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# Chapter 259: Welcome to the 21st Century! Taking Marital Status Out of Rape by Misrepresentation

Michelle Carlson

*Pacific McGeorge School of Law*

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## Chapter 259: Welcome to the 21st Century! Taking Marital Status Out of Rape by Misrepresentation

*Michelle Carlson*

### *Code Sections Affected*

Penal Code §§ 261; 286 (amended).

AB 65 (Achadjian); 2014 STAT. Ch. 259 (Effective September 9, 2013).

### I. INTRODUCTION

If a man pretends to be a married woman's husband and engages in sexual intercourse with her, by law, he has committed rape.<sup>1</sup> Prior to 2013, however, if the woman was unmarried, and a man pretended to be her boyfriend, legally no rape occurred.<sup>2</sup> Two recent events have highlighted this anomaly.<sup>3</sup> First, in Santa Barbara County, an intruder broke into the bedroom of a sleeping woman and began having sex with her.<sup>4</sup> The victim, believing the intruder was her boyfriend, did not initially resist until hearing "her boyfriend cough from the other room."<sup>5</sup> Police caught the intruder but did not charge him with rape because he had not impersonated the victim's husband.<sup>6</sup>

Then, in January 2013, the Second District Court of Appeal overturned a rape conviction because the prosecutor argued an incorrect legal theory of rape by impersonation of a woman's boyfriend.<sup>7</sup> The Court reversed because the jury instructions may have supported an incorrect legal theory allowing the jury to convict on rape by impersonation of the victim's boyfriend while the law only recognizes rape by impersonation of a spouse.<sup>8</sup>

Following these events, Assembly member Achadjian introduced Chapter 259 to expand the definition of rape by misrepresentation beyond impersonation of a spouse to impersonation of any person known to the victim.<sup>9</sup>

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1. *People v. Morales*, 212 Cal. App. 4th 583, 586, 150 Cal. Rptr. 3d 920, 922 (2d Dist. 2013).

2. *Id.* at 586, 150 Cal. Rptr. 3d at 921–22.

3. See Jim Sanders, *Assembly Passes Bill Sparked by 'No Husband, No Rape' Case*, SACRAMENTO BEE CAPITOL ALERT BLOG (May 9, 2011, 5:00 PM), <http://blogs.sacbee.com/capitolalertlatest/2011/05/assembly-passes-bill-sparked-b-1.html> (on file with the *McGeorge Law Review*) (describing a recent crime during which an intruder impersonated a Santa Barbara woman's boyfriend and could not be charged with felony rape); *Morales*, 212 Cal. App. 4th at 596, 150 Cal. Rptr. 3d at 929 (overturning a rape conviction because the jury may have convicted the defendant under an incorrect legal theory, rape by impersonation by a boyfriend).

4. Sanders, *supra* note 3.

5. *Id.*

6. See *id.* (describing how California law only recognizes felony rape by impersonation if the impersonation is of the victim's spouse).

7. *People v. Morales*, 212 Cal. App. 4th 583, 595, 150 Cal. Rptr. 3d 920, 929 (2d Dist. 2013).

8. *Id.*

9. See Press Release, Assembly member Katcho Achadjian, Assemblyman Achadjian and Speaker Pérez

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## II. LEGAL BACKGROUND

Codified in the Nineteenth Century, impersonation of a spouse to engage in sexual intercourse is rape.<sup>10</sup> Section A discusses the changes in rape by impersonation since the Nineteenth Century.<sup>11</sup> Section B explores Assemblymember Achadjian’s previous efforts to expand the definition of rape by impersonation to include impersonation of a cohabitant.<sup>12</sup> Finally, Section C explains recent case law, which acted as an impetus for the passage of Chapter 259.<sup>13</sup>

### A. Rape by Impersonation, Over the Years

The legislature codified sexual intercourse with a woman by impersonation of the victim’s husband as rape in 1872.<sup>14</sup> Revisions to the statute reflecting gender-neutrality passed in 1979—the only updates made to the statute.<sup>15</sup> In 1981, *Mathews v. Superior Court of Butte County* questioned the continuing “distinction between married and unmarried victims” given growing societal acceptance of intimate relationships without marriage.<sup>16</sup>

