Liberta Revisited: A Call to Repeal the Marital Examption for All Sex Offenses in New York's Penal Law

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"I think it is worse to have your husband rape you. It is somebody you loved, somebody you trusted. He took everything we had and threw it out the window. He made our life together dirty."

—marital rape victim

"Domestic violence is something that tragically will never go away. But it is something that the state can do far more to prevent, far more to educate people about and far more to prosecute."

—Governor George E. Pataki; February 22, 1996

**Introduction**

A recent newspaper article described an incident in which a husband showed up at his wife's door after her children left for school. The husband choked and pushed his wife. She fell and broke her ankle. Then the husband grabbed a kitchen knife and ripped off...
her clothes. As she screamed in pain from the broken ankle, the husband raped and sodomized her.³

The legal system generally treats husbands differently from others accused of assault and battery, despite laws allowing prosecution for spousal abuse.⁴ The police and the courts have not effectively responded to domestic violence cases.⁵ Many states implicitly sanction marital rape by failing to adequately treat it as a crime.⁶ The marital exemption precludes the prosecution of husbands for sexually assaulting their wives. Penal laws containing a marital exemption typically define rape as sexual intercourse with a woman who is not married to the actor.⁷

In 1984, the New York Court of Appeals, in People v. Liberta,⁸ held that the marital rape exemption in New York's Penal Law is unconstitutional.⁹ To date, however, the New York Legislature has failed to amend the Penal Law to expressly criminalize spousal rape. Moreover, some lower New York courts continue to apply some form of the marital exemption to sex offenses.¹⁰

This Note argues that to fully protect victims of spousal sexual assault, the New York Legislature should codify the Liberta decision and repeal the marital exemption for all sex offenses. Part I outlines the history of the marital rape exemption and its evolution in New York. Part II discusses the Liberta decision and the barriers to effective prosecution of marital rape, such as the legal stan-

³ See George James, Man Found Guilty of Raping His Wife, N.Y. TIMES, Dec. 6, 1995, at B5 (describing the facts of a case in which a New York City man was ultimately convicted of raping his wife). The defendant was eventually sentenced to a term of 10 to 20 years in prison. See George James, Man Gets 10-to-20-Year Term for Raping His Wife, N.Y. TIMES, Dec. 21, 1995, at B10.

⁴ Katherine M. Schelong, Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking, 78 MARQ. L. REV. 79, 81 (1994) ("The history of domestic violence and marital rape reveals that these offenses have been sanctioned and perpetuated by the criminal justice system, itself a reflection of existing social attitudes.").

⁵ See id. ("A review of data shows that the response to cases involving domestic abuse by the criminal justice system, from the police to the courts, has been ineffectual and inconsistent.").

⁶ See id. (stating that "marital rape is not treated as a crime" in many states).

⁷ See, e.g., N.Y. PENAL LAW § 130.35 (McKinney 1987) (defining rape in the first degree as sexual intercourse by a "male" with a "female") and N.Y. PENAL LAW § 130.00(4) (McKinney 1987) (defining "female" as "any female person who is not married to the actor"). See also DIANA E.H. RUSSELL, RAPE IN MARRIAGE 17 (1990) (stating that rape laws usually define rape as "the forcible penetration of the body of a woman, not the wife of the perpetrator").


⁹ Id. at 573. The Liberta decision applied to first degree rape and first degree sodomy. See id. at 572 n.3.

¹⁰ See discussion infra part II.B.1.
dard for "force," prosecutorial discretion in charging husbands, and gender bias in the courts. Part III gives policy arguments for a statutory amendment and offers a proposed statute to replace the current sex offenses sections of the Penal Law. This Note concludes that victims of marital sexual assault will receive full protection under the law only when the Legislature amends the New York Penal Law to expressly criminalize marital sexual assault.

I. The Marital Rape Exemption: A Historical Perspective

The common law doctrines underlying the marital rape exemption reflect the pervasive historical subordination of women in the law. In early societies, men controlled many aspects of women's lives, and the common law reflected this domination. Sexual contact within the context of marriage was presumptively consensual. Marriage implied the husband's "right to sexual intercourse with the wife upon all occasions."

A. Common Law Theories

Several common law theories contributed to the subjugation of women. Under the feudal doctrine of coverture, which prevailed from about the eleventh century through the sixteenth century, a woman lost her legal identity upon marriage and the law denied her political power and status. Married women were denied the

11. See Anne L. Buckborough, Family Law: Recent Developments in the Law of Marital Rape, 1989 ANN. SURV. AM. L. 343, 345 (1990) ("The marital exemption developed as a corollary of common law property and contract doctrines."); Schelong, supra note 4, at 86-88 (discussing various rationales behind the English common law doctrines that justified the forcible rape of wives by their husbands).
12. See Schelong, supra note 4, at 83-84. For example, A Hebrew husband possessed the power to condemn his wife to death for committing adultery. Id. at 84. Early Roman law even permitted a husband to "beat, divorce, or murder his wife for offenses she committed that disparaged his honor or threatened his property rights." Id. (citing R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 36-37 (1979)).
13. Buckborough, supra note 11, at 345 ("Proponents of the theory [of implied consent] assert that a woman who enters into a sexual relationship with a man, even for a short period of time, legally surrenders her right to refuse having sex with that man in the future."). Id. at 345-46. "Th[e] marital rape exemption was derived from an out dated belief that because the fact of marriage itself implies irrevocable consent to sex, nonconsensual sex in marriage is legally impossible." Developments in the Law—Legal Responses to Domestic Violence, 106 HARV. L. REV. 1498, 1533 (1993).
14. See RUSSELL, supra note 7, at 17 (quoting HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 163 (1980)).
15. See Schelong, supra note 4, at 86 ("Since women were denied both [status and political power], they inescapably were inferior citizens.") (citing Salina Szechtman, Wife Abuse: Women's Duties - Men's Rights, 10 VICTIMOLOGY: INT'L J. 253, 254
privilege of land ownership until the nineteenth century.\textsuperscript{16} According to Sir William Blackstone, a husband, under the doctrine of coverture, had the right to chastise his wife and beat her if she misbehaved, allowing him to maintain order within the family.\textsuperscript{17}

