
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 1171 **Hearing Date:** July 13, 2021
Author: Cristina Garcia
Version: May 27, 2021
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Rape of a spouse*

HISTORY

Source: Santa Clara County District Attorney's Office

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
AB 2599 (Gipson), 2016, not heard in Asm. Public Safety Cmte.
SB 1402 (Kuehl), Ch. 45, Stats. of 2006
SB 208 (Solis), Ch. 177, Stats. of 1995
SB 187 (Solis), Ch. 595, Stats. of 1993

Support: Alameda County District Attorney's Office; California Coalition Against Sexual Assault (CALCASA); California Commission on The Status of Women and Girls; California National Organization for Women; Democratic Activist for Women Now Dawn; Dolores Huerta Foundation; Enough Is Enough Voter Project; Equality Now; Feminist Majority; Feminist Majority Foundation; Joyful Heart Foundation; Los Angeles County District Attorney's Office; National Clearinghouse on Marital and Date Rape; National Organization for Women; Next Door Solutions to Domestic Violence; Office of Lieutenant Governor Eleni Kounalakis; Prosecutors Alliance of California; Ro Khanna for Congress; San Diego County District Attorney's Office; San Francisco Democratic Party; San Francisco District Attorney's Office; San Joaquin County District Attorney Office; Santa Barbara Women's Political Committee; Santa Clara County Democratic Party; Santa Clara County District Attorney's Office; Santa Clara County Supervisor Susan Ellenberg, District 4; Silicon Valley Democratic Club; South Bay Labor Council; Women's March San Jose

Opposition: California Attorneys for Criminal Justice; California Public Defenders Association (oppose unless amended)

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this legislation is to repeal provisions of code relating to spousal rape thereby making an act of sexual intercourse accomplished with a spouse punishable as rape if the act otherwise meets the definition of 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 specifies 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 of the nature of the act, as one of the following:
 - The victim was unconscious or asleep;
 - The victim was not aware, knowing, perceiving, or cognizant that the act occurred; or
 - The victim was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact (the perpetrator tricked, lied to, or concealed the information);
- Against the victim’s will by threats, as defined.
- Against the victim’s will by threat of authority, as defined.

This bill repeals the provisions of the penal code relating to spousal rape.

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.)

Existing law provides that in addition to the acts that would constitute rape if committed against a spouse, an act of sexual intercourse with a non-spouse accomplished under any of the following circumstances is also rape: (Pen. Code, § 261, subd. (a).)

- Where the victim is incapable of giving legal consent due to a mental disorder or developmental or physical disability;
- By false pretenses (where the perpetrator gains consent by pretending to be someone known to the victim other than the perpetrator); or,
- Where the victim is unconscious of the nature of the act because the perpetrator fraudulently represented that the sexual penetration served a professional purpose.

Existing law provides that an unmarried person under 18 years of age is capable of consenting to and consummating marriage upon obtaining a court order granting permission to the underage person or persons to marry. (Fam. Code, § 302, subd. (a).)

This bill expands the circumstances under which sexual intercourse with a spouse is rape, to include these circumstances: where a spouse is incapable of giving legal consent due to a specified disorder or disability, where a spouse submits to sexual intercourse under false pretenses; or where the offending spouse fraudulently represents that the sexual penetration serves a professional purpose.

Existing law requires a person convicted of rape to register as a sex offender; but requires a person convicted of spousal rape to register as a sex offender only if they commit the offense by use of force or violence and served a state prison sentence. (Pen. Code, § 290, subd. (c)(1).)

Existing law gives courts discretion to impose sex offender registration on those persons convicted of spousal rape who are not already required to register as sex offenders. (Pen. Code, § 290.006.)

Existing law requires a person required to register as a sex offender to be listed on the Megan's law website, except as specified. (Pen. Code, § 290.46.)

This bill requires a person convicted of rape of their spouse to register as a sex offender, thereby eliminating the discretion of judges to not impose registration when the rape is committed in a manner that does not involve force or violence and a prison sentence.

Existing law prohibits the court from granting probation for rape committed under the following circumstances: (Pen. Code, § 1203.065, subd. (a).)

- 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 of the nature of the act; or,
- Against the victim's will by threat of retaliation, as defined.

Existing law provides that before probation may be granted for the crime of rape or spousal rape, the court must:

- Order a diagnostic study of the defendant, which can include being placed in a facility for up to 90 days;
- Conduct a hearing at the time of sentencing to determine if the defendant would pose a threat to the victim; and,
- Order a psychologist or psychiatrist appointed to include a consideration of the threat to the victim and the defendant's potential for positive response. (Pen. Code, § 1203.067, subd. (a).)

