately acquitted, the Rideout case “brought the issues of marital rape to the forefront of the nation’s awareness.” 145 In 1979, in Massachusetts, James Chretien became the first man

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137. FINKELHOR & YLLO, supra note 120.
138. RUSSELL, supra note 24.
139. Siegel, supra note 47, at 352.
140. Id. at 364.
141. Id.
143. Id.
144. Id.
convicted of spousal rape for threatening to kill his wife if she did not have sex with him.\footnote{146}

In 1984, New York judicially repealed a spousal rape exemption in People v. Liberta.\footnote{147} Liberta involved an abusive husband who, because of domestic violence, received a court order to stay away from his wife.\footnote{148} The couple did not adhere to the order.\footnote{149} While meeting at a motel, Mario Liberta attacked his wife and forced her to engage in sexual acts.\footnote{150} He also forced her to make their son watch as Mario profusely violated her.\footnote{151} After charges of rape and sodomy in the first degree, Mario moved to waive them under the New York spousal exemption.\footnote{152} The Court of Appeals of New York ruled that there was no rational basis to distinguish rapes based on the parties’ marital status and declared the statute unconstitutional.\footnote{153} The Liberta court also disavowed the marital privacy justification, stating that privacy does not reach violent acts.\footnote{154}

By 1993, every state had amended its spousal rape laws (either judicially or legislatively), with North Carolina as the last.\footnote{155} After North Carolina’s repeal, Laura X asserted that the pursuance against spousal rape “chang[ed] by leaps and bounds.”\footnote{156} Nevertheless, the repeal in many states was a façade: the new laws still subjected women to the legal possibility of spousal sexual violence but without explicit language doing so.\footnote{157} States prevented rape reform bills from fully repealing the spousal rape privileges.\footnote{158} Legislatures resisted their elimination and the legislative compromise resulted in laws containing various loopholes.\footnote{159}

Instead of repealing spousal exemptions outright through the legislative compromises, states created categories of loopholes including (1) punishing spousal rape separately,\footnote{160} (2) barring marriage as a defense only to rape in the first

\begin{footnotes}
\item[147] See Waggoner, supra note 67, at 557–58.
\item[149] Id. at 569.
\item[150] Id.
\item[151] Id.
\item[152] Id. at 570. (“[D]ue to the ‘not married’ language in the definitions of ‘female’ and ‘deviate sexual intercourse,’ there is a ‘marital exemption’ for both forcible rape and forcible sodomy.”).
\item[153] Id. at 573.
\item[154] Id. at 574 (“While protecting marital privacy and encouraging reconciliation are legitimate State interests, there is no rational relation between allowing a husband to forcibly rape his wife and these interests.”).
\item[155] McMahon-Howard et al., supra note 125, at 507.
\item[157] See infra notes 158–163 and accompanying text.
\item[158] McMahon-Howard et al., supra note 125, at 507; see also Spohn, supra note 124, at 122.
\item[159] See Judith A. Lincoln, Note, Abolishing the Marital Rape Exception: The First Step in Protecting Married Women from Spousal Rape, 35 WAYNE L. REV. 1219, 1233 (1989).
\item[160] Brown, supra note 54, at 665.
\end{footnotes}
degree,\textsuperscript{161} (3) permitting a marriage defense in cases of statutory rape,\textsuperscript{162} or (4) limiting the exemption.\textsuperscript{163} Despite the various movements explained in Part II, married women were not liberated from sexual violence.\textsuperscript{164} This is perhaps because rape reform had diminished focus on “nonparadigmatic victims.”\textsuperscript{165}

Lawmakers have continued to repeal portions of their states’ spousal exemptions without full repeal.\textsuperscript{166} For example, in 1986, the Virginia legislature passed a partial repeal of spousal exemptions.\textsuperscript{167} Then, in 2002, the legislature removed the force and non-cohabitating exemptions from its rape statute.\textsuperscript{168} In 2005, the legislature removed the separate spousal section from the rape, sodomy, and object sexual penetration statutes and incorporated the majority of the statute to prohibit and punish spousal rape.\textsuperscript{169} Yet, throughout these rounds of repeal, state statutes still separated spousal sexual violence from stranger sexual violence by permitting a lesser penalty or other variation.\textsuperscript{170}

Even though progress has been made, due to the loopholes and failed repeal efforts, married women are still at a disadvantage in their access to justice. Because of the historical backdrop and the justifications explained in Part I, spousal rape laws were difficult to fully repeal. However, with problematic consent issues at the forefront in the age of #MeToo, are legislatures and judicial benches making another change?

\textbf{III. The Current State of Spousal Sexual Violence Laws}

As demonstrated in Part II, state statutes were not uniform in how they addressed spousal rape. Differing laws among states still exist today. Part III engages in a robust empirical study of current state laws pertaining to spousal sexual violence. It finds that full repeal remains an “elusive goal” and that married women

\textsuperscript{161} \textit{Id.} at 669.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.} at 670.
\textsuperscript{164} See Hasday, supra note 29, at 1482 (“[T]he legal status of marital rape was again subject to significant attack . . . . Here too, however, the resulting reform has been partial and uneven.”).
\textsuperscript{165} Aya Gruber, Rape, Feminism, and the War on Crime, 84 WASH. L. REV. 581, 595 (2009) (“[V]ictims of rapes without physical injuries, victims acquainted with defendants . . . .”).
\textsuperscript{166} See infra Appendix.
\textsuperscript{168} 2002 Va. Acts 810 (removing “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 bodily injury to the spouse by the use of force or violence”).
\textsuperscript{169} 2005 Va. Acts 631 (removing “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” and revising “who is not his or her spouse” to “whether or not his or her spouse” or similar language from each statute).
are still fighting for “the right to control of their own bodies.”\textsuperscript{171} The following sections track spousal rape laws in the #MeToo era. Section III.A examines the loopholes that permit spousal sexual violence and displays how each adheres to the modern justifications outlined in Section I.C. Section III.B explores whether lawmakers have repealed any loopholes since the emergence of the #MeToo movement and if the movement has had any influence in new legislation.\textsuperscript{172}

\textbf{A. States That Permit Spousal Sexual Violence}

Various states refuse to move past eighteenth-century notions of marriage and instead uphold certain loopholes.\textsuperscript{173} For example, in West Virginia, “sexual contact” is “any intentional touching . . . of the breasts, buttocks, anus or any part of the sex organs of another person . . . where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.”\textsuperscript{174} Because of this existing spousal exemption, a person can commit any of the state’s sexual abuse statutes’ offenses against their spouse and not be liable for a criminal offense.\textsuperscript{175} West Virginia’s sexual abuse statutes include sexual contact without consent “and the lack of consent results from forcible compulsion” or sexual contact with someone who is mentally impaired.\textsuperscript{176} In other states, spousal sexual violence is protected by a myriad of loopholes. That is, some states essentially permit spousal sexual violence in certain circumstances including (1) allowing sexual activity when the perpetrator is in a supervisory position,\textsuperscript{177} (2) creating exceptions to otherwise statutory rape,\textsuperscript{178} or (3) finding consent where the spouse is mentally or physically impaired during sexual contact and therefore unable to consent.\textsuperscript{179} Other states treat spousal sexual violence differently. Some states charge spousal

\begin{footnotes}
\protect\footnoterefname{footnote}
\protect\footnotetext{171}{Brown, infra note 54, at 670.}
\protect\footnotetext{172}{For a fifty-state survey of spousal sexual violence laws, see infra Appendix.}
\protect\footnotetext{173}{The Supreme Court of Mississippi affirmed its belief in the marital defense as recently as 2015. Burgess v. State, 178 So. 3d 1266, 1273 (Miss. 2015). A state representative from Virginia has questioned, “How on earth you could validly get a conviction of a husband-wife rape when they’re living together, sleeping in the same bed, she’s in a nightie, and so forth, there’s no injury, there’s no separation or anything?” Lizzie Crocker, \textit{Virginia Legislator Running for Congress Says Spousal Rape Should Be Legal}, DAILY BEAST (Apr. 14, 2017, 1:04 PM), https://www.thedailybeast.com/virginia-legislator-running-for-congress-says-spousal-rape-should-be-legal [https://perma.cc/6BCS-K9KF].}
\protect\footnotetext{174}{W. VA. CODE § 61-8B-1 (2021).}
\protect\footnotetext{175}{Id.}
\protect\footnotetext{176}{Id. §§ 61-8B-7 to -8.}
\protect\footnotetext{177}{See generally ARIZ. REV. STAT. ANN. § 13-1412 (2021); GA. CODE ANN. § 16-6-5.1 (2020); 720 ILL. COMP. STAT. 5/11-9.5 (2020); NEB. REV. STAT. § 28-322 (2021); S.D. CODIFIED LAWS § 22-22-29 (2021).}
\protect\footnotetext{178}{See infra Section III.A.1.}
\protect\footnotetext{179}{Sexual assault by compulsion fits within the impairment category but is a lesser offense. Found in statutes like Hawaii’s state code, a spouse may commit “sexual assault in the fourth-degree” by compulsion. HAW. REV. STAT. § 707-733 (2021). Compulsion is the “absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.” Id. § 707-700.}
\end{footnotes}
sexual violence under separate statutes and as a lesser crime\textsuperscript{180} while other states bar a spousal defense.\textsuperscript{181}

1. Statutory Rape

Some states permit sexual acts with minors as long as the perpetrator is their spouse.\textsuperscript{182} For example, in West Virginia, spousal sexual abuse is permitted against those twelve years old and younger if the perpetrator is fourteen years old or older.\textsuperscript{183} These statutes are ambiguous about whether they apply only to consensual acts within a marriage or any sexual act within a marriage that includes a minor. Yet, accounting for the role that power plays in consent, are sexual acts between a minor and adult ever consensual?