Under the marital unity theory,\textsuperscript{18} which derived from the doctrine of coverture, the wife and the husband became one upon marriage.\textsuperscript{19} According to Blackstone, "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and \textit{cover}, she performs every thing . . . ."\textsuperscript{20} The wife could not make a contract, sue another party, own personal property, or make a will.\textsuperscript{21} Before the nineteenth century, a husband did not make a contract with his wife since it was tantamount to making a contract with himself.\textsuperscript{22}

Under the chattel theory, introduced around the sixth century, a woman was first the property of her father and then, upon marriage, the property of her husband.\textsuperscript{23} Two means of acquiring valu-
able property and social status involved two English customs: bride capture, in which a man conquered a woman through rape, and stealing an heiress, in which a man kidnapped a woman for marriage. Rape laws developed from these customs to protect the property rights of male relatives of the victim from other men, not to protect women. Rape laws also protected a man’s valuable property interest in his wife’s chastity or daughter’s virginity. For example, if a man raped an unmarried virgin, he was guilty of stealing her father’s property, and if “a husband raped his wife he was merely using his property.”

Scholars credit the English jurist Sir Matthew Hale with creating the marital exemption for rape under the theory of implied consent. During the seventeenth century, Hale stated that “the husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.” Since the husband and wife were legally one, the common law did not recognize a wife’s refusal to have sex with her husband. Hale’s assertion became the basis for the marital rape exemption in England and the United States.

24. Schelong, supra note 4, at 87 (citing Note, To Have and to Hold, supra note 19, at 1257). See also Susan Brownmiller, Against Our Will: Men, Women and Rape 17 (1975) (“[M]arriage appears to have been institutionalized by the male’s forcible abduction and rape of the female.”).


26. See Buckborough, supra note 11, at 345 (citing Note, The Marital Rape Exemption, 52 N.Y.U. L. Rev. 306, 309 (1977)).

27. Schelong, supra note 4, at 87. See also Ryder & Kuzmenka, supra note 25, at 394 (“[P]rosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property.”).

28. 1 M. Hale, History of the Pleas of the Crown 629 (S. Emlyn ed. 1778), quoted in Buckborough, supra note 11, at 346. See also Rene I. Augustine, Marriage: The Safe Haven for Rapists, 29 J. Fam. L. 559, 560 (1990-91) (“Any perceived objectivity on Hale’s part toward women is tainted by the facts that he burned women at the stake as witches and has been characterized as a misogynist.”).

29. See Buckborough, supra note 11, at 346.

30. Augustine, supra note 28, at 561 (citations omitted). Hale gave no legal basis for his statement, but his assertion was the most cited authority for the marital rape exemption in this country. Id. at 560-61.
B. The Marital Rape Exemption in New York

New York followed most states in recognizing a marital exemption for rape. The marital exemption, codified in the Penal Code of 1909, offered a husband absolute protection from prosecution for the rape of his wife.

The 1922 case of People v. Meli illustrates the peculiar notion of the husband’s proprietary interest in his wife’s sexuality. The trial court convicted John Meli of raping his wife. Meli did not commit the act himself but aided and abetted another man in raping his wife. He contended that the marital rape exemption in the penal code should bar his prosecution. Meli argued that because he could not be guilty of marital rape under the penal code, he could not be guilty of aiding another person in raping his wife.

Relying on Hale’s assertion, the court found that a husband had a right to rape his wife, but that right was his alone. "It is true that he may enforce sexual connection, and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of

31. See Oliver L. Barbour, A Treatise on the Criminal Law of the State of New York 71 (1852) (“A man can not be guilty of a rape upon his own wife; for the matrimonial consent can not be retracted; but he may be guilty as a principal by assisting another person to commit a rape upon his wife.”) (footnote omitted).

32. See N.Y. Penal Law § 2010 (Consol. 1909). This section provided in part:

A person who perpetrates an act of sexual intercourse with a female not his wife, against her will or without her consent... is guilty of rape in the first degree and punishable by imprisonment for not more than twenty years.

A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of eighteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years.

33. 193 N.Y.S. 365 (Sup. Ct. 1922).

34. Id. at 365-66. Meli received a sentence of eight to ten years for first degree rape after a trial in a Chautauqua County Court. Id. at 365. He appealed that sentence in the Supreme Court, Chautauqua County, by application for a writ of habeas corpus. Id.

35. Id. at 365. Meli was present at the rape and actually helped to overcome his wife. Id.

36. Id. at 366. Meli argued that rape within marriage did not exist in the penal code. Id.

37. Id. Meli argued that since he “could not be guilty of the crime as an actual perpetrator and therefore punished directly, he [could not] be punished indirectly under... the Penal Law as a principal.” Id.

