



State contexts and the criminalization of marital rape across the United States



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ABSTRACT

Spousal exemptions from rape prosecution persist in many US states' criminal codes thereby compromising women's rights to bodily self-control and personhood. Power resources theory—which emphasizes that given limited resources, groups act strategically to achieve goals—and gender stratification perspectives guided an event history analysis of the likelihood of marital rape criminalization in US states between 1978 and 2007. Findings suggest criminalization is influenced by the expected marginal benefit of law reform, women's relative socioeconomic resources, and racial heterogeneity. This research highlights the importance of considering how existing laws, group resources, and intersecting social cleavages influence the expansion of women's rights.

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1. Introduction

Despite abundant evidence that marital rape is detrimental to women's health and wellbeing (Bergen, 2006), legal protections from spousal rape have been absent for much of US history. Legal actors historically were reluctant to intervene in cases of spousal rape and other domestic violence under the assumptions that the state should not encroach on private, familial matters, and that a man has the right to discipline his family. And compared to other forms of domestic violence, the criminalization of marital rape faced an additional challenge—the traditional view that consent to sex is implicit in the marriage contract, and marital rape therefore cannot exist (Harless, 2003; Woolly, 2007). Beginning in the 1970s, however, rape law reformers encouraged US states to abandon traditional rape laws that embody the narrow and flawed views that “real” rape only occurs between strangers. They argued that these laws ignore the prevalence of rape between intimates and other common forms of sexual violence (DuMont et al., 2003; Estrich, 1987; Galvin, 1985; Williams, 1984). Reformers promoted several changes to rape statutes that better ensure the rights and safety of women (Berger et al., 1988; Spohn and Horney, 1992). In this article I focus on the adoption of one important reform—the criminalization of marital rape without restrictions that hinder the prosecution of spousal offenders (i.e., unrestricted criminalization). I consider marital rape laws apart from other domestic violence and rape statutes because the 1970s anti-rape movement preceded the domestic violence/battered women's movement, whose origins outside feminism were more diverse (Gottschalk, 2006), and because reforms targeting other dimensions of sexual assault often neglected marital rape (Berger et al., 1988; Bienen, 1980).

The content of marital rape laws is imperative because more encompassing, progressive laws expand women's rights to bodily self-control and personhood by acknowledging that women can legally refuse sex within marriage. Laws that deny women these rights exemplify “relations of domination based on control of women's bodies...[that] undermine women's abilities to participate as ‘independent individuals’—citizens—in the polity, which in turn affect their capacities to demand

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and utilize social rights” (Orloff, 1993:309). Conversely, laws that recognize women’s control over their own sexual activity confer rights to bodily self-control and personhood. These rights lay a foundation upon which women may achieve other rights or improve their position in a gender stratification system.

The focus on expanding rights and legal solutions beginning in the 1970s departed from earlier anti-rape movements that had strong roots in radical feminism, which was skeptical of state-sponsored solutions. But the focus on *law* reform largely was attributable to the longstanding US tradition of political liberalism as well as to the timing of initiatives, which came on the heels of the 1960s civil rights movement. Additionally, rape law reforms consistent with liberal feminism gained momentum alongside law-and-order politics, which spurred not only funding for victim’s services and law enforcement, but also encouraged tougher criminal laws, which include rape statutes (Gottschalk, 2006). And although rape, civil rights, and law-and-order were concerns in national politics, specific outcomes—namely, marital rape criminalization—have varied across states and over time.

I propose that state-level variation in marital rape criminalization stems from diversity in state contexts—which motivate and shape public policy—along economic, political, and social characteristics (Gray, 2007). Additionally, political interest organizations often are confined within states (Wolak et al., 2002). Yet quantitative, state-level research on this topic is scarce. Nonetheless, two studies stand out. In their cross-sectional study, Berger et al. (1991) found that although measures of gender equality and the political environment explained some aspects of rape law reform, only changes in the rape rate were associated with the content of marital rape laws. McMahon-Howard et al. (2009) examined over-time data and found that the adoption of strong marital rape laws was positively associated with women’s labor force participation, but they failed to observe an association with the violent crime rate. McMahon-Howard and colleagues also found that strong marital rape laws within a state were associated with national trends in marital rape law reform, and with the number of previous changes to a state’s marital rape laws. But their study did not investigate whether *specific* aspects of existing laws differentially influenced a state’s likelihood of unrestricted marital rape criminalization. In contrast, I evaluate how the likelihood of unrestricted criminalization is influenced by three specific dimensions of existing marital rape laws.

Building on previous research and guided by power resources and gender stratification theories, I develop hypotheses about how three factors—existing laws, women’s economic and political resources relative to men’s, and racial heterogeneity—shape state contexts in which strategic unrestricted marital rape criminalization becomes more or less likely. I test hypotheses using an event history analysis of unrestricted marital rape criminalization across US states between 1978 and 2007.

2. Theory

I draw from power resources and gender stratification theories to investigate the factors associated with unrestricted marital rape criminalization. Power resources theory emphasizes that rights are important political objectives favoring a subordinate group that help restrain the power of the dominant group over the long run. Importantly, power resources theory suggests that groups pursue objectives strategically; because groups have multiple objectives but limited resources, objectives are prioritized according to the expected marginal benefit they would yield and the likelihood of achieving them (Korpi, 1985, 1989). The expected marginal benefit of achieving an objective in part depends on existing circumstances—namely, the benefit afforded to women under existing marital rape laws compared to the benefit afforded by unrestricted criminalization. The likelihood of achieving an objective partly depends on a group’s socioeconomic and political resources relative to those of its opponent, and on a group’s (lack of) cohesion (Hobson and Lindholm, 1997; Korpi, 1985, 1989).

In the pursuit of unrestricted marital rape criminalization, the most salient opponents are men and women. I therefore draw from gender stratification theories that help explain how the distribution of socioeconomic and political resources reflect and reinforce gender hierarchies (Acker, 2006; Brush, 2003; Orloff, 1993). Traditional laws that exempt spouses from rape prosecution limit women’s rights to bodily self-control and personhood and heighten men’s state-sanctioned power over women by allowing them unrestricted sexual access to their wives. Spousal exemptions thus are provisions in the penal code that facilitate the oppression of women (Russell, 1990). Conversely, progressive laws that eliminate spousal exemptions grant women rights to bodily self-control and personhood, and eliminate a power traditionally afforded to men. Given this conflict, factors that strengthen women’s relative group position should increase the likelihood of unrestricted marital rape criminalization.

Finally, I consider the role of racial heterogeneity, which I propose complicated cohesive rape law reform efforts. I draw from Hobson and Lindholm (1997), who expanded upon power resources theory to explain the challenges facing a group, in this case, women, that historically has been underrepresented in political and labor institutions. The capacity to capture the interests of women from diverse social backgrounds is a potential source of power. But rape law reform likely had distinct implications for blacks and whites inasmuch as it represented anti-crime policy and challenged racial equality. Heterogeneous understandings of rape law reform by race—that is, racial heterogeneity—therefore should decrease the likelihood of unrestricted marital rape criminalization.

In sum, I propose that these three main factors—existing marital rape laws, women’s resources relative to men’s, and racial heterogeneity—create contexts more or less favorable to the strategic unrestricted criminalization of marital rape. In the next sections, I describe each factor in more detail, and I briefly discuss additional factors that also may be associated with unrestricted marital rape criminalization.

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