2. Physical or Mental Impairment

In 2018, Michael S. Jones visited his wife while she lay in the hospital incapacitated.\textsuperscript{184} As she was unable to consent, Jones decided at various moments that he could touch his wife’s genitals.\textsuperscript{185} Nurses reported these instances which resulted in Jones charged with first-degree sexual abuse against his wife.\textsuperscript{186} A similar charge to that above is not possible in Idaho,\textsuperscript{187} Iowa,\textsuperscript{188} Kentucky,\textsuperscript{189} Michigan,\textsuperscript{190} Rhode Island,\textsuperscript{191} or Wyoming\textsuperscript{192} if the spouse is disabled due to mental conditions.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{180} \textit{See} \textit{CAL. PENAL CODE} §§ 261-262 (West 2021).
  \item \textsuperscript{181} Few states fall under this category. Some of these states also still create loopholes within specific statutes. \textit{See} \textit{D.C. CODE} § 22-3019 (2021); \textit{GA. CODE ANN.} §§ 16-6-1 to -2 (2020); \textit{N.H. REV. STAT. ANN.} § 632-A:5 (2021); \textit{N.C. GEN. STAT.} § 14-27.34 (2021).
  \item \textsuperscript{182} \textit{See} \textit{ARIZ. REV. STAT. ANN.} §§ 13-1407 (2021); \textit{ARK. CODE ANN.} §§ 5-14-124 to -127 (2021); \textit{COLO. REV. STAT.} §§ 18-3-402, -405.5 (2020); \textit{DEL. CODE ANN. tit. 11, § 770 (2021)}; \textit{HAW. REV. STAT.} §§ 707-731 to -733 (2021); \textit{IOWA CODE} § 709.4 (2020); \textit{KAN. STAT. ANN.} §§ 21-5504 to -5505 (2021); \textit{LA. STAT. ANN.} § 14:43.3 (2020); \textit{ME. STAT. tit. 17-A, §§ 253, 255-A, 260 (2021)}; \textit{MD. CODE ANN., CRIM. LAW} § 3-318 (West 2021); \textit{18 PA. CONS. STAT.} § 3125 (2021); \textit{S.D. CODIFIED LAWS} §§ 22-22-7, -7.4 (2021); \textit{W. VA. CODE} §§ 61-8B-1, -7 (2021).
  \item \textsuperscript{183} \textit{W. VA. CODE} §§ 61-8B-1, -7 (2021).
  \item \textsuperscript{185} \textit{Id}.
  \item \textsuperscript{186} \textit{Id.}
  \item \textsuperscript{187} \textit{IDAHO CODE} §§ 18-6101, -6107 (2021).
  \item \textsuperscript{188} \textit{IOWA CODE} § 709.4 (2020).
  \item \textsuperscript{189} \textit{KY. REV. STAT. ANN.} § 510.035 (West 2021).
  \item \textsuperscript{190} \textit{MICH. COMP. LAWS} § 750.520a (2021).
  \item \textsuperscript{191} \textit{R.I. GEN. LAWS} §§ 11-37-1 to -2 (2020).
  \item \textsuperscript{192} \textit{WYO. STAT. ANN.} § 6-2-307 (2020).
\end{itemize}
\end{footnotesize}
or in Connecticut,\textsuperscript{193} Maryland,\textsuperscript{194} Mississippi,\textsuperscript{195} Ohio,\textsuperscript{196} Oklahoma,\textsuperscript{197} or West Virginia\textsuperscript{198} if the spouse is impaired.

\textit{a. Disability}

A person can subject their spouse with a disability that limits their ability to consent to sexual violence without legal consequences.\textsuperscript{199} These, and the other loopholes mentioned in this Section, are not cases of poor drafting but purposeful targeting of spousal relationships. The same rules do not apply to single women.\textsuperscript{200} For example, consider Amanda, who lives with a “borderline IQ.”\textsuperscript{201} A borderline IQ qualifies under the Iowa sexual abuse statute as a mental defect.\textsuperscript{202} During a visit from Carl Skaggs, Amanda’s former caseworker’s husband, Skaggs “inserted his penis into” Amanda while she lay next to him.\textsuperscript{203} A doctor asked Amanda if she had told Skaggs “no,” which Amanda did not, thus presenting complicated consent issues.\textsuperscript{204} The court found that due to Amanda’s “limited intellectual abilities,” she was unable to consent to the encounter.\textsuperscript{205} Under Iowa law, the court could not have contemplated the consent issues if Amanda and Skaggs were married. Under these statutes, married women are not allowed to explain whether they told their rapist “yes” or “no.”\textsuperscript{206} They are not even able to explain whether they had the ability to say no. When involving spouses who are cohabitating, the statute assumes implicit consent.\textsuperscript{207}

\textit{b. Impairment}

Various states effectively allow spousal sexual violence when one spouse is under some type of mental or physical impairment.\textsuperscript{208} Ohio’s rape statute allows for

\begin{itemize}
\item \textsuperscript{193} CONN. GEN. STAT. §§ 53a-67, -70b (2021).
\item \textsuperscript{194} MD. CODE ANN., CRIM. LAW §§ 3-304, -307, -318 (West 2021).
\item \textsuperscript{195} MISS. CODE ANN. §§ 97-3-95, -99 (West 2021).
\item \textsuperscript{196} OHIO REV. CODE ANN. § 2907.02 (West 2021).
\item \textsuperscript{197} OKLA. STAT. ANN. tit. 21, § 1111 (2021).
\item \textsuperscript{198} W. VA. CODE §§ 61-8B-1, -8 (2021).
\item \textsuperscript{200} See State v. Skaggs, No. 00-1904, 2002 WL 31015241 (Iowa Ct. App. Sept. 11, 2002).
\item \textsuperscript{201} Id. at *1.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} See IOWA CODE § 709.4 (2020).
\item \textsuperscript{207} See id.
\item \textsuperscript{208} See IDAHO CODE § 18-6101 (2021); OHIO REV. CODE ANN. § 2907.02 (West 2021); MICH. COMP. LAWS § 750.520 (2021); MISS. CODE ANN. § 97-3-95 (West 2021); OKLA. STAT. ANN. tit. 21, § 1111 (West 2021).
\end{itemize}
an egregious spousal exemption to remain.\textsuperscript{209} Under the Ohio statute, rape of a married and cohabitating spouse is only considered criminal if compelled by force or the threat of force.\textsuperscript{210} Ohio’s law, therefore, would permit spousal rape if the victim is drugged—even by the offending spouse—or in another state of impairment caused by a mental or physical condition.\textsuperscript{211} Lawmakers have attempted to remove this loophole; however, each bill has faced opposition.\textsuperscript{212}

Ohio courts have not had to rule on appeal regarding this statute, but they frequently address the issue regarding single women.\textsuperscript{213} In these cases, the court presents their conscious awareness of the spousal exemption and distinguishes whether the victim was single or married to their perpetrator.\textsuperscript{214} For example, during a night out, E.C. drank “too much,” so her friends called an Uber.\textsuperscript{215} E.C. woke up “bent over her bed” as her Uber driver “anally penetrat[ed] her.”\textsuperscript{216} The defendant claimed that E.C. asked him to come into her house, and he believed the invitation implied consent.\textsuperscript{217} The court was not convinced and explained that E.C. could not give consent because of her substantial impairment.\textsuperscript{218} In four different parts of the opinion, the court mentioned that the parties were not married, which would have changed its analysis.\textsuperscript{219} Similarly, in \textit{Ohio v. Allen}, the court explained that one of the pertinent facts to be proven during trial was that the appellant and victim were not

\begin{itemize}
\item \textsuperscript{209} OHIO REV. CODE ANN. § 2907.02 (West 2021).
\item \textsuperscript{210} A court in Ohio challenged the defense of spousal rape when force is used, but the state has not applied similar reasoning to other loopholes. State v. Rittenhour, 678 N.E.2d 293, 295 (Ohio Ct. App. 1996) (“[A] marriage license would give a spouse free rein to assault and sexually abuse their mate to any degree without fear of prosecution because of some impenetrable shield of marital sexual privacy. Meanwhile, the victim spouse would be stripped of his or her right to personal safety and bodily integrity.”).
\item \textsuperscript{211} OHIO REV. CODE ANN. § 2907.02 (West 2021).
\item \textsuperscript{214} See State v. Franklin, No. 29071, 2019 WL 1813045, at *1 (Ohio Ct. App. Apr. 24, 2019) (making the distinction between married and unmarried women under the Ohio rape statutes).
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id. at *1, *6.
\item \textsuperscript{218} Id. at *3–4.
\item \textsuperscript{219} Id. at *2–4, *8.
\end{itemize}
married.\textsuperscript{220} Both cases implied that the marital status of the parties may have caused a different result.

3. Different Treatment

Reporting barriers are also present within state statutes. South Carolina places a strict statute of limitations on prosecuting sexual violence between spouses: an abused spouse must report a case within thirty days of the incident.\textsuperscript{221} After thirty days, the spouse’s access to justice is null. Spousal rape is also punished to a lesser extent than the rape of the unmarried. For example, courts in Virginia can place any person who is convicted of sexual assault against their spouse and is a first-time offender on a conditional probation.\textsuperscript{222} The spouse must then attend a specified number of court-appointed therapy meetings.\textsuperscript{223} The complaining spouse and the Commonwealth must consent to the conditional probation.\textsuperscript{224} Once the spouse completes the court-appointed therapy, the court may dismiss the charges if it finds dismissal “will promote maintenance of the family.”\textsuperscript{225}

The spousal exemptions that remain in state statutes reinforce both the modern and historical justifications for spousal exemptions. The existence of statutes that permit sexual violence through supervisory privilege, age, and impairment supports the theory that states still adhere to implied and irrevocable consent. For example, Virginia’s lesser punishments for spousal rape support an insistence on marital reconciliation.\textsuperscript{226} Similarly, statutes that require a certain type of force to constitute sexual violence support the notion that spousal rape cases are difficult to prove. Moreover, a narrow statute of limitations relates to the theory that women are vindictive actors, only reporting when it is beneficial. These theories are also present in current repeal efforts, with various members of the Kansas Legislature citing them in their opposition.\textsuperscript{227}

\textsuperscript{220} State v. Allen, No. OT-18-001, 2018 WL 4524000, at *1 (Ohio Ct. App. Sept. 21, 2018) (finding perpetrator and victim drank together, then the perpetrator “digitally penetrated” her, taped it, and released the video on social media).