38. See Hale, supra note 28 and accompanying text.

39. Meli, 193 N.Y.S. at 366-67. “The husband can be guilty of the crime of rape, in so far as his wife is concerned, if he procured the offense to be committed upon her by another, or aided or abetted that other in so doing. If he was the one who with force and against her consent performed the sexual act upon her, there was and could be no rape.” Id. at 366.
rape. But it is too plain for argument that this privilege is a personal one only."

In 1965 the New York Legislature reformulated the elements for various sex offenses and their respective punishments. Definitions were added for the terms "sexual intercourse," "deviate sexual intercourse," "sexual contact," and "female." The definition for "female," defined as "any female person who is not married to the actor," perpetuated the marital rape exemption.

New York maintained an absolute exemption for rape in marriage until 1978. With the advent of rape reform in the early 1970s, the New York Legislature amended the Penal Law so

40. Id. at 367 (quoting State v. Dowell, 11 S.E. 525, 525 (N.C. 1890)).
42. See N.Y. Penal Law § 130.00(1)-(4) (McKinney 1967). Section 130.00 provided in part:

   The following definitions are applicable to this article:
   1. "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight.
   2. "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.
   3. "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party.
   4. "Female" means any female person who is not married to the actor.

Subsection (4) is the basis for the marital rape exemption.

43. To avoid repeating the phrase "not married to the actor" in the definitions for each of the sex offenses, the Legislature added the term "female." N.Y. Penal Law, art. 130, Richard G. Denzer & Peter McQuillan, Practice Commentaries, 268, 271 (McKinney 1967). The Legislature, by adding this term, intended that the Penal Law protect only those women who were not legally married to the actor; hence, it protected common-law wives. "[A] man and woman living together as husband and wife, although not legally married, are not deemed 'married to each other' for purposes of this article." Id. Although New York is not among them, some states provide an exemption for a man who is living with a woman, and for a "voluntary social companion" or date. See, e.g., Del. Code Ann. tit. 11, § 775(a)(2) (1995); Acquaintance Rape: The Hidden Crime 327 (Andrea Parrot & Laurie Bechhofer eds., 1991) [hereinafter Acquaintance Rape]; Buckborough, supra note 11, at 344 n.7.

44. See Cassia Spohn & Julie Horney, Rape Law Reform: A Grassroots Revolution and Its Impact 20 (1992). Rape law reform began in the early 1970s in response to both an increasing concern about the number of reported rapes and criticism of traditional rape laws. Id. Women's groups lobbied state legislatures to change "antiquated rape laws" to reflect the changing status of women in society. Id. Police and prosecutors joined the effort as the number of reported rapes increased dramatically during the 1960s and 1970s. Id. Most states had reformed their rape laws by the mid-1980s. Id.

45. See Act of Aug. 7, 1978, ch. 735, 1978 N.Y. Laws 1516. To Penal Law § 130.00(4), which states: "'Female' means any female person who is not married to the actor," the Legislature added the following:
that women who were legally separated or had orders of protection against their husbands received the protection the rape statutes afforded.\textsuperscript{46}

In 1983, in \textit{People v. De Stefano},\textsuperscript{47} a Suffolk County, New York court was the first in the country to address the constitutionality of the marital rape exemption,\textsuperscript{48} and found it unconstitutional.\textsuperscript{49} The court found that a woman had a right to "bodily integrity," and that the marital rape exemption unconstitutionally gave the husband a right to control his wife's body.\textsuperscript{50} "Even when accom-

\begin{verbatim}
For the purposes of this article "not married" means:
(a) the lack of an existing relationship of husband and wife between the female and the actor which is recognized by law, or
(b) the existence of the relationship of husband and wife between the actor and the female which is recognized by law at the time the actor commits an offense proscribed by this article by means of forcible compulsion against the female, and the female and actor are living apart at such time pursuant to a valid and effective:
(i) order issued by a court of competent jurisdiction which by its terms or in its effect requires such living apart, or
(ii) decree or judgment of separation, or
(iii) written agreement of separation subscribed by them and acknowledged in the form required to entitle a deed to be recorded which contains provisions specifically indicating that the actor may be guilty of the commission of a crime for engaging in conduct which constitutes an offense proscribed by this article against and without the consent of the female.
\end{verbatim}

\textsuperscript{46} See id.
\textsuperscript{47} 467 N.Y.S.2d 506 (County Ct. 1983).
\textsuperscript{48} See Lisa Dawgert Waggoner, \textit{New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption}, 22 N.M. L. Rev. 551, 557 (1992) ("The first case in the nation to examine the constitutionality of the marital exemption was \textit{People v. De Stefano}.").
\textsuperscript{49} \textit{De Stefano}, 467 N.Y.S.2d at 516. In \textit{De Stefano}, the defendant and his wife separated in 1982 after 14 years of marriage. \textit{Id.} at 508. Mrs. De Stefano obtained an order of protection against her husband in November of that year. \textit{Id.} at 508. Three weeks later \textit{De Stefano} violated the order of protection by entering the marital home and forcibly raping his estranged wife at knifepoint. \textit{Id.} A grand jury indicted \textit{De Stefano} for first degree rape. \textit{Id.} He argued that N.Y. Penal Law § 130.00(4)(b)(i), see supra note 45, was unconstitutional because it violated the due process and equal protection clauses of the New York and Federal Constitutions. \textit{Id.} at 509. \textit{De Stefano} contended that the Penal Law did not require that a court order be served upon the husband nor did it require a statement that the husband must refrain from sexual intercourse with his wife. He also argued that the law could not constitutionally exclude a wife separated from her husband from the definition of "female." \textit{Id.} The court reasoned that if a woman had a unilateral right to use contraceptives, have an abortion, have a hysterectomy, or be sterilized, she logically had a right to refuse the sexual acts leading to pregnancy. \textit{Id.} at 513. Accordingly, the court held that N.Y. Penal Law § 130.00(4) was unconstitutional to the extent that it granted a husband immunity from prosecution for marital rape. \textit{Id.} at 516.
\textsuperscript{50} See \textit{id.} at 514. The court stated: "While recognizing the sanctity of marriage modern decisional law also recognizes that the right of a wife to supremacy over her own body is paramount to her spouse's desire. Indeed her rights to individual auton-
plished behind the veil of a marriage license, [rape] is a crime of violence not only damaging to the body, but scarring upon the mind." One year later, New York's highest court addressed the constitutionality of the marital rape exemption.

