

**REPORT OF THE  
JOINT SUBCOMMITTEE STUDYING**

# **Marital Rape**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



## **House Document No. 33**

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**Report of the Joint Subcommittee Studying  
Marital Rape  
To  
The Governor and the General Assembly of Virginia  
Richmond, Virginia  
1986**

To: Honorable Gerald L. Baliles, Governor of Virginia,

and  
The General Assembly of Virginia

**INTRODUCTION**

Pursuant to House Joint Resolution No. 301 (See Appendix A), the 1985 Session of the General Assembly called for a study of Virginia law relating to marital rape. The purpose of this study was to examine the implications of the marital exemption, which has historically existed in the Commonwealth's case law, in light of recent Virginia Supreme Court cases and sweeping revisions in the rape laws of other states.

Thomas W. Moss, Jr., a delegate from Norfolk and sponsor of the study resolution, was selected to chair the joint subcommittee. Other members of the General Assembly chosen from the House of Delegates to serve on the subcommittee were Royston Jester, III, Clinton Miller, Franklin M. Slayton, Theodore V. Morrison, Jr., and, from the Senate, Thomas J. Michie, Jr., Wiley F. Mitchell, Jr., and Stanley C. Walker. Additionally, four citizen members with special expertise in this area of the law were selected by the Governor to serve on the study subcommittee: Nancy M. Brock of Virginia Beach, Jerrauld Jones of Norfolk, H. Lane Kneidler of Charlottesville and Ann P. Palamer of Fredericksburg.

**HISTORICAL BACKGROUND**

The legal doctrine that a man cannot be prosecuted for raping his wife has pervaded English common law for over two centuries. This concept is rooted in the writings of Sir Matthew Hale, a noted eighteenth century jurist and misogynist who achieved notoriety presiding over trials of "witches," who were frequently hung.

In 1736, Lord Hale gave birth to the marital exemption doctrine when he wrote:

[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by this mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract...[I]n marriage she hath given up her body to her husband....<sup>1</sup>

Although Lord Hale cited no authority for his statement (which was asserted in a treatise), the concept was accepted without question as part of the common law by American courts, legislators and criminal law experts.

This irrevocable implied consent theory was buttressed by the traditional common law doctrine that a woman was her husband's property. Until relatively recent times, her legal existence was held to be "incorporated and consolidated into that of her husband".<sup>2</sup>

The first American case to formally recognize the marital exemption was decided by the Supreme Judicial Court of Massachusetts in 1857. <sup>3</sup> Dictum in that case stated that marriage to the victim would always be a defense to rape. Decisions by courts in other states were quick to incorporate the reasoning of the Massachusetts court.

The marital exemption endured virtually intact in this country for over a hundred years. Then, in 1978, a supermarket checkout clerk, Gloria Rideout, accused her husband of rape under an Oregon reform statute. Although John Rideout was acquitted, the question of whether a man has a right to rape his wife had been unleashed.

In rapid succession, state after state either eliminated or modified the marital exemption, reflecting the more progressive view of women which has evolved in this country during recent decades.

The Virginia Supreme Court joined this movement in early 1984 in the case of Weishaupt v. Commonwealth, 227 Va. 389. In that decision, the court reversed preexisting Virginia law and held that a man could be found guilty of raping his wife, but only if the wife (i) was not living with her husband at the time, (ii) had refrained from voluntary sexual relations with him and (iii) had conducted herself in such a way to clearly show that the marriage was over.

Less than six months later in the case of Kizer v. Commonwealth, 1 VLR 274 (1984), the Supreme Court exonerated a defendant who had been convicted in lower court of raping his wife, reasoning that the wife had failed to make the fact of the marriage's termination sufficiently clear to her husband. As a result of this holding, much confusion was created over what behavior was necessary on a wife's part to satisfy the third Weishaupt requirement to adequately apprise her husband that their marriage was over. When this case was decided, only eight states still provided a complete exemption to rape while the parties were validly married.

Subsequently, the General Assembly commissioned this study to clarify and, if necessary, amend the Commonwealth's laws governing marital rape.