\textsuperscript{221} S.C. CODE ANN. §§ 16-3-615, -658 (2021).

\textsuperscript{222} VA. CODE ANN. § 18.2-61 (2021); see also id. § 19.2-218.1.

\textsuperscript{223} Id. § 19.2-218.1.


\textsuperscript{225} VA. CODE ANN. § 19.2-218.1 (2021). The only case to reach the Virginia appellate court regarding court-appointed therapy for spousal rape is Wilson v. Commonwealth. In Wilson, the defendant’s wife refused to have sex with him. He “stuck his finger in her anus,” and threatened to kill her. He then forced her to perform oral sex. Ultimately, the court did not give its required consent to therapy and Wilson did not receive the lesser penalty. Brief for the Commonwealth at 3–4, Wilson, 711 S.E.2d 251 (No. 0728-10-1).

\textsuperscript{226} VA. CODE ANN. § 18.2-61 (2021); see also id. § 19.2-218.1.

\textsuperscript{227} See infra notes 274–276.
B. Repeal in the Wake of Increased Awareness About Sexual Violence

While some states are reluctant to repeal spousal exemptions, there is evidence that public opinion is impacting legislation. The states mentioned below have devoted attention to remedying their legislatures’ failed attempts to repeal spousal exemptions from the 1980s and 1990s. Section III.B chronicles the repeal of spousal exemptions in Alabama, Alaska, Connecticut, Minnesota, and New Hampshire and the attempted repeals in Idaho, Kansas, Maryland, Michigan, and Ohio. Section III.B also presents the #MeToo movement’s influence on the previously mentioned state attempts to repeal spousal exemptions.

1. Enacted Legislation

In Alabama, before 2019, if the perpetrator and victim were married, the perpetrator could not violate the state’s sexual contact and deviate sexual intercourse statutes by assaulting their spouse.228 During the 2019 legislative cycle, sponsors State Representative Christopher England and State Senator Vivian Figures successfully proposed legislation to remove the “not married to each other” language from the Alabama statutes.229 The removal of the spousal exemption clause now allows for the conviction of spouses for sexual misconduct, sexual abuse in the first degree, and sexual abuse in the second degree.230 The Alabama Coalition Against Rape was highly influential in helping the spousal exemption’s repeal.231

Similarly, Justin Schneider’s case highlighted Alaska’s sexual assault crises.232 Schneider grabbed a woman, strangled her, and then masturbated on her.

228. ALA. CODE § 13A-6-60(2) (2018) (defining deviate sexual intercourse as “[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another”); id. § 13A-6-60(3) (sexual contact); id. §§ 13A-6-65 to -67. Even though an Alabama court held that the spousal rape privilege was unconstitutional, the legislature worked around this ruling by allowing a spousal exemption in the state’s other sexual assault statutes. Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986) (“[W]e now hold that the marital exemption for rape also violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.”).

229. ALA. CODE §§ 13A-5-6, -6-60 to -65, -6-65.1, -6-66 to -68, -6-70 to -71, -6-81 to -82, -6-122, -6-241, -6-243, -11-9, -11-32.1, -12-120 to -121, -12-190, -12-192, 15-3-3, -20A-5, -20A-44, 23-101 to -102 (2018), amended by S. 320, 2019 Leg., Reg. Sess. (Al. 2019).


unconscious body.\textsuperscript{233} He did not serve any jail time because his actions did not fit within Alaska’s definition of sexual assault.\textsuperscript{234} The Schneider case influenced Alaskan lawmakers to overhaul the state’s sexual violence statutes,\textsuperscript{235} resulting in a repeal of the state’s spousal rape defense.\textsuperscript{236} Two signature bills attempted to repeal the previous statute, the first being Alaska House Bill 33.\textsuperscript{237} Sponsored by State Representative Matt Claman, the bill removed a defense that allowed “a perpetrator of sexual assault to use marriage as a defense if the person engages in sexual activity with their spouse when they know their spouse is mentally incapable, incapacitated, or unaware that the sexual act is being committed.”\textsuperscript{238} However, the standalone Alaska House Bill 33 did not pass; its proposal left the committee dissatisfied with the House’s comprehensive crime bill, Alaska House Bill 49.

Initially, under Alaska House Bill 49 (touted to improve Alaska’s laws and make the state’s communities safer), the spousal rape exemption would remain.\textsuperscript{239} However, after the introduction of Alaska House Bill 33, amendments to Alaska House Bill 49 were introduced to address spousal assault in several ways: (1) adding the spousal defense to sexual assault in the fourth degree;\textsuperscript{240} (2) repealing portions


\textsuperscript{233.} Baird, supra note 232.

\textsuperscript{234.} Id.

\textsuperscript{235.} See Brooks, Alaska Governor Vows to Fix ‘Loophole’ in Sex Crime Laws, supra note 232; Brooks, To Fight Crime, Democratic Lawmakers Seek to Close Loopholes in State Law, supra note 232.

\textsuperscript{236.} ALASKA STAT. § 11.41.432 (2020).


\textsuperscript{239.} An Act Relating to Criminal Law and Procedure; Relating to Controlled Substances; Relating to Probation; Relating to Sentencing; Relating to Reports of Involuntary Commitment; Amending Rule 6, Alaska Rules of Criminal Procedure; and Providing for an Effective Date, H.R. 49, 31st Leg., 1st Sess. (Alaska 2019) (as amended on Feb. 20, 2019).

\textsuperscript{240.} An Act Relating to Criminal Law and Procedure; Establishing the Crime of Possession of Motor Vehicle Theft Tools; Relating to Electronic Monitoring; Relating to Controlled Substances; Relating to Probation; Relating to Sentencing; Relating to Registration of Sex Offenders; Relating to Operating under the Influence; Relating to Refusal to Submit to a Chemical Test’ Relating to the Duties of the Commissioner of Corrections; Relating to the Alaska Criminal Justice Commission; Relating to the Duties of the Attorney General and the Department of Law; Relating to Testing of Sexual Assault Examination Kits; Relating to Public Disclosure of Information Relating to Certain Minors; Amending Rule 6(R)(6), Alaska Rules of Criminal Procedure; and Providing For an Effective Date, H.R. 49, 31st Leg., 1st Sess. (Alaska 2019) (as amended on Apr. 30, 2019).
of the spousal defense, allowing its use for perpetrators in a supervisory role and sexual assault in the fourth degree;\textsuperscript{241} and (3) repealing the spousal defense.\textsuperscript{242}

After the various amendments stated above, the house voted down the spousal exemption repeal before sending the bill to the state senate.\textsuperscript{243} State Representative Sara Rasmussen condemned the House for voting the repeal amendment down stating, “[O]ur state consistently ranks among the highest sexual abuse rates nationally, and many of those cases are domestic violence cases between spouses. I am at a loss as to why some members of the Majority continue to downplay this issue and skirt the need to solve this problem.”\textsuperscript{244} Representative Rasmussen also told a familiar story during a press conference after the house voted the amendment down.\textsuperscript{245} In the story Representative Rasmussen recounted, an Alaskan woman’s husband sexually assaulted her after her medication left her unconscious.\textsuperscript{246} Due to the spousal defense, the husband was not charged.\textsuperscript{247} Once the bill reached the state senate, senators supported the complete repeal of the spousal defense.
amendment, and after a special session, the Governor signed Alaska House Bill 49 into law.

Likewise, Connecticut partially repealed the state’s spousal exemptions in 2019. Before the limited repeal, any rape statute that contained the words “sexual intercourse” or “sexual contact” contained a spousal exemption. Additionally, the spousal rape statute required physical force or force through the use of a “dangerous instrument.” Connecticut House Bill 7396 removed the spousal exemption from the statute’s definitions and repealed the specific spousal rape statute. However, a spousal exemption remains. The state continues to allow marriage as an affirmative defense to portions of the rape statute. Further, the exemptions that remain cover all cohabitating relationships, not only couples who are legally married.

Before Minnesota repealed its voluntary relationship defense, one could legally sexually assault one’s spouse so long as the spouse was mentally or physically incapacitated. Jenny Teeson, who herself is a survivor of spousal rape, spearheaded the movement to repeal Minnesota’s archaic law. In Teeson’s case, her husband recorded their consensual intimate moments as well as his abuse. The videos included a recording where he “forcibly penetrat[ed] her with an


249. Press Release, Office of Governor Mike Dunleavy, Governor Dunleavy Signs Crime-Fighting Legislation into Law (July 8, 2019), https://gov.alaska.gov/newsroom/2019/07/08/governor-dunleavy-signs-crime-fighting-legislation-into-law/ [https://perma.cc/8PXD-EZDA] (“Repeals marriage as a defense to sexual assault except in cases where there is consent and the conduct is illegal due to the nature of the relationship but-for the marriage (probation officer/probationer, peace officer/person in custody, DJJ officer/person 18 or 19 an [sic] under the jurisdiction of the Division of Juvenile Justice.”).

250. CONN. GEN. STAT. § 53a-65 (2018) (defining “sexual intercourse” as “vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex, and its meaning is limited to persons not married to each other” and “sexual contact” as “any contact with the intimate parts of a person not married to the actor”).