Existing law provides that if probation is granted for rape or spousal rape, the defendant must complete a sex offender management program. (Pen. Code, § 1203.067, subd (b)(2).)

Existing law prohibits plea bargaining when an indictment or information charges any serious felony, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence. (Pen. Code, § 1192.7, subd. (a)(2).)

Existing law classifies rape as a serious felony, strike. (Pen. Code, §§ 667 & 1192.7, subd. (c)(3).)

This bill prohibits probation and requires a mandatory state prison sentence for rape of a spouse accomplished under the following circumstances:

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

Existing law allows the court in unusual circumstances to grant probation for rape committed against the victim's will by threat of authority. (Pen. Code § 1203.065, subd. (b)(1).)

This bill eliminates the court's discretion to grant probation and requires a mandatory state prison sentence where spousal rape is accomplished against the spouse's will by threat of authority, as defined.

COMMENTS

1. Need for This Bill

According to the author:

Although marital rape is illegal in all 50 states, California is one of nine states that distinguishes "spousal rape" from "rape."

If an individual is raped by a stranger, or even their partner with which they have had a years-long relationship, the act is traumatic and is carried for a lifetime. It's no different when they are raped by a spouse. Spouses that experience rape suffer from long-lasting physical and psychological effects from their experience. A handful of studies have found post-traumatic stress disorder, fear, anxiety, depression, and sexual dysfunction to be consequences of marital rape. A marriage license doesn't make the consequences of rape any less severe.

AB 1171 provides parity in California law and would require the same standards for spousal rape that are currently in the Penal Code for rape. Rape is universally acknowledged as a crime of violence that is both physically and psychologically

harmful to the victim. Here in California, those who are convicted under spousal rape law may face less severe sentencing and may not have to register as a sex offender.

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.

California law requires a continuous, enthusiastic “yes” from both parties to consent to engaging in sexual activities. Even if a married couple has engaged in consensual sexual activities previously, a voluntary “yes” must be obtained each time. If not, it is nonconsensual and considered rape. However, California law currently distinguishes between nonspousal rape and spousal rape and there a differing levels of punishment for each. AB 1171 will provide parity in California law and send the message that spousal rape is just as harmful and serious as nonspousal rape.

2. Spousal Rape in California Law

Under California law, the crime of spousal rape is a separate crime from the crime of rape. While both crimes hold the same punishment in terms of the number of years an offender may spend in state prison, the crime of spousal rape differs from the crime of rape in terms of collateral consequences. Both crimes are punishable by imprisonment in state prison for three, six, or eight years. However, persons who are convicted of spousal rape are eligible to plea bargain their sentence and may be sentenced to probation while a person convicted of rape is not probation eligible. Likewise, when a defendant is convicted rape they face mandatory sex registration but a defendant convicted of spousal rape faces discretionary registration unless the rape was forcible and results in a prison sentence. In addition, the crime of spousal rape does not include instances where the victim is unable to consent to sexual intercourse due to a mental disorder or a developmental or physical disability; rape by false pretenses; or rape by fraudulent representation that the intercourse served a professional purpose.

This bill would eliminate all distinctions between spousal rape and rape by eliminating the crime of spousal rape. Once eliminated, by operation of law, all acts considered rape under California law committed by a perpetrator upon a spouse would be treated in all manner as any rape under the Penal Code, § 261 et seq.

Legislative History

For most of its history California did not recognize the rape of a wife by her husband. AB 546 (Mori), statutes of 1979, enacted the first spousal rape law in California. This was codified in Penal Code, § 262, which was separately codified from the general (non-marital) rape section in Penal Code, § 261. The initial reasoning for criminalizing the rape of a spouse were arguments centered upon the fact that marriage did not grant irrevocable consent to engage in intercourse with a spouse, and women should not be viewed as property. Specifically, “a woman does not give up her right to consent to sexual intercourse by virtue of marriage, and that the existing definition of rape treats married women in an unequal and unfair fashion.”¹

¹ Ross, *Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage* (Dec. 2015) Digital Commons @ University of Nebraska – Lincoln; <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1085&context=historydiss> at p. 136, citing Senate Committee on Judiciary summary of A.B. 546 at fn. 384 [as of May 26, 2021].

Following the codification of spousal rape in 1979, the Legislature has amended Penal Code, § 262 many times to make it correspond more closely with the provisions of Penal Code, § 261 (rape). Most recently, AB 701 (C. Garcia), Ch. 848, Stats. of 2015 added § 263.1 to the Penal Code which reads: “The Legislature finds and declares that all forms of nonconsensual sexual assault may be considered rape for purposes of the gravity of the offense and the support of survivors.”