II. People v. Liberta and Its Aftermath

A. People v. Liberta

In 1984, the New York Court of Appeals declared the marital rape exemption unconstitutional in People v. Liberta. The decision marked the first time that any state's highest court had struck down an explicit exemption for marital rape.

A jury convicted Mario Liberta of first degree rape and first degree sodomy after he raped his wife in violation of an order of protection. The New York Penal Law treated married couples...
who were legally separated, or separated by court order, as “not married” for purposes of the law. Although Liberta was “not married” within the meaning of the statute, he invoked the marital exemption.

In his appeal to the New York Court of Appeals, Liberta contended that the statutes violated the Equal Protection Clause because they were underinclusive in two respects: first, the law allowed only married men who cohabited with their spouses the right to invoke the marital rape exemption; and second, the law provided for the prosecution of men alone for committing rapes. Therefore, Liberta argued, the statutes burdened him “but not others similarly situated.”

The Court of Appeals began its opinion with a discussion of the history of the marital rape exemption. The court noted that courts, following Sir Matthew Hale, generally assumed that a man could not be guilty of raping his wife.

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N.Y. PENAL LAW § 130.50 (McKinney 1987). For a discussion of the definition of “deviate sexual intercourse,” see supra note 42; infra part III.B.

55. Liberta, 474 N.E.2d at 570. For a discussion of the term “not married,” see supra note 45 and accompanying text.

56. Liberta, 474 N.E.2d at 570. The trial court had agreed with Liberta’s decision to invoke the marital exemption and dismissed the indictment. See People v. Liberta, 455 N.Y.S.2d 882, 883 (App. Div. 1982). The trial court reasoned that the order of protection granted by the family court did not conform to the statutory definition of “living apart” in N.Y. Penal Law § 130.00(4) since it applied to Liberta only and not his wife. Id. at 883. According to the trial court, an order of protection requiring only the husband to move out of the marital home fell outside of the scope of orders of protection contemplated by the 1978 Legislature. Id. The Appellate Division reviewed the legislative history of the bill and found that the first version of the bill referred to both an order of protection issued by a family court requiring the parties to live apart and to an order issued by the state supreme court directing the wife to have exclusive occupancy of the marital home. The Legislature expanded the final version of the bill to include “an order issued by any court which order by its terms or in its effect requires such living apart.” On remand, the trial court convicted Liberta of first degree rape and sodomy and the Appellate Division affirmed. See People v. Liberta, 473 N.Y.S.2d 636 (App. Div. 1984), aff’d, 474 N.E.2d 567 (N.Y. 1984), cert. denied, 471 U.S. 1020 (1985).

57. The Equal Protection Clause provides, “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

58. Liberta, 474 N.E.2d at 570. The court gave Liberta standing to challenge the issue although the state’s remedy might not benefit him. The court’s decision to expand coverage to those married men previously excluded gave Liberta a “pyrrhic victory.” Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 STAN. L. REV. 235, 256 (1994).

59. Liberta, 474 N.E.2d at 571.

60. Id. at 572. See also HALE, supra note 28 and accompanying text; BARBOUR, supra note 31 and accompanying text.
The court stated that under the Equal Protection Clause, distinctions based on marital status must be rational and reasonable. The court noted that underlying the traditional rationales for the distinction between marital and nonmarital rape were “archaic” ideas of implied consent and property rights that failed to “withstand even the slightest scrutiny.” According to the court, rape constituted an act of violence causing severe emotional and physical trauma, and the notion that anyone would impliedly consent to such an act was “irrational and absurd.”

The State in *Liberta* argued that the marital rape exemption promoted reconciliation and protected married couples from governmental intrusion into their private lives. According to the court, although marital privacy and reconciliation were legitimate state interests, they provided no rational basis for allowing a husband to rape his wife. The court then addressed other modern rationales advanced in support of a marital rape exemption. One rationale offered for retaining an exemption was that proving lack of consent in marital rape cases would be difficult. The court stated that a prior sexual relationship between the victim and the offender exacerbates the difficulty of proving lack of consent in rape cases generally. Another rationale advanced was that other assault statutes permitted the prosecution of husbands for assaulting their wives.

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61. *Liberta*, 474 N.E.2d at 573. The court found that the distinction between marital and nonmarital rape violated the Federal and State Constitutions. *Id.* at 575.

62. *Id.* at 573. See also discussion *supra* part I.A.

63. *Liberta*, 474 N.E.2d at 573 (“Other than in the context of rape statutes, marriage has never been viewed as giving a husband the right to coerced intercourse on demand.”). The Court of Appeals invalidated the remaining justifications for the marital exemption, including the two common law doctrines that a woman was the property of her husband and that her legal existence merged with his. *Id.* See also discussion *supra* part I.A.