251. Id. § 53a-70b (“No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.”).


254. Id.

255. MINN. STAT. § 609.349 (2021).


257. Bierschbach, supra note 256.
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object as she lay unconscious next to their four-year-old son. Teeson believes her husband drugged her to commit the violation and soon after reported her husband’s abuse. Then, she found out that the actions that her husband took were not technically sexual assault within the statutory definition under Minnesota law. After Teeson became aware of Minnesota’s spousal defense, she spoke with the Minnesota Legislature. Minnesota lawmakers were unaware of the exemption and passed a unanimous bill repealing the exemption shortly after Teeson brought it to their attention.

In 2020, the New Hampshire legislature repealed most of the state’s spousal exemptions through New Hampshire House Bill 705. Previously, the state’s statute contained loopholes regarding sexual assault against spouses with disabilities that made them “incapable of freely arriving at an independent choice as to whether or not to engage in sexual conduct.” Additionally, New Hampshire House Bill 705 removed exemptions regarding spousal sexual violence against minors.

2. Proposed Legislation

Currently, under Idaho law, there are six spousal exemptions in the state’s spousal rape statute. In 2021, Idaho State Senator Wintrow introduced Idaho Senate Bill 1089 which fully repeals the Idaho statute permitting spousal exemptions. The bill unanimously passed the Idaho state senate and has crossed over to the house to be read in that chamber.

Additionally, Kansas sexual battery law contains “who is not the spouse” language, exempting spouses from the definition of a victim of sexual battery. In an effort to repeal the current statute, State Representative Brett Parker introduced Kansas House Bill 2079 after “hearing concerns from a representative of the

259. Id.
260. Id.
261. See id.
262. Id.
263. Id.
264. Id.
Metropolitan Organization to Counter Sexual Assault. No one directly opposed the bill, but state representatives voiced several concerns that mirror the justifications discussed in Part I. State Representative Emil Berquist voiced concern about “a spouse who regretted experimentation with ‘abnormal and abhorrent’ sexual acts” who might then accuse their spouse of rape. State Representative Kellie Warren worried about prosecuting spouses who were “in the mood for sex while the partner wasn’t on the same page.” Additionally, State Representative Mark Samsel wondered if spouses would use this statute as a way to punish the other in a future unrelated marital controversy. There was no documented opposition to the bill, but it did not move forward during the 2019 legislative term because it was “deemed not important enough.” In 2020, lawmakers again tried to bring this issue to the forefront. Representative Fred Patton proposed a bill similar to Kansas House Bill 2079, Kansas House Bill 2467, which does not have any documented opposition. Kansas House Bill 2467 did not advance from the Kansas Senate Judiciary Committee.

In 2019, the Maryland House of Delegates proposed to eliminate the spousal defense for sexual offenses. The bill did not leave the Maryland House Judiciary Committee. This, in part, was due to the opposition wondering whether “‘smacking the other’s behind’ during an argument” would be considered sexual assault. Another lawmaker asked, “If your religion believes if you’re married, two are as one

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275. Id. Berquist’s commentary is an example of evidentiary issues.

276. Id. Warren’s commentary is an example of implicit consent.

277. Id. Samsel’s commentary is an example of evidentiary issues.


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body . . . [.] Can you get a religious exemption?" 283 In 2020, Maryland lawmakers again proposed a bill, Maryland House Bill 590, to eliminate the state’s spousal defense. 284 Advocates explained the need for the bill, citing a familiar circumstance where a husband repeatedly raped his wife while she was unconscious. 285 However, lawmakers had misgivings. Opposition came from State Senator Robert Cassilly, who questioned the necessity of repealing the spousal exemption given the availability of other legal protections for spouses, stating, “If you don’t want to be touched, put him out of the house with a protective order.” 286 In 2021, lawmakers have continued to evaluate legislation to repeal the state’s spousal exemptions. 287

Lawmakers in Michigan proposed a change to their spousal rape statutes in late 2019. 288 Currently, a spouse is not liable for spousal sexual violence “solely because” their spouse is “mentally incapable, or mentally incapacitated” during sexual acts. 289 The law then permits spouses to sexually abuse their partners while they are unable to consent. Michigan House Bill 4942 proposes to eliminate the mental incapacitation loophole. 280 The inspiration for the repeal began when a constituent messaged State Representative Pohutsky about the loophole on Twitter. 291 A survivor of intimate partner rape herself, State Representative Pohutsky was very troubled when learning that Michigan law allowed for this type of abuse. 292 She plans to eliminate the mentally incapable language at a later date

283. Id.
286. Id.
289. MICH. COMP. LAWS § 750.520(2021); see also id. § 750.520a(j)–(k) (“‘Mentally incapable’ means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct. ‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.”).
290. H.R. 4942, 100th Leg., Reg. Sess. (Mich. 2019); Pohutsky Fights to Close Marital Rape Loophole, MICH. HOUSE DEMOCRATS (Sept. 10, 2019), https://housedems.com/pohutsky-fights-to-close-marital-rape-loophole/ [https://perma.cc/TDEW-4FWV] (“A law like this only empowers those who view their spouses as property, preventing justice for Michiganders who have already experienced unspeakable trauma. It’s time for us as a state to make it unequivocally clear that rape is rape in all circumstances.”).
292. Id.
because she believes that the statutory definition of mentally “incapable” and implications of a repeal are less clear. 293 State Representative Pohutsky has found bipartisan support and believes that this repeal is a crucial step forward toward justice for survivors of sexual assault. 294 The Michigan Legislature has not moved forward with the bill. 295

Similarly, Ohio lawmakers again tried to repeal the state’s spousal rape loophole. 296 Ohio’s governor and the current and former attorneys general pushed for an elimination of the statute of limitations in the state’s rape statutes. 297 Lawmakers attached a spousal rape repeal to the legislation. 298 The Ohio Prosecuting Attorneys Association, a previously influential opponent to the repeal, even stated that repeal was feasible. 299 However, the bills did not advance through the Ohio Senate Judiciary Committee or the Ohio House Criminal Justice Committee. 300

3. Related Legislation

There are other contentious legislative issues involving spousal rape that are not captured in rape statutes. Arizona State Senator Eddie Farnsworth has fought to allow a spousal rape exemption to a bill that would “terminate the parental rights” of rapists. 301 In 2020, he stated, “I don’t think someone who’s been married, and has children, should be able to cry rape.” 302 He has held this view for a while. In


294. Id.


297. Id.


299. Smyth & Karnowski, supra note 282.


302. Id.
2005, he told the executive director of the Arizona Sexual Assault Network that “[s]ome would argue there are conjugal rights that exist within a marriage.”

A similar bill was before the North Dakota legislature. State Representative Kim Koppelman proposed an amendment to the bill which would prevent the nonrapist spouse from terminating the other’s parental rights. Echoing the marital privacy justification, State Representative Koppelman stated, “[C]ourts should not disrupt the family where two people for whatever reason have decided to remain married.” After an outcry, the legislature removed the amendment from the bill.

C. Influences to Repeal

Most lawmakers who have proposed legislative efforts to repeal spousal exemptions did not explicitly cite #MeToo as their reason for doing so. It appears that decision has to do with the #MeToo movement’s association with workplace harassment and not spousal sexual violence. But, when explaining why they favored a repeal of spousal exemptions, the lawmakers seemed influenced by an awareness of sexual violence in their states. This awareness is most likely visible due to the #MeToo movement’s impact.

For example, in Michigan, State Representative Laurie Pohutsky stated that “[t]here’s been this effort over the last couple of years to really start addressing the issue of sexual assault and rape.” Similarly, in Ohio, State Senator Nickie Antonio said, “We believe that now, more than ever, the public is on the side of removing the artificial line in the sand that prevents a survivor from coming forward.” These statements suggest that the #MeToo movement and its broader implications of placing sexual violence at the forefront of our public discourse may be making an effect.

Advocates, on the other hand, have cited the #MeToo movement as a way for people to understand the need for repeal. In Maryland, the legal director at the Women’s Law Center of Maryland, Laure Ruth, stated that the movement “has

303. Id.
306. Id.
308. Tankersley, supra note 293.
309. Hancock, supra note 296. Although, a different state representative stated a few months earlier that “the #MeToo movement has more of a chilling effect.” Mattie Quinn, Marital Rape Isn’t Necessarily a Crime in 12 States, GOVERNING (Apr. 10, 2019), https://www.governing.com/topics/public-justice-safety/gov-marital-rape-states-ohio-minnesota.html [https://perma.cc/29V6-EZZL].
helped educate people about what is and isn’t acceptable in terms of sexual interactions.”310 In Kansas, the program director at the YWCA Center for Safety and Empowerment, Michelle McCormick, has stated that the country has “come to grips . . . with how much trauma and abuse occurs due to the lack of understanding or misguided beliefs about consent.”311 Thus, the comments from both lawmakers and advocates indicate that awareness of these issues can influence a repeal of spousal exemptions and protect spouses against the current state-sanctioned abuse.

Awareness regarding spousal rape has proven to work.312 Once Minnesota lawmakers became aware of the state’s voluntary relationship exemption, there was a unanimous repeal.313 However, awareness is not enough. Arguably, the #MeToo movement has hit workplaces the hardest, and yet studies have shown that there have not been many tangible differences put in place at these institutions.314 Many of the men shamed out of lucrative positions are coming back into the public eye.315 Furthermore, within the first year of #MeToo, federal and state legislatures only passed twenty-three more bills targeting sexual assault than they did the previous year.316 Therefore, awareness of the issue is only the first step in what needs to be a multipronged solution.