Nevertheless, the provisions outlined above related to the granting of probation, some discretion in sex registration, not criminalizing intercourse between spouses where one or more of the spouses has a specified disability, rape by false pretenses, and rape by fraudulent representation that the intercourse serves a professional purpose have not been aligned between the code sections for spousal rape and rape. This bill would accomplish this by eliminating the crime of spousal rape completely.

3. Eliminating Discretionary Sex Registration

California was the first state to require sex offender registration in 1947. The stated purpose for sex offender registration is to deter offenders from committing future crimes, provide law enforcement with an additional investigative tool, and increase public protection. [*Wright vs. Superior Court* (1997) 15 Cal.4th 521, 526; Alissa Pleau (2007) *Review of Selected 2007 California Legislation: Closing a Loophole in California's Sex Offender Registration Laws*, 38 *McGeorge L. Rev.* 276, 277; *Hatton vs. Bonner* (2004) 365 F. 3rd 955, 961.] Pen. Code, § 290 historically required lifetime registration by persons convicted of specified sex crimes that reside in, attend school or work in California. (Pen. Code, § 290 subd. (a).) In 2017 SB 384 (Wiener), Ch. 541 modified California's sex registration to a three-tiered registration system.

Sex offenders are required to register annually within five working days of their birthday. (Pen. Code, § 290 subd. (b).) If the offender has no fixed address, he or she is required to register every 30 days. (Pen. Code, § 290.011 subd. (a).) A person is also required to notify law enforcement of any change of address within five days of moving. (Pen. Code, § 290.014.) A person who fails to register as a sex offender within the period required by law is guilty of a felony punishable by 16 months, 2 or 3 years. (Pen. Code, § 290.018 subd. (b).)

In 1996, California enacted "Megan's Law" allowing the public to access an address list of registered sex offenders. Before 2003, members of the public could only obtain the information on the Megan's Law list by calling a "900" or visiting certain designated law enforcement agencies and reviewing a CD-ROM. However, in 2003, California required the DOJ to put the Megan's Law list of offenders on a public access Web site with the offender's address, photo and list of offenses. [See Pen. Code, § 290.46(a).] For some offenders with less serious offenses, only his or her ZIP code is listed. Now, a citizen can enter his or her address and see if there are registered sex offenders living in his or her community or even next door.

The registration statute does not distinguish crimes based on severity and instead requires all persons convicted of a listed crime must register annually within five days of his or her birthday and for the rest of his or her life. (Pen. Code, § 290.012 subd. (a).) Although most registerable offenses are felonies, there some alternate felony/misdemeanor penalties and a few straight misdemeanors. [See (Pen. Code, § 243.4 (sexual battery); (Pen. Code, § 266c (obtaining sexual consent by fraud); (Pen. Code, §§ 311.1, 311.2(c), 311.4, 311.11 (child pornography); (Pen. Code § 647.6 (annoying or molesting a child); and, (Pen. Code, § 314(1)(2) (indecent exposure).)

Spousal Rape and Sex Registration

Under California law sex registration for spousal rape is only mandated for offenses involving the use of force or violence and the offender is sentenced to state prison. (Pen. Code, § 290, subd. (c).) This registration is for life. However, courts have the discretion to impose sex registration upon an offender in all other instances of spousal rape for 10 years, 20 years, or life. (Pen. Code, § 290.006.)

This bill would mandate sex registration for all instances of rape of a spouse by eliminating the provisions of spousal rape that follows a separate matrix for determining sex registration.

The proponents of the legislation argue that there should be no distinction between rape of a spouse and any other rape. The premise of the bill is that the elimination of the distinctions between the consequences of rape of a spouse and other forms of rape is a matter of equity. The acts of raping a spouse and raping a non-spouse should be the same under the law as they are equally wrongful. According to the Prosecutors Alliance the distinctions between the crimes are “a vestige of misogyny and must be changed.”

However, the bill’s opponents point out that sex registration is not intended as a punishment, it is intended to protect the community. They feel that courts are in the best position to make determinations about registration particularly when it involves a victim who is related to the perpetrator. Mandatory sex registration may carry consequences for the victim and their family.