### B. Prior Attempt to Update the Nineteenth Century Law

In 2011, Assembly member Achadjian proposed legislation to expand rape by impersonation to include sexual intercourse obtained by impersonation of a cohabitant.<sup>17</sup> The catalyst was the above-mentioned Santa Barbara County incident in which a woman engaged in sexual intercourse with a man she

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Team Up to Introduce Bipartisan Proposal to Change Archaic State Law, Ensure Justice for Rape Victims (Jan. 8, 2013), available at [http://arc.asm.ca.gov/member/AD35/?p=article &sid=425&id=253629](http://arc.asm.ca.gov/member/AD35/?p=article&sid=425&id=253629) [hereinafter Press Release, Assembly member Achadjian, Jan. 8, 2013] (on file with the *McGeorge Law Review*) (introducing legislation to expand the criminalization of rape by impersonation to protect all victims of this crime, not only married victims).

10. *Morales*, 212 Cal. App. 4th at 594, 150 Cal. Rptr. 3d at 928.

11. Jim Sanders, *Rape Case Ruling Sparks Legislative Proposals in California*, SACRAMENTO BEE (Jan. 5, 2013), <http://www.sacbee.com/2013/01/05/v-print/5093412/rape-case-ruling-sparks-legislative>.html (on file with the *McGeorge Law Review*).

12. AB 765, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as amended on May 5, 2011, but not enacted).

13. *Morales*, 212 Cal. App. 4th at 595, 150 Cal. Rptr. 3d at 929.

14. *Id.* at 594, 150 Cal. Rptr. 3d at 928.

15. *Id.* at 595, 150 Cal. Rptr. 3d at 928.

16. See *Mathews v. Super. Ct. of Butte Cnty.*, 119 Cal. App. 3d 309, 310–12, 173 Cal Rptr. 820, 820–21 (3d Dist. 1981) (Paras, Acting P.J., concurring) (highlighting “an obvious and serious oversight in our Penal Code,” after granting defendant’s motion to dismiss after he “sexually fondled and caressed a woman as she slept in the bed she usually shared with another man” because he was charged with “fraudulent procurement” not fraudulent impersonation, and the court held that he could not be “both procurer and seducer” under the statute).

17. AB 765, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as amended on May 5, 2011, but not enacted).

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believed was her boyfriend but was actually an intruder.<sup>18</sup> The intruder was prosecuted, but not for felony rape because “the victim lived with her boyfriend rather than with her husband.”<sup>19</sup> This prior legislation stalled in committee due to prison overcrowding and a resulting policy not to pass any laws that might add to the prison population.<sup>20</sup>

### C. *Overtured Rape Conviction: Another Reason for Change*

In January 2013, in *People v. Morales*, the Second District Court of Appeal overturned the conviction of a man found guilty of rape of an unconscious person under Penal Code Section 261(a)(4).<sup>21</sup> Under Section 261(a)(4), a rape has occurred if the victim is “unconscious of the nature of the act” because he or she is unconscious, asleep, unaware of the act occurring, or unaware “of the essential characteristics of the act.”<sup>22</sup> The case involved a man who impersonated a woman’s boyfriend and began having sex with her while she was asleep.<sup>23</sup> At the trial, the prosecutor argued, not only that the victim was asleep, but that she was also unaware “of the essential characteristics of the act because defendant deceived her into believing he was her boyfriend.”<sup>24</sup> The court considered whether the defendant’s actions were those of fraud in the fact<sup>25</sup> or fraud in the inducement.<sup>26</sup> “[C]ourts have historically been reluctant to impose criminal liability on the defendant [for fraud in the inducement] since the victim consented to the particular act performed, albeit under false pretenses.”<sup>27</sup> The court held that rape by impersonation was fraud in the inducement and not fraud in the fact and therefore did not apply to Section 261(a)(4), but only to Section 261(a)(5), which specified that the impersonation must be of a spouse.<sup>28</sup>

18. Sanders, *supra* note 3.

19. Press Release, Achadjian Bill to Close Rape Loophole Is Finally Approved by, at 1 (May 14, 2013), available at <http://arc.asm.ca.gov/member/AD35/?p=article&sid=425&id=255375> [hereinafter Press Release, Assembly Member Achadjian, May 14, 2013] (on file with the *McGeorge Law Review*).