310. Jeff Barnes, Maryland Lawmakers Look to Repeal State’s ‘Archaic’ Sex Laws, AP (Jan. 23, 2020), https://apnews.com/93e855ac3d1ecfb904a1020a7e7795ee [https://perma.cc/3G3M-73JM] (stating that “[p]eople know what consent is now, or should know what consent is now”).
312. See Zraick, supra note 258.
313. Id.
314. The study found that thirty-one percent of respondents believed that nothing has changed in their workplace. Men seem to think that the slight changes made to mostly sexual harassment policies have helped more than women do, with forty-nine percent of men saying that “men support women more because of increased awareness” while fifty-three percent of women say that they do not feel more respected. HAVE HER BACK, THE #METOO EFFECT: DO WOMEN AND MEN THINK GENDER EQUITY IS ADVANCING IN THEIR WORKPLACE? (2019), https://haveherback.com/static/downloads/Have-Her-Back-Consulting_MeToo-Survey.pdf [https://perma.cc/JLC3-4MFG]; Mary Beth Ferrante, Two Years After #MeToo Started, Report Finds Companies Are Not Taking Enough Action, FORBES (Nov. 13, 2019, 2:00 PM), https://www.forbes.com/sites/marybethferrante/2019/11/13/two-years-after-metoo-started-report-finds-companies-are-not-taking-enough-action/#7c228275981 [https://perma.cc/MD3H-VNPL]. Another survey found that many companies have yet to institute policies surrounding sexual harassment. And those that do are often “ineffective, and even archaic.” Olivia Balsamo, The #MeToo Movement Is Changing the Corporate World: Survey, YAHOO! FIN. (Nov. 21, 2019), https://finance.yahoo.com/news/the-me-too-movement-is-changing-the-corporate-world-says-sap-exec-222632466.html [https://perma.cc/FYH4-S2H3].
316. Cara Kelly & Aaron Hegarty, #MeToo Was a Culture Shock. But Changing Laws Will Take More than a Year, USA TODAY (Oct. 5, 2018, 12:28 PM), https://www.usatoday.com/story/news/investigations/2018/10/04/me-too-me-too-sexual-assault-survivors-rights-bill/1074976002/ [https://perma.cc/9G2B-372A] (examining the bills passed within a year from Alyssa Milano’s tweet and finding that between both the Federal Legislature and state legislatures, 261 laws were passed addressing sexual violence while in the year before, the federal legislature and state legislatures only passed 238 laws; Congress did not pass any laws related to workplace sexual harassment, a cornerstone of the recent #MeToo movement).
IV. ELIMINATING THE ALLOWANCE OF SPOUSAL SEXUAL VIOLENCE

As Christina Kennedy and Deena Hausner explain in *My Husband Rapes #MeToo*, lawmakers should design laws “to offer the highest level of support and protections to all survivors of sexual violence.” It is time that lawmakers fully repeal the various legislative exemptions stated in Part III. As the country elects more women to federal and state legislatures and as our social consciousness about consent and sexual violence grows, I am hopeful that a full repeal is within reach.

Repeal of spousal exemptions gives victims a remedy for the abuse that they suffer if they desire to pursue a legal solution. For example, after repeal in Minnesota, the Minnesota Sentencing Guidelines Commission concluded that repeal would result in an additional seven convictions annually.

Spouses will not receive a legal remedy, however, if legislatures continue to carve out loopholes under the guise of repeal. These carve-outs are evident in Part II and, as shown in Part III, continue to this day. These small carve-outs hinder advancement toward full repeal. Studies show that “an increase in the number of prior, weaker changes to a state’s marital rape law significantly decreases a state’s likelihood of completely eliminating the spousal exemption . . . by about 60 percent.”

While repeal provides a legal remedy, a full repeal will not be enough to eradicate spousal sexual violence. After repeal, if the statutes are unenforced, then the lack of intervention essentially creates an extralegal spousal privilege. However, enforcement mechanisms as they currently stand present serious issues and need reform to create more meaningful change.

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317. Kennedy & Hausner, *supra* note 29, at 59 (“The continued disparity in the treatment of marital rape has important symbolic value, for it indicates that the law continues to view rape by an intimate partner as less serious and less of a crime than stranger rape.”).

318. Studies have shown that the “percent of legislators who are women . . . are not significant predictors” in the elimination of spousal rape laws. But, that is since men far outweigh the number of women, not that women are not “more committed than male legislators to advancing women’s interests.” McMahon-Howard et al., *supra* note 125, at 518.

319. The bill’s sponsor stated, “That is seven people who are not getting the justice they are due because of this law.” Tim Walker, *House OKs Bill to Eliminate ‘Marital Exception’ in Sexual Misconduct Cases, MINN. LEGISLATURE: MINN HOUSE REPRESENTATIVES* (Feb. 21, 2019, 5:20 PM), https://www.house.leg.state.mn.us/SessionDaily/Story/13642 [https://perma.cc/74UA-WN8S].

320. While it is abhorrent that spousal sexual violence against the disabled is permitted, a full repeal of statutes dealing with mental incapacity could have serious implications. Currently, spouses who may not be able to consent and do not want to consent do not have a path to justice. However, a full repeal could hurt spouses who may not be deemed able to consent and want to. See Sofia Barrett-Ibarria, *People with Down Syndrome Need Healthy Sex Lives, Too, VICE* (Jan. 12, 2018, 2:51 PM), https://www.vice.com/en_us/article/ne49mk/sex-dating-and-down-syndrome [https://perma.cc/M55B-4ME9]. Thus, when legislatures are faced with repeal of these disability spousal exemptions, they must be cognizant of the difficult circumstances surrounding consent. See Tankersley, *supra* note 293 (explaining that the Michigan legislature is grappling with these issues).

321. McMahon-Howard et al., *supra* note 125, at 520.

322. Awareness, repeal, and reform must be performed simultaneously for effective elimination of spousal rape. See Warfield, *supra* note 39 (“I just don’t think that you can policy your way, or legislate your way, into teaching somebody to treat another person as a human being.”); Spohn, *supra* note 124, at 129.
rape-reform movement are instructive on the shortcomings of relying on legislation only. Studies on the impact of the previous reform bills found little change regarding reporting.\textsuperscript{323} Survivors of sexual violence do not report because the consequences “outweigh the benefits.”\textsuperscript{324} After reporting their abuse to authorities, survivors fear social stigma, retaliation, and traumatic recounting.\textsuperscript{325} If more survivors reported their abuse, there may be a large decrease in the amount of violence that they receive. A study found that women who contacted police or applied for protective orders after their first rape were less likely to experience intimate partner rape again.\textsuperscript{326}

Sexual violence between intimate partners exacerbates reporting issues.\textsuperscript{327} In intimate partner relationships, seventy-seven percent of completed and attempted rapes and seventy-five percent of sexual assaults go unreported, compared to fifty-four percent of completed rapes, forty-four percent of attempted rapes, and thirty-four percent of sexual assaults by strangers.\textsuperscript{328} Survivors may also feel that reporting is a waste of time due to the limited number of rapes that are penalized. According to the Rape, Abuse & Incest National Network (RAINN), those who commit crimes of sexual violence are far less likely to be incarcerated than those who commit any other crime.\textsuperscript{329} RAINN reports that out of every 1,000 sexual assaults, only 5 cases will lead to a felony conviction, only 46 reports will lead to arrest, and only 230 assaults will be reported to police.\textsuperscript{330}

These issues stem from the various mechanisms that fail survivors. Dispatchers do not receive substantial training and downgrade rape when coding crimes.\textsuperscript{331} The police have a history of not helping survivors effectively.\textsuperscript{332}

\begin{itemize}
\item \textsuperscript{323} Spohn, supra note 124, at 129 (“One study showed that the reforms had no impact in five of six major urban jurisdictions studied.”). There was a slight increase in the number of arrests and convictions. Morgan Namian, \textit{Hypermasculine Police and Vulnerable Victims: The Detrimental Impact of Police Ideologies on the Rape Reporting Process}, 40 WOMEN’S RTS. L. REP. 80, 84 (2018).
\item \textsuperscript{324} Namian, supra note 323, at 82.
\item \textsuperscript{325} Jacson, supra note 53, at 193; see Namian, supra note 323, at 82; McBride, supra note 22, at 37.
\item \textsuperscript{326} The study found that if women contacted police, they were fifty-nine percent less likely to be raped again, and if they applied for a protective order, they were seventy percent less likely to be raped again. Lauren R. Taylor & Nicole Gaskin-Laniyan, \textit{Sexual Assault in Abusive Relationships}, 256 NAT’L INST. JUST. J. 12, 13 (2007).
\item \textsuperscript{327} \textit{See Bureau of Just. Statistics, U.S. DEPT OF JUST., NCJ 194530, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000}, at 3 (2002).
\item \textsuperscript{328} Id.
\item \textsuperscript{330} Id.
\item \textsuperscript{332} Namian, supra note 323, at 84 (“[P]olice officers play a crucial gatekeeping role in determining whether victims will have access to justice . . . .”). The Baltimore Police Department offers an illuminating example of how police treat survivors of sexual violence. In a 2016 report, the Department of Justice (DOJ) found that the Baltimore Police Department humiliated those who
Additionally, some prosecutors actively work against those who report, and the judiciary does not have the best record when it comes to upholding the rule of law against offenders. Moreover, societal attitudes toward sex in marriage influence juries to be skeptical of those who bring their cases to trial.

As many feminist activists and scholars note, however, there is a danger in relying on the criminal justice system to eliminate sexual violence. This reluctance is rooted in the reality that the criminal justice system focuses “nearly exclusively on punishing criminals and virtually ignores forgiveness, victim healing, elimination of socio-economic predicates of crime, and victim social services.” Therefore, repeal and reform must be done for those who wish to pursue a legal remedy, but community, noncarceral approaches must also be pursued to eradicate spousal sexual violence.