### SUMMARY

Following a comprehensive review of the historical, legal and social ramifications of this issue and the various alternatives available to protect wives who are sexually assaulted by their husbands, the joint subcommittee recommends:

1. That, as between spouses, the offenses of rape, forcible sodomy and inanimate object sexual penetration be recodified to encompass such acts committed while the parties are living apart or which resulted in serious physical injury to the complaining witness by the use of force or violence.

2. That a new, lesser included offense of marital sexual assault with diminished penalties be created which may apply where the parties are living together and there is no serious injury.

3. That counseling or therapy be provided for the accused spouse in some instances with the possibility of dismissal of charges or suspension of sentence when the court finds this action will promote maintenance of the family unit and be in the best interest of the complaining witness.

4. That Virginia's rape statute be made gender-neutral.

### CONSIDERATIONS

In an effort to clearly understand all issues involved in this study, the joint subcommittee went to great lengths to hear the advice and opinions of as many interested groups and individuals as possible.

In addition to public hearings which were held in Fairfax, Roanoke, Norfolk and Richmond, the subcommittee met in numerous working sessions in an attempt to resolve the complexities inherent in the marital rape controversy. The recommended legislation (See Appendix B) is intended to protect victims of marital rape while at the same time preserve to the greatest extent possible the integrity of individual families.

### FINDINGS AND RECOMMENDATIONS

#### A : Basic Question of Criminality

The threshold question confronting the subcommittee involved the validity of the marital exemption itself, i.e., whether or not marital rape should be criminalized and to what degree.

Basically, two arguments predominated in comments by those who opposed or wished to severely restrict criminalization:

1. That allowing such prosecutions could lead to fabricated complaints by vindictive wives (this includes the related argument that marital rape would be difficult to prove).—A majority of the subcommittee discounted this argument, particularly after hearing testimony from Commonwealth's attorneys that our legal system has built in mechanisms and safeguards to determine the merits of such complaints. Prosecutor discretion, public investigators and jury deliberations are used to decide the truth or falsity of all other allegations, and the subcommittee felt the same process could weed out spurious marital rape claims. As to the difficulty of proof when a consensual sexual relationship is involved, there was a realization that proving lack of consent is normally the most difficult part of any rape prosecution, particularly when the rapist and the victim had a prior relationship. The subcommittee concluded, and documentation from other states confirmed, that married women would be no more likely to fabricate complaints than unmarried women.

2. That marital rape is not as serious an offense as other rape and is therefore adequately covered by the possibility of prosecution under other, less severe criminal charges such as assault. Testimony from victims of marital rape, experts who work with rape crisis centers, health care professionals and law-enforcement authorities overwhelmingly indicated that marital rape has, if anything, a more traumatic effect on the victim than other types of rape. Feelings of ultimate violation and humiliation are magnified in the marital context due either to the crushing sense of betrayal and breach of trust in the closest of relationships or to the intensely negative feelings which often exist between estranged spouses. These findings assume greater proportions in light of the conclusion of many studies that marital rape occurs far more frequently than all other types of rapes combined.

A basic determination was therefore made that rape between spouses should, in designated circumstances, constitute criminal conduct.

#### **B - Existing Offenses Modified**

After much deliberation, the subcommittee agreed to consider identical amendments to the offenses of forcible sodomy and inanimate object sexual penetration in addition to rape. All three crimes - which carry the same penalty - were viewed as equally heinous. Although there was disagreement among subcommittee members as to whether a marital exemption currently exists in the two former offenses, the decision was made to treat violations involving spouses similarly for the sake of consistency.

Consequently, establishing specific crimes of spousal rape, forcible sodomy and inanimate object sexual penetration was recommended where a violation occurs and the married parties were (i) living separate and apart ' or (ii) the complaining witness suffered "serious bodily injury." These qualifications were designed to prevent a spouse from pressing a frivolous charge stemming from a marital argument.

The net effect of this recommendation was to drop two of the three Weishaupt requirements (i.e. refraining from voluntary sex and clearly showing that the marriage is over). Punishment for violations involving spouses would be identical to that provided for nonspousal violations.

#### **C - New Offense Created - Marital Sexual Assault**

The subcommittee determined that less serious sexual assaults between spouses should also be criminalized, although with a significantly diminished penalty. A new crime of marital sexual assault was therefore created as a lesser, included offense of rape, forcible sodomy and inanimate object sexual penetration. This offense would apply in all specified sexual assaults between spouses, even where the parties were not living separate and apart or serious bodily injury was not inflicted.

To discourage the possibility of false charges, the subcommittee recognized the need for a requirement that a violation be reported within a specified period of time. Significantly different time limitations were proposed by various members, and the ten-day reporting requirement represented a compromise time frame. This limitation is not to be imposed if a spouse is

physically unable to make a report or is restrained or otherwise prevented from reporting the violation.

Marital sexual assault is to be punishable by confinement in the penitentiary for a term of one to twenty years or by the discretionary Class 1 misdemeanor penalty of up to a year in jail and/or a fine of not more than \$1,000.

**D : Therapy for the Accused**

Secondary to concern for the victim of a sexual assault by his or her spouse was the subcommittee's desire to preserve the affected family unit whenever possible. Consequently, the court is given wide latitude to provide therapy or counseling for the accused in designated circumstances (i) following a probable cause finding at the preliminary hearing stage, (ii) pursuant to a juvenile and domestic relations district court hearing to which a circuit court refers the accused where there was a direct indictment or (iii) at the trial stage following a finding of guilt. Consent of the complaining witness and the Commonwealth's attorney (or, in some instances, consideration of the complaining witness's views) is required, as well as the consent of the accused, as a prerequisite to therapy.

Completion of therapy by the accused can result in dismissal of charges, discharge of the defendant, or suspension of sentence if the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness. Consent of the complaining witness and the Commonwealth's attorney (or, in some instances, consideration of the complaining witness's views) is also required at this stage.

It should be noted that therapy may be provided at the indicated times only if therapy has not previously been used. Also, no statement or disclosure by an accused during therapy can be used against him in court as evidence or as the basis for evidence.

**E : Gender-Neutral Rape Statute**

To conform Virginia's rape statute to our other sex offense statutes (and to avoid a possible constitutional challenge on the basis of an equal protection violation), the subcommittee also recommended that § 18.2-61 be made gender-neutral.

Respectfully submitted,

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## APPENDIX A

### GENERAL ASSEMBLY OF VIRGINIA -- 1985 SESSION HOUSE JOINT RESOLUTION NO. 301

*Creating a joint subcommittee to study marital rape.*

Agreed to by the House of Delegates, February 4, 1985  
Agreed to by the Senate, February 20, 1985

WHEREAS, the Constitution of Virginia begins, "All men [and women] are by nature equally free and independent and have...certain...rights, the enjoyment of life and liberty...and obtaining happiness and safety"; and

WHEREAS, in Virginia, because of English common law tradition, in the words of Lord Chief Justice Hale (17th Century), "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath give up herself in this kind unto her husband, which she cannot retract"; and

WHEREAS, since 1983, Virginia's criminal justice authorities have brought a number of marital rape cases to court; and decisions have extended protection for some but not others; and

WHEREAS, there is a need to study the historical, logical and social implications of the marital rape exception in order to examine its validity in this the late twentieth century; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, that a joint subcommittee be created to study all the implications of the marital rape exception, its validity and its relation to the safety of all the citizens of the Commonwealth.

The joint subcommittee shall consist of twelve members who shall be appointed as follows: three members of the House Committee for Courts of Justice, two members of the House Committee on Health, Welfare and Institutions to be appointed by the Speaker of the House of Delegates; two members of the Senate Committee for Courts of Justice, and one member of the Senate Committee on Education and Health to be appointed by the Senate Committee on Privileges and Elections; and four citizens at large to be appointed by the Governor.

The joint subcommittee shall make any recommendations it deems appropriate to the 1986 Session of the General Assembly.

The costs of this study, including direct and indirect costs, are estimated to be \$23,845.



## APPENDIX B

### HOUSE BILL NO. 378

A BILL to amend and reenact §§ 18.2-61, 18.2-67.1 and 18.2-67.2 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 16.1-279.2, 18.2-67.2:1, and 19.2-218.1, relating to criminal sexual assault; preliminary hearings required; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-61, 18.2-67.1 and 18.2-67.2 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 16.1-279.2, 18.2-67.2:1 and 19.2-218.1 as follows:

**§ 16.1-279.2. Preliminary hearings involving marital sexual assault.—A.** In any preliminary hearing of a charge against a person for a violation under §§ 18.2-61B, 18.2-67.1B, 18.2-67.2B or 18.2-67.2:1, upon a finding of probable cause the court may request that its court services unit, in consultation with any appropriate social services organization, local board of mental health and mental retardation, or other community mental health services organization, prepare a report analyzing the feasibility of providing counseling or other forms of therapy for the accused and the probability such treatment will be successful. Based upon this report and any other relevant evidence, the court may, (i) with the consent of the accused, the complaining witness and the attorney for the Commonwealth in any case involving a violation of §§ 18.2-61B, 18.2-67.1B or 18.2-67.2B or (ii) with the consent of the accused and after consideration of the views of the complaining witness in any case involving a violation of § 18.2-67.2:1, authorize the accused to submit to and complete a designated course of counseling or therapy. In such case, the hearing shall be adjourned until such time as counseling or therapy is completed or terminated. Upon the completion of counseling or therapy by the accused and after consideration of a final evaluation to be furnished to the court by the person responsible for conducting such counseling or therapy and such further report of the court services unit as the court may require, and after consideration of the views of the complaining witness, the court, in its discretion, may discharge the accused if the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

**B.** No statement or disclosure by the accused concerning the alleged offense made during counseling or any other form of therapy ordered pursuant to this section or §§ 18.2-61, 18.2-67.1, 18.2-62.2, 18.2-67.2:1 or 19.2-218.1 may be used against the accused in any trial as evidence or as a basis for such evidence.

**§ 18.2-61. Rape.— A.** If any person has sexual intercourse with a female a complaining witness who is not his or her spouse or causes a female such complaining witness to engage in sexual intercourse with any other person and such act is accomplished (i) against her the complaining witness's will, by force, threat or intimidation of or against the complaining witness or another person, or (ii) through the use of the female's the complaining witness's mental incapacity or physical helplessness, or (iii) with a female child under age thirteen as the victim, he or she shall be guilty of rape; in the discretion of the court or jury, be punished with confinement in the penitentiary for life or for any term not less than five years.

**B.** If any person has sexual intercourse with his or her spouse or causes such spouse to engage in sexual intercourse with any other person 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. 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 serious physical injury to the spouse by the use of force or violence.

**C.** A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in the penitentiary for life or for any term not less than five years. However, in any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 16.1-279.2 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds

*such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.*

*D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 16.1-279.2. If the defendant fails to so complete such counseling or therapy, the court may enter an adjudication of guilt and proceed as otherwise provided. If such counseling is completed as prescribed under § 16.1-279.2, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.*

**§ 18.2-67.1. Forcible sodomy.—A.** An accused shall be guilty of forcible sodomy if he or she engages in cunnilingus, fellatio, analingus, or anal intercourse with ~~the~~ a complaining witness who is not his or her spouse, or causes the complaining witness to engage in such acts with any other person, and

1. The complaining witness is less than thirteen years of age, or
2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

*B. An accused shall be guilty of forcible sodomy if (i) he or she engages in cunnilingus, fellatio, analingus, or anal intercourse with his or her spouse, or causes such spouse to engage in such acts with any other person, and (ii) such act is accomplished against the will of the spouse, by force, threat or intimidation of or against the spouse or another person.*

*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 serious physical injury to the spouse by the use of force or violence.*

**B C .** Forcible sodomy is a felony punishable by confinement in the penitentiary for life or for any term not less than five years. *However, in any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under § 16.1-279.2 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.*

*D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 16.1-279.2. If the defendant fails to so complete such counseling or therapy, the court may enter an adjudication of guilt and proceed as otherwise provided. If such counseling is completed as prescribed under § 16.1-279.2, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.*

**§ 18.2-67.2. Inanimate object sexual penetration; penalty.—A.** An accused shall be guilty of inanimate object sexual penetration if he or she penetrates the labia majora or anus of ~~the~~ a complaining witness who is not his or her spouse with any object, other than for a bona fide medical purpose, or causes the complaining witness to engage in such acts with any other person ; or causes such witness to so penetrate his or her own body with an object and

1. The complaining witness is less than thirteen years of age, or

2. The act is accomplished against the will of the complaining witness, by force, threat or intimidation of or against the complaining witness or another person, or through the use of the complaining witness's mental incapacity or physical helplessness.

**B. An accused shall be guilty of inanimate object sexual penetration if (i) he or she penetrates the labia majora or anus of his or her spouse with any object other than for a bona fide medical purpose, or causes such spouse to engage in such acts with any other person or to so penetrate his or her own body with an object, and (ii) such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another person.**

**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 serious physical injury to the spouse by the use of force or violence.**

**B C . Inanimate object sexual penetration is a felony punishable by confinement in the penitentiary for life or for any term not less than five years. However, in any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy if not already provided, in the manner prescribed under § 16.1-279.2 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.**

**D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 16.1-279.2. If the defendant fails to so complete such counseling or therapy, the court may enter an adjudication of guilt and proceed as otherwise provided. If such counseling is completed as prescribed under § 16.1-279.2, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.**

**§ 18.2-67.2:1. Marital sexual assault.—A. An accused shall be guilty of marital sexual assault if (i) he or she engages in sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with his or her spouse, or penetrates the labia majora or anus of his or her spouse with any object other than for a bona fide medical purpose, or causes such spouse to engage in such acts with any other person or to so penetrate his or her own body with an object, and (ii) such act is accomplished against the spouse's will by force or a present threat of force against the spouse or another person.**

**B. There shall be no prosecution under this section unless the spouse or someone acting on the spouse's behalf reports the violation to a law-enforcement agency within ten days of the commission of the alleged offense. However, the ten-day limitation shall not apply while the spouse is physically unable to make such report or is restrained or otherwise prevented by the accused from reporting the violation.**

**C. A violation of this section shall be punishable by confinement in the penitentiary for a term of not less than one year nor more than twenty years or, in the discretion of the court or jury, by confinement in jail for not more than twelve months and a fine of not more than \$1,000, either or both. In any case deemed appropriate by the court, all or part of any sentence may be suspended upon the defendant's completion of counseling or therapy if not already provided, in the manner prescribed under § 16.1-279.2 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.**

**D. Upon a finding of guilt under this section in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further**

*proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under § 16.1-279.2. If the defendant fails to so complete such counseling or therapy, the court may enter an adjudication of guilt and proceed as otherwise provided. If such counseling is completed as prescribed under § 16.1-279.2, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.*

*E. A violation of this section shall constitute a lesser, included offense of the respective violation set forth in §§ 18.2-61 B, 18.2-67.1 B or 18.2-67.2 B.*

*§ 19.2-218.1. Hearing before juvenile and domestic relations district court required for persons accused of certain violations against their spouses.—A. In any case involving a violation of §§ 18.2-61B, 18.2-67.1B, 18.2-67.2B or 18.2-67.2:1 where a preliminary hearing pursuant to § 16.1-279.2 has not been held prior to indictment or trial, the court shall refer the case to the appropriate juvenile and domestic relations district court for a hearing to determine whether counseling or therapy is appropriate prior to further disposition unless the hearing is waived in writing by the accused. The court conducting this hearing may order counseling or therapy for the accused in compliance with the guidelines set forth in § 16.1-279.2.*

*B. After such hearing pursuant to which the accused has completed counseling or therapy and upon the recommendation of the juvenile and domestic relations district court judge conducting the hearing, the court may, with the consent of the complaining witness and the attorney for the Commonwealth, dismiss the charge.*