20. See CALIFORNIA STATE SENATE REPUBLICAN CAUCUS, *Briefing Report: Receivership/Overcrowding Crisis Aggravation (“ROCA”)* (Aug. 22, 2007), <http://cssrc.us/publications.aspx?id=2992> (on file with the *McGeorge Law Review*) (describing the Senate Public Safety Committee policy of holding any bills that could increase the prison population due to overcrowding).

21. 212 Cal. App. 4th 583, 587, 150 Cal. Rptr. 3d 920, 922 (2d Dist. 2013).

22. CAL. PENAL CODE § 261(a)(4)(A)–(D) (West 2008).

23. See *Morales*, 212 Cal. App. 4th at 586, 150 Cal. Rptr. 3d at 922 (recognizing that the accused entered a woman’s bedroom “after her boyfriend departed and, without disclosing his identity, had sexual intercourse with her”).

24. *Id.* at 586–87, 150 Cal. Rptr. 3d at 922.

25. See *id.* at 591, 150 Cal. Rptr. 3d at 925 (defining fraud in the fact as obtaining “consent to perform one act,” but performing another, invalidating consent because there was no consent to the act performed).

26. See *id.* (defining fraud in the inducement as misrepresentation to obtain consent, and then performing the act consented to).

27. *Id.*

28. See *id.*; *People v. Morales*, 212 Cal. App. 4th 583, 595, 150 Cal. Rptr. 3d 920, 929 (explaining why criminal liability for rape can only be charged for fraud in the inducement when specifically defined in a

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In the analysis, the court also highlighted the principles of statutory construction and general avoidance of interpreting a statute in such a way that eliminates the need for other provisions in the law.<sup>29</sup> Therefore, the court felt “compelled to interpret Section 261, subdivision (a)(4), in a way that [did not] render subdivision (a)(5) superfluous.”<sup>30</sup> However, the *Morales* Court “urge[d] the Legislature to reexamine Section 261, subdivisions (a)(4) and (5), and correct the incongruity that exists when a man may commit rape by having intercourse with a woman when impersonating a husband, but not when impersonating a boyfriend.”<sup>31</sup>

### III. CHAPTER 259

Chapter 259 expands the crime of rape by fraud beyond impersonation of a victim’s spouse to impersonation of anyone the victim knows.<sup>32</sup> Specifically, Chapter 259 expands the definition of rape and sodomy to include situations in which a victim “submits under the belief that the person committing the act 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, with the intent to induce the belief.”<sup>33</sup> This law includes an urgency clause allowing it to go into effect immediately.<sup>34</sup>

### IV. ANALYSIS

According to Assemblymember Achadjian, Chapter 259 “close[s] an archaic loophole . . . that has denied justice to victims simply because they were not married.”<sup>35</sup> Section A discusses societal views of non-marital relationships and how they have changed over the years.<sup>36</sup> Section B reviews the treatment of non-marital relationships in other criminal statutes.<sup>37</sup> Finally, Section C considers the costs of Chapter 259.<sup>38</sup>

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statute).

29. *See id.* at 594, 150 Cal. Rptr. 3d at 928 (reviewing the principles of statutory construction and the courts responsibility to not invalidate other sections of a statute through judicial interpretation).

30. *Id.* at 595, 150 Cal. Rptr. 3d at 929.

31. *Id.* at 587 n.3, 150 Cal. Rptr. 3d at 922 n.3.

32. PENAL CODE §§ 261(a)(5); 286(j) (amended by Chapter 259).

33. *Id.*

34. 2014 Cal. Stat. ch. 259, §4.

35. SENATE FLOOR, COMMITTEE ANALYSIS of AB 65, at 4 (June 25, 2013).

36. *Id.*

37. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS of AB 65, at 4 (Mar. 12, 2013) (reviewing other criminal statutes and how they protect victims in other types of relationships, not just victims married to the accused).

38. *See* SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS of AB 65, at 3 (July 1, 2013) (considering data from California Department of Corrections and Rehabilitation showing only five convictions

*McGeorge Law Review / Vol. 45**A. Changing Societal Views of Intimate Relationships Without Marriage*

Historically, rape by impersonation of a spouse was necessary to protect a wife from the accusation of adultery.<sup>39</sup> However, as noted by the California District Attorneys Association, a sponsor of Chapter 259, “societ[al] norms have evolved . . . [such that] [i]t is no longer uncommon for persons who are not married but are involved in an intimate relationship to engage in sexual behavior.”<sup>40</sup> As early as 1981, courts questioned the continued unequal treatment based only on marital status.<sup>41</sup> In 2013, the *Morales* court entreated the legislature to resolve the unequal treatment of victims of rape by impersonation, which provided justice to married victims when the impersonation was of a spouse, but no justice to unmarried victims when the impersonation was merely of a lover.<sup>42</sup> As noted by Assembly member Achadjian, “rape is rape” and relationship status is irrelevant.<sup>43</sup> Thus, Chapter 259 expands the definition to protect a victim from a perpetrator who impersonates anyone known to the victim.<sup>44</sup>

*B. Aligning Chapter 259 with Other Criminal Statutes*

California is only the second state to protect all victims of felony rape by impersonation regardless of marital status.<sup>45</sup> Additionally, other California criminal statutes recognize and protect victims in close personal relationships other than marriage.<sup>46</sup> For example, felony domestic violence treats cohabitants and those who have children together as equal to spouses under the law.<sup>47</sup> The

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for rape by misrepresentation of a spouse since 2000).

39. See J.A. Scutt, *A Disturbing Case of Consent in Rape*, 40 J. CRIM. L. 271, 271 (1976) (reviewing the history of rape by impersonation of a spouse and the concern that if the wife was found to have consented to the sexual act, she may also be considered an adulterer, after which her husband could seek a divorce).

40. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS of AB 65, at 4 (Mar. 12, 2013).

41. See *Mathews v. Super. Ct. of Butte Cnty.*, 119 Cal. App. 3d 309, 312, 173 Cal Rptr. 820 (3d Dist. 1981) (Paras, Acting P.J., concurring) (recognizing that given changing societal views of relationships “distinction[s] between married and unmarried victims seems no longer warranted”).

42. *People v. Morales*, 212 Cal. App. 4th 583, 587 n.3, 150 Cal. Rptr. 3d 920, 922 n.3 (2d Dist. 2013).

43. Gina Potthoff, *Dudley Achadjian Work to Change Rape-by-Fraud Law*, NOOZHAWK (Jan. 8, 2013, 11:52 PM), [http://www.noozhawk.com/noozhawk/article/010813\\_officials\\_change\\_outdated\\_rape\\_by\\_fraud\\_law](http://www.noozhawk.com/noozhawk/article/010813_officials_change_outdated_rape_by_fraud_law) (on file with the *McGeorge Law Review*).

44. PENAL CODE §§ 261(a)(5); 286(j) (amended by Chapter 259).

45. See PENAL §§ 261(a)(5); 286(j) (amended by Chapter 259) (replacing references to impersonation of a spouse to impersonation of anyone the victim knows); TENN. CODE ANN. § 39-13-503(a)(4) (West 2011) (finding rape when “sexual penetration is accomplished by fraud”); ARIZ. REV. STAT. ANN. § 13-1401(5)(d) (West 2010) (including impersonation of a victim’s spouse in the definition of “without consent”); ALA. CODE § 13A-6-65(a)(1) (LexisNexis 2005) (declaring that a man has committed sexual misconduct, a misdemeanor, when he obtains a woman’s consent for sexual intercourse through fraud).

46. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS of AB 65, at 4 (Mar. 12, 2013) (reviewing other criminal statutes and how they protect victims in other types of relationships, not just victims that are married to the accused).

47. CAL. PENAL CODE § 273.5(a) (West 2008).

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misdemeanor domestic violence statute is even more inclusive, protecting victims who are engaged to, dating, or have formerly dated the batterer.<sup>48</sup> By recognizing and protecting unmarried victims of this crime, Chapter 259 aligns rape by misrepresentation with these other California statutes.<sup>49</sup>

### C. A Rare Crime Resulting in Minimal Cost

Although uncommon, there is a history of cases involving sexual intercourse by impersonation of a boyfriend in the United States, in addition to the two above-mentioned California cases.<sup>50</sup> In 1994, a New York district court dismissed a charge of sexual misconduct against a defendant accused of impersonating his twin brother to engage in sexual intercourse with his brother's girlfriend.<sup>51</sup> The court dismissed because maintaining the charge required a lack of consent.<sup>52</sup>

Then, in the "Fantasy Man" case in Tennessee, Raymond "Mitchell telephoned women, pretended to be their fiancés or boyfriends, explained that he had had a fantasy about having sex with a blindfolded woman, and persuaded them to leave their doors unlocked and to wait in bed blindfolded."<sup>53</sup> The Tennessee court held that consent obtained by fraud is rape.<sup>54</sup> However, in 2007, the Massachusetts Supreme Court considered a case where a man impersonated his brother to have sexual intercourse with his brother's girlfriend and concluded that "[f]raudulently obtaining consent to sexual intercourse does not constitute rape" under Massachusetts law.<sup>55</sup>

According to the California Department of Corrections and Rehabilitation, since 2000 there have been only five admissions to state prison following convictions under Section 261(a)(5) of the California Penal Code, rape by impersonation of a spouse.<sup>56</sup> Additionally, the California Department of Justice reports only sixteen arrests made from 2009 to 2012 for a violation of Section 261(a)(5).<sup>57</sup> Even Santa Barbara County District Attorney Joyce Dudley "noted that she has seen [only] two or three cases like this in her twenty-three-year career as a prosecutor."<sup>58</sup>

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48. *Id.* § 243(e)(1).

49. *Id.* § 261(a)(5) (amended by Chapter 259).

50. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 67–68 (1998) (describing cases of rape by impersonation of a boyfriend in the United States).

51. *People v. Hough*, 607 N.Y.S.2d 884, 885, 887 (1994).

52. *Id.* at 887.

53. Falk, *supra* note 51, at 67.

54. *Id.*

55. *Suliveres v. Commonwealth*, 865 N.E.2d 1086, 1088, 1091 (2007).

56. Email from Rosalinda Rosalez, Ombudsmen, Cal. Dep't of Corr. & Rehab. to author (Aug. 23, 2013) (on file with the *McGeorge Law Review*).

57. Email from Shawna Tosten, Legis. Fisc. Coordinator, Cal. Dep't of Justice, to author (Aug. 27, 2013) (on file with the *McGeorge Law Review*).

58. Potthoff, *supra* note 43.

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Based on these statistics, the increase in convictions under Section 261(a)(5), due to the expansion for unmarried victims, is likely to be minimal.<sup>59</sup> However, any convictions under the revised statute will likely include a longer prison sentence than could have been obtained otherwise, and each additional year in prison costs the General Fund \$60,000.<sup>60</sup> Yet, the cost is negligible when compared with the justice being sought for victims of this serious and psychologically damaging crime.<sup>61</sup>

## V. CONCLUSION

Before Chapter 259, California law allowed a charge of felony rape when a perpetrator impersonated a spouse to obtain sexual intercourse, but did not allow the same charge for impersonation of a victim's lover.<sup>62</sup> Chapter 259 corrects this unequal treatment of victims by eliminating marital status and criminalizing rape by impersonation of anyone the victim knows.<sup>63</sup> This bipartisan legislation<sup>64</sup> updates the law by reflecting the acceptance of all relationships in today's society.<sup>65</sup> Chapter 259 corrects a loophole and affords equal treatment for all victims of the rare but devastating crime of rape by impersonation.<sup>66</sup>

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59. See SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS of AB 65, at 3 (July 1, 2013) (recognizing the "few and infrequent" convictions under section 261(a)(5)).

60. See *id.* at 1, 3 (noting that additional felony convictions under the expanded definition of rape by impersonation will likely lead to longer prison sentences, resulting in additional yearly incarceration costs).

61. See Potthoff, *supra* note 43 (considering how rarely the crime is committed, but how high the cost is to the victims).

62. See Press Release, Assembly Member Achadjian, Jan. 8, 2013, *supra* note 9 (noting the "archaic loophole in state law" which only recognized rape by impersonation if the impersonation was of the victim's spouse).

63. See CAL. PENAL CODE §§ 261(a)(5); 286(j) (amended by Chapter 259) (removing marital status from rape by impersonation).

64. See Press Release, Assembly Member Achadjian, May 14, 2013, *supra* note 19 (recognizing the variety of relationships in California that deserve the same protections, once reserved for marital partners).

65. *Id.*

66. See Potthoff, *supra* note 43, at 3 (noting the rarity of the crime, the cost to the victim, and the need to protect all victims of rape by impersonation).