**CONCLUSION**

The #MeToo movement has been transformational. Topics thought to be offensive are now within our national conversation; however, this conversation must help spouses. As this Note demonstrates, spousal exemptions still exist in the
United States. To combat this, state legislatures must repeal the current loopholes, societal beliefs about marriage and consent must change, and those tasked with enforcing the laws must be sympathetic to survivors’ needs. And if those changes are not implemented, those who are married may continue to tweet “#MeToo.”

In the Appendix, table 1 provides the current state statutes regarding spousal sexual violence. The table is separated by the categories explained in Part III. For example, the information under “Supervisory Role” may define what roles perpetrators may have where spousal sexual contact is allowed. Additionally, the table provides the year of the most recent reform of the state’s spousal sexual violence laws. For example, as of 2019, Alabama’s rape statutes no longer contain a spousal exemption.
### APPENDIX A

Table 1: Spousal Sexual Violence Laws in 2021

*Note: In Progress labeled as “IP.”

<table>
<thead>
<tr>
<th>Supervisory role</th>
<th>Statutory rape</th>
<th>Recent reform</th>
<th>Different spousal statute</th>
<th>Impairment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Defense that the “victim was the legal spouse of the defendant unless the defendant used or threatened force or fear of force to overcome the victim’s will to prevent the commission of the crime.”</td>
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<td></td>
<td>Defense if the offender is employed in a state correctional facility, or a state or parole officer and engages in sexual penetration with a person with reckless disregard that the person is in the custody of the offender.</td>
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<td></td>
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<tr>
<td>2019</td>
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<tr>
<td>Alabama</td>
<td></td>
<td>2019</td>
<td>Alaska</td>
<td></td>
</tr>
</tbody>
</table>

338. ALASKA STAT. § 11.41.425(a) (2020); see also id. § 11.41.432(d).

339. Id. § 11.41.445(a).
<table>
<thead>
<tr>
<th>Recent reform</th>
<th>Different spousal statute</th>
<th>Impairment</th>
<th>Supervisory role</th>
<th>Statutory rape</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>2005</td>
<td>Defense to a prosecution of sexual abuse and sexual conduct with a minor that the person was the spouse of the other person at the time of commission of the act. It is not a defense to a prosecution of sexual assault that the defendant was the spouse of the victim at the time of commission of the act.</td>
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<td></td>
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<td></td>
<td>Unlawful sexual conduct statute does not apply to &quot;[a]n officer who is married to or who is in a romantic or sexual relationship with the person at the time of the arrest or investigation.&quot;</td>
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<td>Defense to committing &quot;sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age when that minor is the &quot;spouse of the other person at the time of commission of the act.&quot;</td>
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</tbody>
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<thead>
<tr>
<th>State</th>
<th>Recent reform</th>
<th>Different spousal statute</th>
<th>Impairment</th>
<th>Supervisory role</th>
<th>Statutory rape</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>—</td>
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</table>

"[S]exual assault in the first degree if . . . the person engages in sexual intercourse or deviate sexual activity with a minor who is not the actor's spouse and the actor is . . . employed with the Division of Correction, the Division of Community Correction, the Department of Human Services, or any city or county jail or a juvenile detention facility . . . and the actor is supervising the minor while the minor is on probation or parole or for any other court-ordered reason." Similarly, a mandated reporter, an employee in the victim's school or school district, a temporary caretaker, a teacher, principal, athletic coach, or counselor in a public or private school in kindergarten through grade twelve and the actor "[e]ngages in sexual intercourse or deviate sexual activity with a person who is not the actor's spouse and the victim is . . . a student enrolled in the public or private school employing the actor; and [i]s in a position of trust or authority over the victim and uses his or her position of trust or authority over the victim to engage in sexual intercourse or deviate sexual activity."
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<th></th>
<th>Recent reform</th>
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<th>Impairment</th>
<th>Supervisory role</th>
<th>Statutory rape</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>—</td>
<td>Prohibits rape of a spouse under a number of circumstances including by force, intoxication, unconsciousness, and by threat. 347</td>
<td>—</td>
<td>—</td>
<td>&quot;Unlawful sexual intercourse is... accomplished with a person who is not the spouse of the perpetrator, if the person is a minor.&quot; 348</td>
</tr>
<tr>
<td>Colorado</td>
<td>—</td>
<td>&quot;Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense... unless such defense is specifically set forth in the applicable statutory section.&quot; 349</td>
<td>—</td>
<td>—</td>
<td>&quot;Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if... the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or... the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim.&quot; 350</td>
</tr>
</tbody>
</table>
| Connecticut | 2019 | — | "In any prosecution for an offense . . . based on the victim's being mentally incapacitated, physically helpless or impaired because of mental disability or disease, it shall be an affirmative defense that the actor, at the time such actor engaged in the conduct constituting the offense, did not know of the condition of the victim . . . [and] it shall be an affirmative defense that the defendant and the alleged victim were . . . living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship." | "[If] such person subjects another person to sexual contact . . . and [is] responsible for the general supervision of such other person's welfare, or . . . has supervisory or disciplinary authority over [someone who is in custody of law or detained in a hospital or other institution], . . . or such person is a psychotherapist and subjects another person to sexual contact," they can be guilty of sexual assault in the fourth degree. | "[A]ffirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship." for aggravated sexual assault of a minor when the "victim of such offense is under thirteen years of age, and (1) such person kidnapped or illegally restrained the victim, (2) such person stalked the victim, (3) such person used violence to commit such offense against the victim, (4) such person caused serious physical injury to or disfigurement of the victim, (5) there was more than one victim of such offense under thirteen years of age, (6) such person was not known to the victim, or (7) such person has previously been convicted of a violent sexual assault." |}

352. 14a § 53a-70e(1) (aggravated sexual assault—minor).
353. 14a § 53a-67 (b) (emphasis added).
354. 14a § 53a-70e(1) (aggravated sexual assault—minor).
<table>
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<tr>
<th>Supervisory role</th>
<th>Statutory rape</th>
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*Rape in the fourth degree when the person, with another person, and the victim, has not yet reached that, except that such intercourse shall not be unlawful if the victim and person are married at the time of such intercourse.*

<table>
<thead>
<tr>
<th>Statutory rape</th>
<th>Supervisory role</th>
<th>Impairment</th>
<th>Different spousal statute</th>
<th>Recent reform</th>
<th>Georgia</th>
</tr>
</thead>
</table>
| Statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse. | The improper sexual contact statute by an employee or agent does not apply to married individuals. | The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape. | The improper sexual contact statute by an employee or agent does not apply to married individuals. | | }
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<tr>
<th>Recent reform</th>
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<th>Supervisory role</th>
<th>Statutory rape</th>
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<tbody>
<tr>
<td>Hawaii</td>
<td>2016</td>
<td>—</td>
<td>&quot;[S]exual assault in the fourth degree if . . . [t]he person knowingly subjects another person, not married to the actor, to sexual contact by compulsion or causes another person, not married to the actor, to have sexual contact with the actor by compulsion.&quot;[^300]</td>
<td>&quot;[S]exual assault in the first if . . . [t]he person knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that: [t]he person is not less than five years older than the minor; and [t]he person is not legally married to the minor.&quot;[^300]</td>
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<th>State</th>
<th>Recent reform</th>
<th>Different spousal statute</th>
<th>Impairment</th>
<th>Supervisory role</th>
<th>Statutory rape</th>
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</table>
| Idaho   | IP*           | "No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in certain subsections of the Idaho Code." | "No person shall be convicted of rape for any act or acts with that person's spouse." | —               | "No person shall be convicted of rape for any act or acts with that person's spouse."
|         |               |                           |            |                  |               |
| Illinois| —             | —                         |            | Sexual misconduct statute does not apply to "any State employee or any community agency employee who is lawfully married to a person with a disability in custody of the Department of Human Services or receiving services from a community agency." | —             |

Note: IP* indicates a recent reform. 

Statutory rape: "No person shall be convicted of rape for any act or acts with that person's spouse." 

Impairment: "No person shall be convicted of rape for any act or acts with that person's spouse." 

Supervisory role: Sexual misconduct statute does not apply to "any State employee or any community agency employee who is lawfully married to a person with a disability in custody of the Department of Human Services or receiving services from a community agency."
**Statutory Rape**

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<th>Recent</th>
<th>Different Spousal Statute</th>
<th>Impairment</th>
<th>Supervisory Role</th>
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<td>Iowa</td>
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<td>Indiana</td>
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**Iowa Code § 709.4(1)(b)(1)** (emphasis added).

**Iowa Code § 709.4(1)(b)(5)(c)** (emphasis added).

**Iowa Code § 709.4(1)(b)(2)** (emphasis added).
<table>
<thead>
<tr>
<th>Recent reform</th>
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<th>Supervisory role</th>
<th>Statutory rape</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kansas</td>
<td>JP&lt;sup&gt;10&lt;/sup&gt;</td>
<td>&quot;Sexual battery is the touching of a victim who is not the spouse of the offender, who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another.&quot;&lt;sup&gt;373&lt;/sup&gt;</td>
<td>&quot;Unlawful sexual relations is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person who is not married to the offender if . . . if the offender is an employee or volunteer of the department of corrections, . . . a parole officer, . . . a law enforcement officer, an employee of a jail, . . . juvenile detention facility or sanctions house, . . . the Kansas department for aging and disability services or the Kansas department for children and families, . . . a worker, volunteer or other person in a position of authority in a family foster home licensed by the department of health and environment, . . . a teacher, or other person in a position of authority.&quot;&lt;sup&gt;374&lt;/sup&gt;</td>
<td>Marriage is a defense to sexual intercourse with a child who is younger than fourteen.&quot;&lt;sup&gt;375&lt;/sup&gt;</td>
</tr>
<tr>
<td>Recent reform</td>
<td>Different spousal statute</td>
<td>Impairment</td>
<td>Supervisory role</td>
<td>Statutory rape</td>
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<tr>
<td>Kentucky</td>
<td>&quot;A person who engages in sexual intercourse or deviate sexual intercourse with another person to whom the person is married, or subjects another person to whom the person is married to sexual contact, does not commit an offense under this chapter regardless of the person's age solely because the other person is less than sixteen . . . years old or an individual with an intellectual disability.&quot;</td>
<td>See &quot;Different Spousal Statue.&quot;</td>
<td>—</td>
<td>See &quot;Different Spousal Statute.&quot;</td>
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<tr>
<th>State</th>
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<th>Statutory rape</th>
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<tbody>
<tr>
<td>Louisiana</td>
<td>2015</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>&quot;Oral sexual battery is the intentional touching of the anus or genitals of the victim by the offender using the mouth or tongue of the offender, or the touching of the anus or genitals of the offender by the victim using the mouth or tongue of the victim, when . . . [t]he victim, who is not the spouse of the offender, is under the age of fifteen years and is at least three years younger than the offender.&quot;**</td>
</tr>
</tbody>
</table>

Id. tit. 17-A, § 253(1)(B)–(C) (emphasis added).

