

TESTIMONY IN SUPPORT OF HB0004 - FAVORABLE
CRIMINAL LAW - SEXUAL CRIMES - REPEAL OF SPOUSAL DEFENSE

Maryland General Assembly
Judiciary Committee
Room 101
House Office Building
Annapolis, Maryland 21401

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My name is Elizabeth Feldstein. I am a practicing attorney in the District of Columbia. As an undergraduate student, I held leadership positions in my college's sexual assault awareness organization and have given trainings on sexual assault, consent, and bystander intervention to hundreds of students. I graduated from Harvard Law School in 2021 and I am speaking today in my personal capacity.

I am writing in support of HB0004, which would repeal Section 3-318, Maryland's spousal defense to sexual assault. Our current spousal rape exemption is not consistent with the evolution of modern criminal law, with current literature on sexual violence, or with the deeply-held values of Maryland residents.

As you know, under Section 3-318 of the Maryland Criminal Code, a person cannot be prosecuted for rape or other sexual offenses if the victim is their spouse. This is a complete defense. Spousal rape is only illegal if either married couple is separated, or if the perpetrator used force or the threat of force.

The spousal rape exemption in the United States is a relic of eighteenth century English common law, which presumed that women lost their legal personhood after marriage.¹ Rape laws were arguably "developed primarily to protect men's property interests in their wives or daughters as sexual objects."² Marital rape was not criminalized because married women were considered chattel and their consent to sex was implied by the very existence of a marriage contract.³ Through the twentieth century, U.S. state courts frequently held that a man could not legally be guilty of raping his wife, because of this concept of irrevocable matrimonial consent.⁴

This rationale "went largely unchallenged" until the 1970s, when feminist advocates' arguments for eliminating the spousal rape exception gained greater traction.⁵ By 1980, the Supreme Court had disavowed the theory that women lacked legal personhood.⁶ In 1993, marital rape was criminalized in some form in all 50 states for the first time, but the majority of states retained loopholes that rendered this reform "a facade."⁷ Today, our system of laws ostensibly rejects the archaic premises that married women lose their legal personhood and their capacity to consent. We recognize that sexual violence can happen within marriage to people of any gender. But the patriarchal vestiges of these eighteenth-century common-law principles still persist in Maryland's criminal code as long as our laws treat victims of sexual violence differently for being married to their perpetrators.

And today, we are far behind the curve. The Minnesota legislature quickly and unanimously eliminated its spousal rape exception in 2019, after hearing testimony from a survivor whose husband recorded himself sexually assaulting her while she was unconscious.⁸ Witnesses have testified before this Committee in previous years about a strikingly similar incident. Maryland's failure to repeal the spousal rape defense is out of sync with the evolution of the legal system to recognize the dignity and bodily autonomy of all people.

Maryland's spousal rape exemption is also in tension with modern data on sexual violence. Spousal rape is unfortunately a common occurrence.⁹ Over 18% of women and 8% of men have experienced sexual violence by an intimate partner.¹⁰

In previous years, legislators have raised concerns about whether this reform would lead to false allegations. These concerns are not new—the architect of the English spousal rape exception also claimed to be concerned about false reports—but they are as statistically unfounded as they were in 1736.¹¹ False rape allegations are extremely rare and occur at comparable rates to false reports of other crimes.¹² But ultimately, these concerns are beside the point. If HB0004 becomes law, people accused of sexually assaulting their spouse would retain the same procedural safeguards as all other defendants. The only change would be to apply Maryland's existing sexual assault laws equally, regardless of marital status.

Finally, Section 3-318 is inconsistent with Maryland residents' values. Over the past few months, I've had conversations with dozens of friends and family members about this law, both married and unmarried. I've talked to teachers and lawyers, scientists and retirees. Without fail, when I explain Section 3-318 to people in my community, I receive two reactions: shock and horror. People do not know about the spousal rape defense in Maryland, and when they learn about it, they are so appalled that they sometimes have a hard time believing that this law exists. They are even more confused and dismayed when I explained to them that there have been many unsuccessful attempts to repeal the spousal rape exemption, and they wonder why the legislature has yet to act.