64. *Id.* at 574. It may be wondered why the State would argue in favor of the marital rape exemption. The State was concerned that *Liberta*’s facial challenge to the marital exemption would result in the court’s invalidation of the statute and overturning of his conviction. Therefore, the State found itself in the uncomfortable position of having to argue in favor of a limited exemption for husbands who were not subject to orders of protection. As it turns out, however, the Court of Appeals totally invalidated the marital rape exemption and still upheld *Liberta*’s conviction.

65. *Id.* at 574. According to the court, “[t]he marital exemption simply does not further marital privacy because this right of privacy protects consensual acts, not violent sexual assaults.” *Id.*

66. *Id.* The court also noted the concern that vengeful wives would fabricate rape complaints. The court concluded, however, that the possibility of fabricating complaints is no greater for women raped by their husbands than for unmarried women. *Id.*


68. *Id.*
The court parried that rape laws exist because rape causes more harm and devastation to the victim than ordinary assault crimes.\(^6^9\) Having addressed the counterarguments and finding no rational basis for the exemption, the court held that the marital exemption for rape is unconstitutional.\(^7^0\)

B. Barriers to Prosecuting Marital Rape in the Aftermath of Liberta

Although New York’s highest court unequivocally declared that marital rape is a crime in New York, many factors prevent this crime from being adequately addressed. First, courts do not uniformly agree with Liberta, most notably the U.S. Court of Appeals for the Second Circuit, which failed to follow the Liberta holding on the unconstitutionality of the marital rape exemption.\(^7^1\) Second, case law suggests that the courts ambiguously define the required element of “force” in spousal rape cases. Third, because of credibility and proof problems, prosecutors often choose not to prosecute spousal rape cases. Fourth, marital rape prosecutions often fail to convict because of an entrenched gender bias in the judiciary, documented by the 1986 New York Task Force on Women in the Courts.\(^7^2\)

\(^6^9\) Id. ("[T]he harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault.").

\(^7^0\) Id. at 573. The court stated that although its discussion focused on first degree rape, its analysis also applied to first degree sodomy as well. Id. at 572 n.3. The court also held that the rape statute “violate[d] equal protection because it exempt[ed] females from criminal liability for forcible rape.” Id. at 577-78. It noted that historically, rape statutes only applied to males because the laws protected a woman’s chastity and a man’s property rights. Id. at 576. See also discussion supra part I.A. The court concluded that the State’s arguments that: 1) gender-based statutes protected women from pregnancies as a result of rape, 2) a female faces medical and psychological problems unique to her gender, and 3) a woman could not physically rape a man, were unfounded. Id. at 576-77.

Anticipating what the Legislature would have done, the court decided that the most appropriate remedy for its decision was to extend the statute’s coverage to married men who were living with their wives rather than strike it down. Id. at 578. The court rejected Liberta’s argument that this decision, affirming his conviction while extending coverage of the statute to those previously excluded, denied him due process. Id. at 579. Since Liberta fell within the categories of exemptions stricken from the statute, his conduct was covered by the statute and he received fair warning that his conduct was criminal. Id. Finding that the ramifications of a reversal of Liberta’s conviction would be far-reaching, the court affirmed his conviction. Id. at 580.


\(^7^2\) OFFICE OF COURT ADMINISTRATION, UNIFIED COURT SYSTEM, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS (1986), reprinted in 15 FORDHAM URB. L.J. 11 (1986-87) [hereinafter NEW YORK TASK FORCE].
1. Federal Court Equivocation

The defendant in People v. Liberta, Mario Liberta, filed a habeas petition in federal court, seeking to overturn his conviction. The case, Liberta v. Kelly,73 reached the Second Circuit, which declined to find the marital rape exemption unconstitutional.74 Liberta argued that the New York Court of Appeals denied him due process when it struck down the marital rape exemption, in effect, creating a new statute, while affirming his convictions.75 The Second Circuit did not address the constitutionality of the marital rape exemption, the privacy issue, or any of the modern justifications for the exemption as addressed by the New York Court of Appeals.76 Instead, in dicta, the court noted that the Penal Law's "distinction between married men who are subject to protective orders and those who are not 'rationally furthers a legitimate state purpose.' "77 The rational basis is that those husbands subject to orders of protection are more dangerous than those who are not subject to orders of protection.78 The court further noted the availability of coercion statutes to prosecute husbands who raped their wives.79 Nonethe-

74. 839 F.2d at 77. Mario Liberta sought a writ of habeas corpus in the Western District of New York. See Liberta, 657 F. Supp. at 1261. Liberta challenged his conviction and the constitutionality of the statute. Id. The court disagreed with Liberta's contentions and denied his petition. Id. at 1262. Liberta then appealed to the Second Circuit, which found that the evidence supported the jury decision. See Liberta, 839 F.2d at 80.
75. Liberta, 839 F.2d at 78.
76. The constitutionality of the marital rape exemption was not before the Second Circuit and it declined to rule on the issue. Id. at 81.
77. Id. at 82 (quoting Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985)). According to the court, states can legitimately distinguish between husbands who are subject to orders of protection and those who are not since the deterrence of forcible rape and sodomy is a legitimate state objective. Id.
78. See id. at 82. The Second Circuit opined, A state is certainly entitled to conclude that a husband already ordered by a court to live apart from his wife, often as the result of his physically or sexually abusive conduct, represents a far greater threat to her safety than does a husband not subject to a protective order. Accordingly, New York might reasonably have concluded that the law should pose a greater deterrent to marital rape or sodomy for husbands who are subject to such protective orders.
Id.
79. Id. at 82 n.2. Coercion involves compelling another, by instilling a fear of harm, to engage in activity in which the latter has a right to refuse. See N.Y. Penal Law §§ 135.60, 135.65 (McKinney 1987).
less, the Second Circuit affirmed Liberta’s conviction, and found that he had received due process.\footnote{80}

