SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	SB 530	**Hearing Date:**	April 20, 2021
Author:	Cortese		
Version:	March 9, 2021		
Urgency:	No	**Fiscal:**	Yes
Consultant:	GC		

Subject: ***Rape of a spouse***

HISTORY

Source: Michelle Dauber, Stanford University

Prior Legislation: AB 459 (Galgiani), Ch. 646, Stats. of 2019
AB 2888 (Low), Ch. 863, Stats. of 2016
AB 701 (C. Garcia), Ch. 848, Stats. of 2015

Support: California District Attorneys Association; California National Organization for Women; Democratic Activist for Women; Enough Is Enough Voter Project; Equality Now; Feminist Majority; Lieutenant Governor Eleni Kounalakis; National Organization for Women; Next Door Solutions to Domestic Violence; Ro Khanna for Congress; San Francisco District Attorney's Office; Santa Clara Democratic Party; Santa Clara County Supervisor, District 2; Santa Clara County Supervisor, District 4; Silicon Valley Democratic Club; Women's March San Jose

Opposition: California Public Defenders Association

PURPOSE

The purpose of this bill is to expand the definition of rape to include the rape of a spouse and to eliminate the crime of spousal rape.

Existing law provides that the punishment for rape and spousal rape is imprisonment in the state prison for three, six or eight years. (Pen. Code § 264.)

Existing law provides that rape of a spouse is the act of sexual intercourse with a spouse accomplished under any of the following circumstances: (Pen. Code § 262.)

- Against a person's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.
- When a person is prevented from resisting by an intoxicating or anesthetic substance, controlled substance, and this condition was known, or should have been known, to the accused.
- Where the person was unconscious.
- Against the victim's will by threats, as defined.
- Against the victim's will by threat of authority, as defined.

Existing law, known as the One-Strike Sex Law, provides sentences of 15-years-to-life, 25-years-to-life, or life without the possibility of parole for certain sex crimes if specified circumstances are found to be true. (Pen. Code, § 667.61.)

Existing law includes within the qualifying offenses under the One-Strike Sex Law rape and spousal rape accomplished by force, duress, menace, or fear of immediate and unlawful bodily injury and rape and spousal rape accomplished by threat of retaliation. (Pen. Code, § 667.61, subd. (c).)

Existing law, enacted by, states that it is the intent of the Legislature that district attorneys prosecute violent sex crimes under statutes that provide sentencing under a "one strike," "three strikes" or habitual sex offender statute instead of engaging in plea bargaining over those offense. (Pen. Code, § 1192.7.)

This bill would expand the crime of rape to include the rape of a person's spouse and it would eliminate the crime of spousal rape.

This bill specifies that a plea bargain for probation shall not be available for rape of an unconscious person who is the spouse of the perpetrator.

Existing law requires persons convicted of spousal rape register as a sex offender if they commit the offense by use of force or violence for which the person was sent to state prison. (Pen. Code § 290, subd. (c)(1).)

This bill would require a person convicted of rape of a person who is the perpetrator's spouse register as a sex offender under all circumstances by redefining rape.

COMMENTS

1. Need for This Bill

According to the author:

> For decades, California has treated the rape of a spouse differently than all other sexual assaults.
>
> California's Penal Code defines the crime of rape in two separate code sections (261 and 262). In fact, California is only one of 11 states that distinguish between spousal and non-spousal rape.
>
> While the legal description of what constitutes spousal and non-spousal rape are the same, the penalties are not.
>
> Current law requires a person convicted of non-spousal rape to register as a sex offender. Separately, a person convicted of spousal rape only has to register as a sex offender if the act involved the use of force or violence for which the person was sentenced to state prison.
> Another discrepancy in the law that treats spousal rape differently is regarding plea bargains. A defendant accused in the non-spousal rape of an unconscious

person cannot plea bargain. If a defendant is married to the unconscious victim of the rape, they are currently able to plea bargain.

There are disturbing indications that spousal rape is increasing, along with other intimate partner violence, during the COVID-19 pandemic. A recent report by the San Jose Police Department stated that although rapes show an overall declined of 9.4% over the last year, domestic rapes increased 140% and domestic assault with the intent to commit a felony sex crime increased 400%.

SB 530 would require a person convicted of spousal rape to register as a sex offender under all the same circumstances a person convicted of non-spousal rape would be required to.

This bill would also prevent a defendant accused of spousal rape from entering a plea bargain if the victim was unconscious – leveling the law with non-spousal rape.

SB 530 also repeals Section 262 entirely and expands the definition of rape in Section 261 to include *all* rapes, not just non-spousal.

Time has long since passed for California to declare that rape is rape.