"[G]ross sexual assault if that person engages in a sexual act with another person and... [t]he other person, not the actor's spouse, is under official supervision as a probationer, a parolee, a sex offender on supervised release, a prisoner on supervised community confinement status or a juvenile on community reintegration status or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over the other person... [or] is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student." (emphasis added)

"[G]ross sexual assault if that person engages in a sexual act with another person and... [t]he other person, not the actor's spouse, has not in fact attained 14... [or] 12 years of age."
### Spousal Rape Exemptions

<table>
<thead>
<tr>
<th>Statutory rape</th>
<th>Supervisory role</th>
<th>Impairment</th>
<th>Recent reform</th>
<th>Different spousal statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>A person may not be prosecuted for a sexual act with another if the victim is fourteen and the person performing the sexual act is at least four years older than the victim if the victim is the person's legal spouse at the time of the offense.</td>
<td>A person in a position of authority may not engage in a sexual act or sexual contact with a minor who, at the time of the sexual act or sexual contact, is a student enrolled at a school where the person is employed unless the victim is the person's legal spouse at the time of the offense.</td>
<td>A person may not be prosecuted for engaging in sexual contact with another if the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a substantially cognitively impaired individual, a mentally incapacitated individual, or a physically helpless individual if the victim is the person's legal spouse at the time of the offense.</td>
<td>IP*</td>
<td>A person may not be prosecuted under certain statutes for a crime against a victim who was the person's legal spouse at the time of the alleged rape or sexual offense unless they are living apart or force was used.</td>
</tr>
</tbody>
</table>

Maryland

Massachusetts

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382. MD. CODE ANN., CRIM. LAW § 3-318(a)–(b) (West 2021) (emphasis added) (rape and sexual offense spousal defense).
383. Id. § 3-307(a)(2) (sexual offense third-degree); id. § 3-318(a).
384. Id. § 3-308(c)(1) (sexual offense fourth-degree); id. § 3-318(a).
385. Id. §§ 3-307(a)(3), 3-318(a).
<table>
<thead>
<tr>
<th>State</th>
<th>Reform</th>
<th>Different Spousal Statute</th>
<th>Impairment</th>
<th>Supervisory Role</th>
<th>Statutory Rape</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>IP*</td>
<td>&quot;A person may be charged and convicted . . . even through the victim is his or her legal spouse. However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16, mentally incompetent, or mentally incapacitated.&quot; 386</td>
<td>See &quot;Different Spousal Statute.&quot; 387</td>
<td>&quot;Criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and . . . [t]hat other person is at least 16 years old but less than 26 years of age and is receiving special education services, and either of the following applies: [t]he actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of that public school, nonpublic school, school district, or intermediate school district from which that other person receives the special education services. This subparagraph does not apply if both persons are lawfully married to each other at the time of the alleged violation.&quot; 388</td>
<td>See &quot;Different Spousal Statute.&quot; 389</td>
</tr>
</tbody>
</table>

386. MICH. COMP. LAWS § 750.520(1)(a)(i) (emphasis added) (criminal sexual conduct fourth-degree).

387. Id. § 750.520(1)(a)(ii).

388. Id. § 750.520(1)(a)(iii).

389. See "Different Spousal Statute."
SPOUSAL RAPE EXEMPTIONS

<table>
<thead>
<tr>
<th>State</th>
<th>Recent reform</th>
<th>Different spousal statute</th>
<th>Impairment</th>
<th>Supervisory role</th>
<th>Statutory rape</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>2019</td>
<td></td>
<td>Criminal sexual conduct if &quot;the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and . . . the sexual contact occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or the sexual contact occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private. Consent by the complainant is not a defense.&quot;*</td>
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<tr>
<td>Recent reform</td>
<td>Different spousal statute</td>
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<tr>
<td>Mississippi</td>
<td>—</td>
<td>&quot;A person is guilty of sexual battery if he or she engages in sexual penetration with an adult victim who is not the alleged victim's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim.&quot;³⁹⁵</td>
<td>&quot;A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.&quot;³⁹³</td>
<td>&quot;A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of fourteen (14) years or more months older than the child.&quot;³⁹⁴</td>
<td>&quot;A person is guilty of sexual battery if he or she engages in sexual penetration with a child at least fourteen (14) years of age, if the person is thirty-six (36) or more months older than the child.&quot;³⁹³</td>
</tr>
</tbody>
</table>
SPOUSAL RAPE EXEMPTIONS

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<tr>
<th>State</th>
<th>Year</th>
<th>Different Spousal Statute</th>
<th>Impairment</th>
<th>Supervisory Role</th>
<th>Statutory Rape</th>
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<tbody>
<tr>
<td>Missouri</td>
<td>2014</td>
<td>&quot;It shall be an affirmative defense to [certain] prosecutions [see &quot;Statutory Rape&quot;] . . . that the defendant was married to the victim at the time of the offense.&quot;</td>
<td>—</td>
<td>—</td>
<td>&quot;A person commits the offense of statutory rape in the first degree if he or she has sexual intercourse with another person who is less than fourteen years of age.&quot; &quot;A person commits the offense of statutory rape in the second degree if being twenty-one years of age or older, he or she has sexual intercourse with another person who is less than seventeen years of age.&quot; &quot;A person commits the offense of child molestation in the fourth degree if, being more than four years older than a child who is less than seventeen years of age, subjects the child to sexual contact.&quot;</td>
</tr>
</tbody>
</table>
Statutory rape

Recent reform

Different spousal statute

Impairment

Supervisory role

Statutory rape

Montana

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A victim is incapable of consent because the victim is, except for in marriage, "incarcerated in a ... correctional, detention, or treatment facility or is on probation, conditional release, or parole and the perpetrator is an employee ... or volunteer of the supervising authority ... [is] receiving services from a youth care facility ... and the perpetrator ... [is] providing treatment to the victim; and is an employee ... or volunteer of the youth care facility; [is] admitted to a mental health facility, ... a community-based facility or a residential facility ... and the perpetrator ... is providing treatment to the victim; and is an employee, ... or volunteer of a facility ... [is] a program participant ... in a private alternative adolescent residential or outdoor program, ... and the perpetrator is a person associated with the program; ... is a client receiving psychotherapy services and the perpetrator ... is providing or purporting to provide psychotherapy services ...; [is] a student of an elementary, middle, junior high, or high school, whether public or nonpublic, and the perpetrator is not a student of an elementary, middle, junior high, or high school and is an employee, contractor, or volunteer of any school who has ever had instructional, supervisory, disciplinary, or other authority over the student in a school setting."
<table>
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<tr>
<th>State</th>
<th>Recent reform</th>
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<tr>
<td>Nebraska</td>
<td>—</td>
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<td>Sexual abuse of an inmate or parolee deals with individuals employed by &quot;the Department of Correctional Services or by the Division of Parole Supervision, ... and any individual, other than an inmate's spouse, to whom the department has authorized or delegated control over an inmate or an inmate's activities, an individual employed by a city or county correctional or jail facility, including any individual working in central administration of the city or county correctional or jail facility, any individual working under contract with the city or county correctional or jail facility, and any individual, other than an inmate's spouse, to whom the city or county correctional or jail facility has authorized or delegated control over an inmate or an inmate's activities.&quot;</td>
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</tbody>
</table>
A person is guilty of statutory rape when such person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the element of engaging in a pattern of sexual assault.
<table>
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<tr>
<th>Recent reform</th>
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No actor shall be presumed to be incapable of committing a crime under [the sexual offenses] chapter because of age or impotency or marriage to the victim.  

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<td>New Mexico</td>
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<td>&quot;Criminal sexual penetration in the fourth degree consists of all criminal sexual</td>
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<td>penetration . . . perpetrated on a child thirteen to sixteen years of age when the</td>
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<td>perpetrator is at least eighteen years of age and is at least four years older</td>
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<td>than the child and not the spouse of that child, or perpetrated on a child</td>
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<td>thirteen to eighteen years of age when the perpetrator . . . is a licensed school</td>
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<td>employee, an unlicensed school employee, a school contract employee, a school</td>
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<td>health service provider or a school volunteer.&quot;</td>
<td>See &quot;Supervisory</td>
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<td>Role.&quot;</td>
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<td>Recent reform</td>
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<tr>
<td>New York</td>
<td>2010</td>
<td>&quot;In any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old, mentally disabled, a client or patient and the actor is a health care provider, detained or otherwise in custody of law enforcement... or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee, it shall be a defense that the defendant was married to the victim...&quot;</td>
<td>&quot;A person is deemed incapable of consent when he or she is... committed to the care and custody of a local correctional facility, ... and the actor is an employee, not married to the person, who knows or reasonably should know that such person is committed to the care and custody of such facility.&quot;</td>
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407. N.Y. Penal Law § 130.05(3)(b) (McKinney 2021) (defenses); see also id. § 130.05(3)(j) (lack of consent).
**SPOUSAL RAPE EXEMPTIONS**

<table>
<thead>
<tr>
<th>Supervisory role</th>
<th>Impairment</th>
<th>Different spousal statute</th>
<th>Recent reform</th>
<th>North Carolina</th>
<th>North Dakota</th>
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</thead>
</table>

"A person may be prosecuted..." if the act is committed against a spouse, regardless of whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense.

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<tr>
<th>State</th>
<th>Reform</th>
<th>Different Spousal Statue</th>
<th>Impairment</th>
<th>Supervisory Role</th>
<th>Statutory Rape</th>
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</thead>
<tbody>
<tr>
<td>Ohio</td>
<td>IP*</td>
<td>&quot;No person shall engage in sexual conduct with another, not the spouse of the offender, when...&quot;</td>
<td>&quot;No person shall engage in sexual conduct with another, not the spouse of the offender, when...&quot;</td>
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<td>&quot;No person shall engage in sexual conduct with another, not the spouse of the offender, when...&quot;</td>
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</tbody>
</table>


411. Id. § 2907.05(A)(1) (emphasis added) (gross sexual imposition).

412. Id. § 2907.02(A)(1)(a), (c) (emphasis added) (marriage or cohabitation not defenses to rape charges).

413. Id. § 2907.02(A)(1)(b) (emphasis added).

414. Id. § 2907.05(A)(4) (emphasis added).
**SPOUSAL RAPE EXEMPTIONS**

<table>
<thead>
<tr>
<th>Recent reform</th>
<th>Different spousal statute</th>
<th>Impairment</th>
<th>Supervisory role</th>
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<tbody>
<tr>
<td>Ohio</td>
<td>IP*</td>
<td><em>No person shall engage in sexual conduct with another, not the spouse of the offender, when...</em></td>
<td>patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes; the other person is confined in a detention facility, and the offender is an employee of that detention facility; the other person is a minor, the offender is a cleric, and the other person is a member of, or attends, the church or congregation served by the cleric; or the other person is a minor, the offender is a peace officer, and the offender is more than two years older than the other person.</td>
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<tr>
<td>Oklahoma</td>
<td>—</td>
<td>Rape is an act of sexual intercourse accomplished with a person &quot;who is not the spouse of the perpetrator . . .&quot; where the victim is under sixteen (16) years of age.</td>
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<td>Rape is an act of sexual intercourse accomplished with a person &quot;who is not the spouse of the perpetrator . . .&quot; where the victim is under the legal custody or supervision of a state agency, a federal agency, a county, a municipality or a political subdivision and engages in sexual intercourse with a state, federal, county, municipal or political subdivision employee or an employee of a contractor of the state, the federal government, a county, a municipality or a political subdivision that exercises authority over the victim . . .[;] the victim is at least sixteen (16) years of age and is less than twenty (20) years of age and is a student, or under the legal custody or supervision of any public or private elementary or secondary school, junior high or high school, or public vocational school, and engages in sexual intercourse with a person who is eighteen (18) years of age or older and is an employee of the same school system . . .[or] the victim is at least sixteen (16) years of age but less than eighteen (18) years of age and the perpetrator of the crime is a person responsible for the child's health, safety or welfare.</td>
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<td>Rape is an act of sexual intercourse accomplished with a person &quot;who is not the spouse of the perpetrator . . .&quot; where the victim is under sixteen (16) years of age.</td>
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## SPOUSAL RAPE EXEMPTIONS

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<tbody>
<tr>
<td>Oregon</td>
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<td>&quot;A person commits the crime of sexual misconduct if the person engages in sexual intercourse or oral or anal sexual intercourse with an unmarried person under 18 years of age.&quot;</td>
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<tr>
<td>Pennsylvania</td>
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<td>&quot;A person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if . . . the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other.&quot;</td>
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<td>Statutory rape</td>
<td>Supervisory role</td>
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<td><strong>Statutory rape</strong></td>
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<td>&quot;First degree sexual assault if he or she engages in sexual penetration with another person, and if . . . the victim is mentally incapacitated, mentally disabled, or physically helpless.&quot;</td>
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<td>Rhode Island</td>
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</table>
| South Carolina | —             | "A person cannot be guilty of criminal sexual conduct . . . if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree . . . . The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses." | "Criminal sexual conduct in the third degree if the actor engages in sexual battery with the victim and if [the] . . . actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish sexual battery." | "A person engages in sexual battery with a victim who is less than eleven years of age; or the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim." | "Criminal sexual conduct with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age; or the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent."  
"A person is guilty of criminal sexual conduct with a minor in the second degree if . . . the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." |
<table>
<thead>
<tr>
<th>Supervisory role</th>
<th>Statutory rape</th>
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<tr>
<td>&quot;Any psychotherapist who knowingly engages in an act of sexual penetration... with a person who is not his or her spouse and who is a patient who is emotionally dependent on the psychotherapist at the time that the act of sexual penetration is committed, commits a Class 4 felony.&quot;</td>
<td>&quot;Any person, sixteen years of age or older, who knowingly engages in sexual contact with another person, other than that person's spouse, if the other person is under the age of sixteen years is guilty of a Class 3 felony. If the victim is at least thirteen years of age and the actor is less than five years older than the victim, the actor is guilty of a Class 1 misdemeanor.&quot;</td>
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South Dakota

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<tr>
<th>Recent reform</th>
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South Dakota's statutory rape law (SD. Codified Laws § 22-22-29 (2021)) states that any person, sixteen years of age or older, who knowingly engages in sexual contact with another person, other than that person's spouse, if the other person is under the age of sixteen years, is guilty of a Class 3 felony. If the victim is at least thirteen years of age and the actor is less than five years older than the victim, the actor is guilty of a Class 1 misdemeanor. The recent reform of South Dakota's spousal statute (SD. Codified Laws § 22-22-7 (2021)) includes the scenario where a person, other than that person's spouse, lacks the capacity to consent due to impairment or a supervisory role.

In South Dakota, the supervisory role clause (SD. Codified Laws § 22-22-7.4 (2021)) indicates that any psychotherapist who knowingly engages in an act of sexual penetration... with a person who is not his or her spouse and who is a patient who is emotionally dependent on the psychotherapist at the time that the act of sexual penetration is committed, commits a Class 4 felony.
<table>
<thead>
<tr>
<th>Statutory rape</th>
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<th>Recent reform</th>
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<td>Tennessee</td>
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<td>Texas</td>
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*An employee of a public or private primary or secondary school commits an offense if the employee . . . engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works."[102] "It is an affirmative defense to prosecution under this section that . . . the actor was the spouse of the enrolled person at the time of the offense."[103] Affirmative defense if the person "causes the penetration of the anus or sexual organ of a child by any means; causes the penetration of the mouth of a child by the sexual organ of the actor; causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or causes the mouth of a child to contact the anus or sexual organ of another person, including the actor" if the actor was the spouse of the child at the time of the offense.[104]
<table>
<thead>
<tr>
<th>Statutory rape</th>
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<th>Impairment</th>
<th>Different spousal statute</th>
<th>Recent reform</th>
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</thead>
<tbody>
<tr>
<td>No person shall engage in a sexual act with a child who is under the age of 16, except when the persons are married to each other and the sexual act is consensual.</td>
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<tr>
<td>Utah</td>
<td>Vermont</td>
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435. **UTAH CODE ANN.** § 76-5-402(1)–(2) (West 2021) (emphasis added) (rape).
<table>
<thead>
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<td>2006 Virginia</td>
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In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of § 18.2-67.1(B)(2) may be suspended upon the defendant’s completion of counseling or therapy, if not already provided, or, if a latter consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds that such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

437. VA. CODE ANN. § 18.2-61(B)(2) (2021) (emphasis added) (rape); id. § 18.2-67.1(B)(2) (emphasis added) (forcible sodomy).
<table>
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<tr>
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<tbody>
<tr>
<td>Washington</td>
<td>2013</td>
<td>—</td>
<td>—</td>
<td>Rape in the second-degree when the person engages in sexual intercourse with another person and the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who: has supervisory authority over the victim; or is providing transportation, within the course of his or her employment, to the victim; or is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination; or is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator has supervisory authority over the victim; or is a frail elder or vulnerable adult who: has a significant relationship with the victim.</td>
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<tr>
<td>Washington</td>
<td>2013</td>
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<td>“Sexual abuse in the third degree when he subjects another person to sexual contact without the latter’s consent, when such lack of consent is due to the victim’s incapacity to consent by reason of being less than sixteen years old.”</td>
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</table>

440. Id. § 61-8B-8(a) (sexual abuse in the second degree).
441. Id. § 61-8B-7(a)(1)-(2) (sexual abuse in the first degree).
442. Id. § 61-8B-9(a) (sexual abuse in the third degree).
<table>
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<tr>
<td></td>
<td>A defendant shall not be presumed to be incapable of violating the sexual assault section because of marriage to the complainant.</td>
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<tr>
<td>Wyoming</td>
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<td>The fact that the actor and the victim are married to each other is not by itself a defense to certain violations except what is stated in the following cell.</td>
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<td>The actor knows or reasonably should know that the victim through a mental illness, mental deficiency or developmental disability is incapable of appraising the nature of the victim's conduct.</td>
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<td></td>
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<td>Being eighteen (18) years of age or older, the actor engages in sexual contact with a victim who is less than sixteen (16) years of age and the actor occupies a position of authority in relation to the victim.</td>
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<td>Being seventeen (17) years of age or older, the actor inflicts sexual intrusion on a victim who is thirteen (13) through fifteen (15) years of age, and the victim is at least four (4) years younger than the actor.</td>
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