A fair reading of the Second Circuit in \textit{Liberta} is that the court simply did not feel it necessary to consider the constitutionality of the marital exemption.\footnote{81} The court’s focus was narrower: whether it was appropriate for the State to single out those like Liberta, who were subject to protection orders. Nonetheless, the Second Circuit did not go out of its way to embrace the New York court’s facial invalidation of the exemption. This has caused confusion among lower courts and scholars, and has unfortunately led to continued reliance by some courts on the marital exemption, at least where the defendant is not subject to an order of protection.\footnote{82}

Despite the New York Court of Appeals’ decision to strike down the marital rape exemption, courts continue to apply the exemption, even when evidence of force or physical injury exists. \textit{Liberta} is subject to narrow construction since the Court of Appeals addressed the marital rape exemption only within the context of first degree rape and first degree sodomy.\footnote{83} This narrow construction has caused procedural confusion among lower courts with respect

\footnote{80. \textit{Liberta}, 839 F.2d at 81. According to the court, Liberta received notice “that his actions were criminal” under the old statute and thus he received due process. \textit{Id}. In addition, the Second Circuit disagreed with the New York Court of Appeals on the issue of whether the rape statutes should be gender-neutral. The Second Circuit found legitimate reasons for the rape statutes to apply to males only. \textit{Id}. at 82. The court found no evidence of females raping males and stated that the “possibility of female rape does not render Section 130.35 unconstitutional where such events are virtually or wholly nonexistent.” \textit{Id}. at 83. The court concluded that with respect to rape, men and women were not similarly situated and the exclusion of women from the rape statute did “not deny men equal protection.” \textit{Id}.}

\footnote{81. See id. at 81.}

\footnote{82. See, e.g., Williams v. Lambert, 902 F. Supp. 460, 463 (S.D.N.Y. 1995) (“It is significant that the decision of the New York Court of Appeals [that the marital rape exemption violated the Equal Protection Clause] . . . was subsequently found by the Second Circuit to be more generous than the Constitution required.”); Buckborough, \textit{supra} note 11, at 366 (“By remaining silent on the issue of a woman’s right to bodily autonomy, the Second Circuit . . . decision sets a precedent which favors judicial restraint in determining the constitutionality of statutes that limit the liability of husbands who sexually assault their wives . . . [I]t is a strong statement by an influential federal court to other federal and state courts that they are under no obligation to take any affirmative constitutional stand that may lead to the overturn of discriminatory laws.”).}

\footnote{83. See \textit{Liberta}, 474 N.E.2d at 572 n.3.}
to Liberta's application to other sex offenses. Courts have been forced to decide, based on the facts of each case, whether the marital exemption is applicable.

For example, in a recent unpublished opinion, a prosecutor presented medical evidence that a husband had raped his wife, seriously injured her during several attacks, and charged him with sexual misconduct. Nevertheless, relying upon the marital exemption, the judge dismissed the charges. According to the prosecutor, the judge narrowly construed the Liberta decision to apply to rape and not sexual misconduct, a misdemeanor under the Penal Law.

In another case, a jury acquitted a man of the rape and sodomy of his common-law wife after the trial court instructed the jury that a rape "victim" was "any female not married to the actor." In a dissenting opinion, one justice inferred that the jury charge on the issue of rape probably led the jury to acquit.

84. Liberta is procedurally confusing because the defendant did not challenge the marital rape exemption. Instead he challenged the fact that it was underinclusive in that he was excluded from the class of husbands who were exempt from prosecution for raping their wives.

85. See cases cited infra note 101.

86. See Paul Vitello, A Question of Interpretation, NEWSDAY, June 10, 1993, at A8. In the unpublished opinion, a New York woman accused her husband of rape. The prosecutor reduced the charges to sexual misconduct. The victim testified at the non-jury trial that she and her husband had been sleeping in separate bedrooms at the time of the attacks. Id.

87. Id. ("[T]he defense lawyer asked for a dismissal of the sexual misconduct charges, based on the marital exemption set forth in Penal Law section 130.00(4). "). The judge dismissed the charges and did not rule on the evidence in the case. Id.

88. Id. See also N.Y. PENAL LAW § 130.20 (McKinney 1987).

89. People v. Guzman, 559 N.Y.S.2d 550, 552 (App. Div. 1990). In that case, the jury acquitted the defendant, initially charged with rape, sodomy and kidnapping of his common-law wife. He was acquitted of the rape and sodomy charges in a jury trial but convicted of kidnapping and assault. On appeal, the Appellate Division reversed his conviction for kidnapping because the trial court failed to charge the jury with a presumption of innocence in its final instructions. Id. at 551. According to the court, the jury saw the issue of credibility as a close one because it acquitted the defendant of rape and sodomy while convicting him for kidnapping. Id.

90. Id. at 552 (Sullivan, J., dissenting). "[T]he court, in charging on the sex offenses, defined a victim as 'any female who is not married to the actor.' In that regard, the court also defined the relationship of husband and wife as one 'which may be recognized by law.' Thus, the jury might well have excluded the complainant from the protected class for whom the rape and sodomy statutes were intended." Id. See also Denzer & McQuillan, supra note 43, at 271 (discussing the New York Legislature's intent to protect women not legally married to the actor). The provisions of the statute as written prior to Liberta, presumably protected common-law wives.
2. A Definition of "Force"

The common law approach to rape focused not on the offender's forceful conduct but on the victim's lack of consent. A victim had to show that she resisted her attacker to the "utmost" to prove that she did not consent to unwanted sex. Although force, or the threat of force, was generally an element of the crime of rape, cases often turned on the thorny issue of the victim's lack of consent.