4. Curtailing the Ability to Plea Bargain and Grant Probation for Rape of a Spouse

California law has specified that a number of criminal offenses are not eligible for probation. Specifically, in California outright prohibits probation for the following offenses under Penal Code § 1203.056, subd. (b)(1):

- Forcible sexual intercourse (Penal Code § 261, subds. (a)(2) or (6));
- In concert sexual assault (Penal Code § 264.1);
- Pimping and pandering (Penal Code §§ 266h and 266i);
- Procuring or obtaining a minor under the age of 16 for lewd and lascivious act (Penal Code § 266j)
- Aggravated sexual assault of a child under 14 (Penal Code § 269)
- Forcible or in concert sodomy(Penal Code § 286, subds. (c)(2), (3) or (d));
- Forcible or in concert oral copulation (Penal Code § 288a, subds. (c)(2),(3) or (d));
- Sexual intercourse or sodomy of a child 10 or younger (Penal Code § 288.7);
- Forcible foreign object sexual penetration (Penal Code § 289, subd. (a)); or
- Making child pornography (Penal Code § 311.4, subd. (b)).

California also provides that “(e)xcept in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of” the following crimes under Pen. Code, § 1203.056, subd. (b)(1):

- Rape by threat of use of public official authority (Penal Code § 261 (a)(7));
- Sodomy by threat of use of public official authority (Penal Code § 286(k));

- Oral copulation by threat of use of public official authority (Penal Code § 28a(k)); subdivision Foreign object sexual penetration by threat of use of public official authority (Penal Code § 289(g)); or
- Assault with intent to commit a specified sexual offender (Penal Code § 220).

AB 2888 (Low), Ch. 863, Stats. of 2016 additionally prohibited judges from granting probation for the following offenses:

- Rape, sodomy, forced oral copulation, or sexual penetration by a foreign object when the perpetrator uses an intoxicating or anesthetic substance.
- Rape, sodomy, or forced oral copulation when the victim is unconscious.
- Sexual penetration by a foreign object when the victim submits under the belief that the person committing the act or causing the act to be committed is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused.

Additionally, probation is prohibited if a perpetrator uses a firearm in the commission of a rape or inflicts great bodily injury upon the victim. (Pen. Code, §§ 1203.06, subd. (a)(1)(F) & 1203.075, subd. (a)(6).)

Probation Eligibility for Spousal Rape

In contrast, besides cases involving use of a firearm or infliction of great bodily injury, under current law, the court has discretion to grant probation in spousal rape cases in specified circumstances. This discretion is not without limits. In order to do so, the court must order a diagnostic study of the defendant which can include up to 90 days in a facility. (Pen. Code, §§ 1203.067, subd. (a)(1) & 1203.03.) The court must also order a psychologist or psychiatrist to evaluate the defendant to determine their potential for positive response and their threat to the victim. (Pen. Code, § 1203.067, subd. (a)(3).) At the time of sentencing, the court must conduct a hearing to determine if probation would pose a threat to the victim. (Pen. Code, § 1203.067, subd. (a)(2).) If probation is granted, the defendant must complete a sex offender management program, which shall not be less than one year. (Pen. Code, § 1203.067, subd. (b).)

This bill would virtually eliminate the eligibility for probation for spousal rape in the same manner it has been eliminated for rape generally. Historically, when eliminating probation eligibility the committee has examined whether there is no conceivable set of circumstances where it would be considered appropriate to grant probation.

Proponents of this legislation find the ability to grant probation in instances of rape of a spouse to be incongruous and unjust when compared to the punishment that is mandated by rape offenses generally. The elimination of spousal rape would mean that all of the existing limitations on granting probation and mandating state prison would apply to persons who rape their spouse.

Opponents to the bill argue that judges, who hear the facts and circumstances of a particular case, are in the best position to craft the appropriate remedy in the form of appropriate punishment. Factoring in both the interests of the community as well as the victim. They point to the additional complications that can arise when the victim is married to the perpetrator. A lengthy prison sentence can have emotional and economic consequences on the victim and their family.

The California Public Defender's Association has proposed a compromise position on this provision. Their proposal would eliminate spousal rape, but in terms of probation eligibility would eliminate probation eligibility for rape (when the victim is a spouse) is accomplished through force or violence. This proposal would retain judicial discretion to grant probation in instances of rape of an unconscious spouse or an intoxicated spouse.

5. Expansion of the Crime of Rape to Specified Spouses

Unlike rape generally, spousal rape has not been expanded to cover the following categories:

- Where the victim is incapable of giving legal consent due to a mental disorder or developmental or physical disability;
- By false pretenses (where the perpetrator gains consent by pretending to be someone known to the victim other than the perpetrator); or,
- Where the victim is unconscious of the nature of the act because the perpetrator fraudulently represented that the sexual penetration served a professional purpose.

This bill would apply these provisions to spouses by eliminating the crime of spousal rape. Generally, these categories do not fit within the rubric of rape of a spouse.

For instance, rape by false pretenses seems inapplicable to spouses. Presumably, the victim and offender would know each other. Similarly, although in theory rape by fraudulent representation of a professional purpose between spouses seems plausible, it too is largely inapplicable.

Rape of a Person with a Specified Disorder or Disability as Applied to Spouses

Rape where the victim is incapable of giving legal consent due to a mental disorder or developmental or physical disability was presumably created to protect a vulnerable community from sexual assault. These individuals do not have the capacity to consent to sexual intercourse. As a state, we have likewise categorized minors in this manner. As incapable of consenting to a wide spectrum of sexual activity committed willfully, but without legal consent. The idea is that we would protect someone from being taken advantage of and sexually assaulted or raped by another who cannot legally consent to sex.

This bill would criminalize sexual intercourse between spouses, committed willfully, if one or both of the spouses suffers from a mental disorder, developmental disability, or physical disability that prevents them from giving legal consent. California law has recognized that sex between a minor and an adult is not punishable as a crime if the minor and the adult are lawfully married. (Fam. Code, § 302, subd. (a).) Even though a minor cannot legally consent to sex, California law permits the minor to have sex with an adult if they are married.

This bill would criminalize sex between adult spouses who willfully engage in sexual intercourse while married.

6. Arguments in Support

According to Laura X, the Director of the National Clearinghouse on Marital and Date Rape:

As you may not know, I am still alive, at 80, and am thrilled that this is happening, because I coordinated the 1978-79 California campaign and then 45 other successful state campaigns. I know the effort it takes.

We made it to 50 states in 1993. I know all too well what kind of important, meaningful, and very difficult effort it is to have equal treatment under the law for women married to their rapists. Marriage should not be a License to Rape as Dr David Finkelhor titled his book on the subject.

AB 1171 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.

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.

Dr. Diana Russell, the pre-eminent scholar on all forms of rape, found in her study that 14 percent of women who had ever been married had been raped by their husbands. A professor at Mills College, Dr. Russell also wrote the definitive book on the subject, Rape in Marriage.

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.

Regardless of the relationship, rape is rape. AB 1171 eliminates this distinction so we can ensure justice for victims of sexual assault. Specifically, AB 1171 repeals PC section 262 and deletes "not the spouse of the perpetrator" from PC section 261.

According to the Alameda County District Attorney:

According to the National Coalition Against Domestic Violence, 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. Although marital rape is illegal in all 50 states, California is one of the eleven states that distinguishes "spousal rape" from "rape." If an individual is raped by a

stranger, or even their partner with which they have had a years-long relationship, the act is traumatic and carried for a lifetime, it's no different when they are raped by a spouse. Spouses that experience rape suffer from long-lasting physical and psychological effects from their experience. Studies have found post-traumatic stress disorder, fear, anxiety, depression, and sexual dysfunction to be consequences of marital rape. A marriage license should not make the consequences of rape any less severe.

AB 1171 provides parity in California law and would require the same standards for spousal rape that are currently in the Penal Code for rape. Rape is universally acknowledged as a crime of violence that is both physically harmful to the victim. 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.

When spousal 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. Regardless of the relationship, rape is rape. AB 1171 eliminates the distinction so we can ensure justice for victims of sexual assault.

7. 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 Assembly Bill 1171 ("AB 1171") by Assembly Member Garcia 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 and to allow individuals with mental disorders, physical and mental disabilities the right to consent to sexual intercourse.

AB 1171 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, AB 1171 would repeal Penal Code Section 262 in its entirety and prohibit under most circumstances granting of probation to a person convicted of spousal rape. AB 1171 would criminalize the sex lives of mentally, developmentally or physically disabled spouses since under Penal Code section 261(a)(1) their spouses would be deemed incapable of consenting to sex.

Although CPDA understands the desire to recognize the trauma of spousal rape, AB 1171 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, AB 1171 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, AB 1171 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 reentry 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 AB 1171 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.

Eliminating spousal rape will criminalize the sex lives of mentally, developmentally or physically disabled spouses since rape under Penal Code section 261(a)(1) is defined as having sex with someone who legally is incapable of consenting. Some people with such disabilities live with and are married to other disabled people but others are married to non-disabled spouses. Additionally, some people might become disabled due to age, disease or accident. Does it make sense to criminalize their consensual sex with their partners?

Already there is a tension in California law between the desire to protect the disabled and respecting their rights to control their own sex lives. California courts have held that the developmentally disabled or delayed individual "must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (*People v. Thompson*, 142 Cal.App.4th 142.) The *Thompson* court found that a woman who lived in a group home and worked in a sheltered workshop, read at the level of a 7 or 8 year old, understood what sex was but did not understand the disease potential could not consent to sex even though she had given legal consent in other matters on various forms.