2. Background: California Sex Assault Crimes

California's sexual assault crimes are set forth in discrete sections that describe the specific nature of the sexual assault. For example, rape, defined as nonconsensual sexual intercourse (Penal Code § 261), nonconsensual sodomy (Penal Code § 286), nonconsensual oral copulation (Penal Code section 288a) and nonconsensual sexual penetration (Penal Code § 289) all set forth particular sex crimes based upon the nature of the felony conduct.

Each of these crimes carries the same sentence triads and life sentences where aggravating circumstances are present. Over the last many years have been amended to reflect a broader, more comprehensive understanding of the fundamental nature of these sex crimes. While the specific conduct is proscribed in discrete sections of the law, those sections contain mirroring language. This is the case for spousal rape and rape following passage of SB 1402 (Kuehl) in 2006 which eliminated an additional requirement for spousal rape which required that an allegation of spousal rape had to be previously reported or corroborated by independent evidence.

Of these statutes, only nonconsensual sexual intercourse is expressly described as "rape." Sodomy is described as "sodomy." Oral copulation is described as "oral copulation." And, nonconsensual sexual penetration is described as "sexual penetration." These descriptions, however, do not limit the scope, application or sentences for these crimes. The law considers these crimes to be equally grave. The same applies to spousal rape vs. rape. Issues can however arise because there is, necessarily a familial relationship between the victim and the perpetrator. Regardless of this familial relationship, the crimes are treated virtually identically.

In 2015, AB 701 (C. Garcia) attempted to redefine a six code sections as "rape" rather than the discreet code sections they were at the time. The bill would have enacted would a new code section stating that for its purposes, a person shall be considered guilty of rape if he or she is convicted under any the following sections:

(a) Section 261 (sexual intercourse);
(b) Section 262 (spousal rape);
(c) Section 266c (sexual acts by fraud, fear, etc.);
(d) Section 286 (sodomy);
(e) Section 288a (oral copulation); or
(f) Section 289 (sexual penetration).

At the time members considered whether redefining the crime of "rape" to include more sex crimes than sexual intercourse, would impact the interpretation and application of the extensive case law on California's sex crime statutes. Instead, members opted to not weaken or otherwise confuse existing law by passing legislation to clarify that the above code sections may be considered as rape for purposes of relating to support of survivors. AB 701 (C. Garcia), Ch. 45, Stats. of 2015.

This bill would, similar to the introduced version of AB 701, combine a discreet crime into the existing crime of "rape." Proponents argue that the state should "declare that rape as rape." By enacting this legislation the section of spousal rape will be deleted and the existing rape statute will be expanded to include rape of a person's spouse. The bill goes on to make a number of conforming changes.

Mandatory Sex Offender Registration

Specifically, this bill will mandate that all rape of a spouse must register as a sex offender. Under current law spousal rapists must register as a sex offender if they commit the offense by means of force or violence and are sentenced to prison. Under California law, sex offender registration has made allowances for judges to make decisions on whether an offender should have to register as a sex offender or whether they appear on the Megan's Law website when familial relationships are involved. Unlike crimes with victims who are not related, having one's parent listed on the Megan's Law website who is also their child molester will often naturally out the victim as a victim of sexual violence to the community they live in. Judges have been given some discretion in this are to make decisions in the best interest of the victim when appropriate. This bill would remove that discretion in specified cases between spouses. But members may feel there is an overriding public interest in treating rape of one's spouse as any other rape in all circumstances.

No Plea Bargaining for Rape of an Unconscious Spouse

Under current law we have limited the ability of prosecutors to plea bargain with such terms as probation for a number of offenses, including specified sex crimes. Under current law a prosecutor can plea bargain in instances of spousal rape where the victim is unable to consent because they are unconscious at the time of the assault. "Unconscious" can mean either asleep, or deceived as to who the victim believes they are having intercourse with. This bill would eliminate that ability to plea bargain in cases where the victim of the rape is a spouse of the perpetrator.

3. Argument in Support

According to Enough is Enough Voter Project:

> SB 530 provides parity in California law and would require the same standards for spousal rape that are currently in the Penal Code (PC) for rape. Rape is universally acknowledged as a crime of violence that is both physically and psychologically harmful to the victim. Here in California, rapists who are convicted under spousal rape law may face less severe sentencing and may not have to register as a sex offender.
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> According to the National Coalition Against Domestic Violence (NCADV), between 10-14% of married women have been or may experience rape by their spouse. Additionally 18% of these victims state their children have witnessed the rape.
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> When marital rape is not treated as seriously as other forms of rape, it invalidates the victims' traumatic experiences and continues to promote rape culture. Moreover, a rapist should not be shielded from punishment simply because the rapist is married to the victim.
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> Regardless of the relationship, rape is rape. SB 530 eliminates this distinction so we can ensure justice for victims of sexual assault. Specifically, SB 530 repeals PC section 262 and deletes "not the spouse of the perpetrator" from PC section 261.

4. Argument in Opposition

According to the California Public Defenders Association:

> The California Public Defenders Association (CPDA), a statewide organization of public defenders, private defense counsel, and investigators, regrets to inform you of our opposition to Senate Bill 530 (“SB 530”) by Senator Cortese unless it is amended to allow judges to retain discretion to grant probation to spousal rapists and to retain discretion in determining whether to require sex offender registration for spouses,
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> SB 530 would amend the Penal Code and a variety of other applicable California statutes to treat and punish the crime of spousal rape the same as rape of a stranger, requiring a mandatory state prison sentence for a spousal rapist and requiring mandatory registration as a sex offender. Specifically, SB 530 would repeal Penal Code Section 262 in its entirety and prohibit under any circumstances the granting of probation to a person convicted of spousal rape.
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> Although CPDA understands the desire to recognize the trauma of spousal rape, SB 530 is bad public policy because it takes discretion away from judges and it imposes a one size fits all sentence on individuals in the criminal justice system. There are many reasons that judges are best situated to evaluate each case on its merits. Moreover, taking away discretion from judges may have the unintended

consequence of disincentivizing the reporting of spousal rape by the victims who do not wish to punish their spouse or their children by sending their spouse to prison and branding their spouse with the stigma of sex offender registration.

By taking away judicial discretion in sentencing, SB 530 will force courts to sentence the spouse to state prison even when the victim has explicitly stated that they do not want prison because of the economic hardship it will impose on the victim and the children or when sentencing the spouse to prison will make the family homeless or when the victim only sought to get help for the spouse. These are all circumstances in which the judge has discretion under existing law to evaluate in sentencing the spouse to prison or granting probation.

Even more draconian, SB 530 will require mandatory sex offender registration for spousal rape. Among the many repercussions, requiring mandatory sex offender registration may preclude the individual from having future contact with either their children with the victim spouse or their children from a different union.

Sex offender registration requirements can prevent an individual from finding stable housing or employment both crucial to successful rehabilitation and rentry into the community. Most significant in requiring the mandatory registration of a spouse is the unintended consequence of punishing the children. As noted in Human Rights Watch's seminal study, *Raised on the Registry*:

> Offender registration laws can have especially harmful impacts on the children of registrants. A 2009 study found that 75 percent of the children of registrants had lost friendships as a result of a parent's status as a registered sex offender. Additionally, 59 percent reported that other children at school treated them differently when it was discovered that they had a parent on the registry. Another study found that a Kentucky policy restricting registered sex offender parents from attending their children's school functions interfered with their parenting role and could have serious deleterious consequences for the entire family. Children of registrants reportedly experience adverse consequences including stigmatization, violence, harassment, and differential treatment by teachers and classmates. In one instance, a teenage girl in Texas shot herself to death after her father's photo appeared on the state Internet registry, embarrassing her at school. (Internal citations omitted,) (*Raised on the Registry, The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S.*, Human Rights Watch, May 2013, pp. 61-62.)

Generally, California's sex offender registration requirements make sense only when applied to those who, based on prior sexually motivated criminal conduct, are reasonably believed to pose a risk of committing other sexually motivated crimes in the future. The list of crimes for which registration is required is already extensive, encompassing nearly every conceivable sexually motivated crime. In addition, under existing law, *judges already have the authority to order sex offender registration of any defendant who has been convicted of any crime believed to be driven by sexual compulsion or motivated by a desire for sexual gratification,* even if the crime is not among those listed in Penal Code section 290.

For California's sex offender registration laws to bear any rational relationship to any legitimate government interest, other than punishment, they must apply only to those convicted of a sex offense who are believed to pose a danger of reoffending with another sex offense. The purpose of sex offender registration is in no way served by requiring sex offender registration for individuals who pose no risk of reoffense, and their mandatory inclusion in California's already bloated-beyond-belief sex offender registry actually impacts public safety in a negative way – diverting scarce law enforcement resources to individuals who pose little or no risk of sexually reoffending.

Registration laws don't exist "to punish" those who break the law – that is constitutionally impermissible. For registration laws to be valid, they must be reasonably calculated to protecting the public from those reasonably deemed likely to sexually reoffend. The population targeted by this bill poses no such risk.

For far too long the criminal justice system in our state has imposed lengthy mandatory prison terms on individuals that run afoul of the law without allowing courts to consider additional mitigating factors that, in certain circumstances, reflect upon the actions and motivations of the perpetrator and which have precluded input in sentencing decisions from the victims of crimes. The proposed amendments to the rape laws in California under SB 530 would remove the discretion of judges, which currently allows for consideration of the victims' expressed input into sentencing terms in limited circumstances. It would also preclude the imposition of more rehabilitative sentencing provisions on persons convicted of spousal rape. The effect of this bill would be a move away from a more humane and understanding criminal justice system that is designed to effectuate restorative justice in the limited circumstances where it is warranted.

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