The authors of the Model Penal Code, in drafting the Code's proposed sex crimes laws, attempted to shift the emphasis from the victim's lack of consent to the offender's forceful conduct. The New York Legislature followed the Model Penal Code's lead, re-


92. See People v. Dohring, 59 N.Y. 374, 382-83 (1874). In early New York law, a female rape victim had to use "utmost resistance," or all of her power to resist her attacker. "The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength longer to resist, or from the number of persons attacking resistance must be dangerous or absolutely useless, or there must be duress or fear of death . . . . But whatever the circumstances may be, there must be the greatest effort of which she is capable therein, to foil the pursuer and preserve the sanctity of her person." Id.

93. See N.Y. Penal Law § 2010 (Consol. 1909) (defining rape as an act of sexual intercourse perpetrated against a female "[w]hen her resistance is forcibly overcome"). For a discussion of § 2010, see supra note 32 and accompanying text. See also John Dwight Ingram, Date Rape: It's Time for "No" to Really Mean "No", 21 Am. J. Crim. L. 3, 12 (1993) ("Th[e] pervasive distrust of a rape accuser's testimony accounts for the requirement that there not only be evidence of force by the attacker, but also that the victim's nonconsent be proved by evidence of her physical resistance."); Wicktom, supra note 91, at 403-04 ("Courts in the United States ordinarily require the state to prove nonconsent by showing that the victim physically resisted the rape.").

94. See Susan Estrich, Real Rape 59 (1987) ("The requirement of force is not new to the law of rape . . . . Yet so long as the focus was on female nonconsent, defined as utmost or at least reasonable resistance, force was a decidedly secondary issue and remained essentially unaddressed.").

95. See Model Penal Code § 213.1 cmt. 2, at 279 (Official Draft and Revised Comments 1980). Section 213.1(a) provides: "A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone . . . ." § 213.1(a). The purpose of this section was "to meet [the] difficulties [in defining "force"] in the most serious form of rape by focusing upon objective manifestations of aggression by the actor." § 213.1 cmt. 2, at 280. Moreover, the authors criticized the New York statute for its use of the resistance requirement in defining forcible compulsion. See § 213.1 cmt. 3(b), at 288 ("The focus of the New York statute on the 'earnest resistance' of the victim in the definition of 'forcible
pealing the common law "resistance" requirement in 1982. \(^{96}\) Despite the shift in focus from the victim's to the offender's behavior, most rape statutes still require both elements of nonconsent and force. \(^{97}\)

Some have argued that the standard of force used in rape cases is a standard defined by men. \(^{98}\) This male standard offers the compulsion'. . . seems an unwarranted emphasis on the degree of the victim's resistance rather than the degree of force employed by the actor.'

\(^{96}\) See N.Y. PENAL LAW, art. 130, William C. Donnino, Practice Commentaries, 566, 568 (McKinney 1987). The New York Legislature amended the definition of forcible compulsion three times. The 1965 law defined forcible compulsion as "physical force that overcomes earnest resistance, or a threat, express or implied, that places a person in fear of immediate death or serious physical injury . . . ." \(^{97}\) Id. After the Appellate Division required that a victim use resistance "to the utmost limit of her power" in People v. Yanik, 390 N.Y.S.2d 98, 101 (App. Div. 1977), rev'd, 371 N.E.2d 497 (N.Y. 1977), the Legislature amended the statute in 1977 to read that "if forcible compulsion means physical force which is capable of overcoming earnest resistance . . . ." \(^{98}\) Donnino, supra at 568. The Legislature explained that futile attempts to resist an attacker significantly increased a victim's chances of serious injury and possibly death. Recognizing however, that some courts might interpret the statute to require earnest resistance, the Legislature repealed the "earnest resistance" requirement in 1982. \(^{97}\) Id. at 569. It defined forcible compulsion as "physical force or a threat, express or implied, which force or threat places a person in fear of immediate death or serious physical injury . . . ." \(^{98}\) Id. The Legislature realized that the statute required that the physical force place the victim in fear of death or serious injury and amended the statute a third time in 1983 allowing forcible compulsion to result exclusively from the use of physical force or the threat of physical force. \(^{97}\) See generally Margaret A. Clemens, Note, Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience, 47 ALB. L. REV. 871 (1983) (discussing the New York Legislature's repeal of the "earnest resistance" requirement).

\(^{97}\) See Remarks of Robin West in Men, Women and Rape, 63 FORDHAM L. REV. 125, 149 (1994) [hereinafter Men, Women and Rape] ("Most states presently require two things for sex to be rape: nonconsent and force. If both are present, there is a rape. If one but not the other is present, there is no crime. Thus, if there is considerable force but consent, there is no rape. On the other hand, perhaps more importantly, if there is clearly no consent but the defendant has accomplished his end without using force, then again there is no rape."); Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM. L. REV. 1780, 1784 (1992) (stating that "[e]ven in the reform jurisdictions, force remains an element and consent remains a defense").

The New York statute provides that lack of consent may result from 1) forcible compulsion, 2) incapacity to consent, or in the case of sexual abuse 3) the victim's failure to "expressly or impliedly acquiesce in the actor's conduct" in addition to one of the other aforementioned elements. N.Y. PENAL LAW § 130.05(2) (McKinney 1987). "Forcible compulsion means to compel by either: a) use of physical force; or b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." N.Y. PENAL LAW § 130.00(8) (McKinney 1987).

\(^{98}\) See Estrich, supra note 94, at 60 (finding that "[m]ost of the time a criminal law that reflects male views and male standards imposes its judgment on men who
predominantly male legal system little insight into the trauma suffered by rape victims.99

The element of force is generally more difficult for the state to prove in nonstranger rape cases.100 In marital and acquaintance

have injured other men”). Rape, however, is a crime primarily committed by men against women and it is crucial to decide whose standard of force should be used. Id.

99. See Lynn Hecht Schafran, Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist, 20 FORDHAM URB. L.J. 439, 441 (1993) (“[A] male-defined concept of violence—a concept of violence premised on a school yard fist fight or a barroom brawl—and lack of knowledge about rape trauma produce erroneous sentences for rapists.”). See also People v. Huurre, 603 N.Y.S.2d 179 (App. Div. 1993) (reversing defendant’s conviction for sexual abuse in the third degree after finding that “profoundly mentally retarded” victim possessed the ability to communicate an unwillingness to engage in sexual conduct), aff’d, 645 N.E.2d 1210 (N.Y. 1994). In Huurre, the victim, a 35-year-old woman, had an IQ functionally equivalent to that of a three-year-old child. Id. at 180. She also suffered from cerebral palsy and epilepsy rendering her unable to verbally communicate. Id. The court concluded that the victim had the ability to communicate her unwillingness to be subjected to the hospital examination following the assault and thus, she was capable of communicating her lack of consent to the defendant’s sexual conduct. Id. at 181. See generally Lee Madigan & Nancy C. Gamble, The Second Rape: Society’s Continued Betrayal of the Victim (1991) (discussing the subsequent victimization of rape victims by the system).

100. See Estrich, supra note 94, at 60. In nonstranger rapes involving no weapons, courts often make a distinction between “force” that is merely incidental to intercourse and the “force” necessary to convict one of rape. Id. In the aggravated cases, those involving weapons and threats of injury, the weapons constitute force. “[E]ven force that goes far beyond the physical contact necessary to accomplish penetration— is not itself prohibited. What is required, and prohibited, is force used to overcome female nonconsent. The prohibition of ‘force’ or ‘forcible compulsion’ ends up being defined in terms of a woman’s resistance.” Id. See also, People v. Gibbs, 628 N.Y.S.2d 296 (App. Div. 1995) (reversing defendant’s conviction for sexual abuse in the first degree and ordering a new trial for forcibly fondling the breasts of the complainant while they were out on a date); People v. Daniels, 627 N.Y.S.2d 483 (App. Div. 1995) (reversing defendant’s conviction for rape of three victims after consolidating trials in which the details of the first two rapes differed significantly from the third rape thereby prejudicing the defendant and noting that no weapons were used, the victims “voluntarily” got into defendant’s car, “spent time socializing with him,” defendant permitted each victim “to get dressed” and then drove her to a destination of her choice). Compare Guzman, 559 N.Y.S.2d 550 (affirming defendant’s acquittal of rape and sodomy charges of common-law wife after pulling her hair, dragging her to an abandoned apartment, keeping her for more than 24 hours, and sexually assaulting her) with People v. Wakefield, 617 N.Y.S.2d 788 (App. Div. 1994) (affirming defendant’s conviction for rape and sodomy after telling the victim he had a gun, pulling her hair, putting her into his closet, and sexually assaulting her), appeal denied, 647 N.E.2d 134 (N.Y. 1994). But cf. In re M.T.S., 609 A.2d 1266, 1279 (N.J. 1992) (holding that force is used in rape cases when sexual penetration is “accomplished without the affirmative and freely-given permission of the alleged victim”). In that case, the 17-year-old defendant was charged with raping the 15-year-old victim. Id. at 1269. Sexual penetration occurred after consensual kissing and petting. The victim admitted that she had not been injured in any other way. Id. at 1268. The issue before the
rapes, a defendant is usually acquitted unless his conduct was unquestionably brutal.101

Some commentators advocate a standard based solely on the victim's nonconsent.102 Undoubtedly, a standard of force for rape based solely on the victim's lack of consent presents unique problems in marital rape cases.103 One commentator notes that reformers have "characterize[d] as marital rape occasions when the court was whether force constituted any amount of unwanted sexual touching or whether it required the power necessary to overcome a lack of consent. Id. at 1269.

101. Estrich, supra note 94, at 78 ("[I]n ... jurisdictions like New York that at least hold all men to the formal possibility of conviction for wife rape it seems that a wife rape must be aggravated in every respect other than the identity of the rapist to qualify as a real rape."). See also, People v. M.D., 595 N.E.2d 702 (Ill. App. Ct. 1992) (affirming defendant's conviction of aggravated criminal sexual assault for forcing his fist into his wife's vagina), appeal denied, 602 N.E.2d 467 (Ill. 1992); People v. Stapleton, 612 N.Y.S.2d 178 (App. Div. 1994) (affirming defendant's conviction for first degree rape and sodomy after handcuffing girlfriend to pole, tearing off her clothes, raping and sodomizing her, whipping her with electrical cord, sticking pins in her legs and burning her), appeal denied, 642 N.E.2d 337 (N.Y. 1994); Olivia Winslow, Li Man Guilty of Rape, Murder of Wife in Vt., Newsday, