



State of Maryland
Office of the Attorney General

January 28, 2022

TO: The Honorable William C. Smith, Jr., Chair, Judicial Proceedings
Committee

FROM: Carrie J. Williams, Assistant Attorney General

RE: Attorney General's Support for SB 33

The Attorney General urges the Judiciary Committee to report favorably on Senate Bill 33. Senate Bill 33 repeals Criminal Law Article, Section 3-318, which provides that, with exceptions, a person cannot be charged for sexually assaulting his or her legal spouse.

Under current law, a person can engage in non-consensual “sexual contact” with his or her spouse without fear of prosecution. Likewise, a person can have vaginal intercourse or engage in a “sexual act” with his or her spouse, even if the spouse is substantively cognitively impaired, mentally incapacitated, or physically helpless, and the State cannot prosecute that act.

Concerns that a repeal of the “marriage defense” could result in a husband being prosecuted for touching his wife without asking permission first are misplaced. The law in Maryland is clear that, in order for the State to prove a lack of consent when the victim is competent and conscious, “mere passivity on the victim’s part” is not enough. *Travis v. State*, 218 Md. App. 410, 424 (2014). There must be evidence of: 1) an express denial of consent; or 2) an implicit denial of consent via resistance or a rational fear of resisting. *Id.* As in any other case involving non-consensual sexual contact, in the above hypothetical the State would have to prove that a husband touched his wife’s “genital, anal, or other intimate area,” and that his wife expressly denied consent, resisted the contact, or the circumstances established that a reasonable person in the wife’s position would have been afraid to resist the contact.

“Spousal defense” laws are archaic. They stem from the 18th century belief that “marriage constituted permanent consent that could not be retracted.”¹ That belief has since been rightly rejected. People do not sacrifice their bodily autonomy when they marry. A relationship with the victim should not be a defense to sexual assault. The Attorney General urges the Judicial Proceedings Committee to report favorably on Senate Bill 33.

cc: Members of the Committee

¹ Rothman, Lily, “When Spousal Rape First Became a Crime in the U.S.”, *Time Magazine*, July 28, 2015, available at time.com/3975175/spousal-rape-case-history/ (last visited Jan. 29, 2020).