Most people are not familiar with the contours of the Maryland criminal code, but that does not make this an esoteric or marginal issue. When I took the time to explain Section 3-318 to people I knew, it became clear that you do not need a law degree or a background in sexual violence advocacy to instinctively understand how medieval and sickening this law is. Maryland residents care deeply about sexual violence, and believe that our legal system should treat all survivors of sexual assault equally, regardless of marital status. It is long past time for our laws to catch up to these values.

I urge a favorable report on HB0004 without any amendments.

Sincerely,

Elizabeth Feldstein
Maryland Legislative District 16

¹ Michael J. Gonring III, *Spousal Exemption to Rape*, 65 Marq. L. Rev. 120 (1981); *see also* 1 M. Hale, *Pleas of the Crown* 629 (1st Am. ed. 1847) (“But 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.”)

² *Id.*

³ *Id.*

⁴ Kennedy Holmes, *Shining Another Light on Spousal Rape Exemptions: Spousal Sexual Violence Laws in the #MeToo Era*, 11 U.C. Irvine L. Rev. 1213 (2021); *see, e.g., Frazier v. State* 86 S.W. 754 (Tex. Cri. App. 1905) (“all the authorities hold that a man cannot himself be guilty of actual rape upon his wife. One of the main reasons being the matrimonial consent which she gives when she assumes the marriage relation, and which the law will not permit her to retract in order to charge her husband with the offense of rape”); *State v. Haines*, 25 So. 372 (La. 1899) (“because the husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract”);

⁵ Raquel Kennedy Bergen, *Marital Rape: New Research and Directions*, National Online Resource Center on Violence Against Women (Feb. 2006); Holmes, *Shining Another Light on Spousal Rape Exemptions*.

⁶ *Trammel v. United States*, 445 U.S. 40, 52 (1980).

⁷ Bergen, *Marital Rape: New Research and Directions*; Holmes, *Shining Another Light on Spousal Rape Exemptions*.

⁸ Holmes, *Shining Another Light on Spousal Rape Exemptions*; Don Tompson, *California may end ‘spousal rape’ distinction in punishment*, Associated Press (Mar. 22, 2021), <https://apnews.com/article/legislature-california-sexual-assault-962ff3592c5b86c35097de0e35d4c860>. In April of last year, California repealed a provision of its criminal code that required disparities in sentencing for married perpetrators. Dmitry Gorin, *Spousal Rape Law Repealed in California - Penal Code 262 PC*, Eisner Gorin LLP (Apr. 28, 2022), <https://www.egattorneys.com/spousal-rape-penal-code-262-repealed>. There are also reform efforts underway in other states. *See, e.g., Gabriel Cripe, Well Past Time: The (What Seems Fairly Obvious) Argument for Eliminating Ohio’s Spousal Exemption to Rape Law*, Univ. Cincinnati L. Rev., <https://uclawreview.org/2022/02/18/well-past-time-the-what-seems-fairly-obvious-argument-for-eliminating-ohios-spousal-exemption-to-rape-law>.

⁹ Raquel Kennedy Bergen and Elizabeth Barnhill, *Marital Rape: New Research and Directions*, VAWnet (Feb. 2006), <https://vawnet.org/material/marital-rape-new-research-and-directions>.

¹⁰ Centers for Disease Control, *The National Intimate Partner and Sexual Violence Survey: 2015 Data Brief* (Nov. 2018) | <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>

¹¹ Gonring III, *Spousal Exemption to Rape*.

¹² Claire Ferguson and John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, *Archives of Sexual Behavior* 45 (5) (July 2016); *Myths about Sexual Assault Reports*, Brown University, <https://www.brown.edu/campus-life/health/services/promotion/sexual-assault-dating-violence/myths-about-sexual-assault-reports>.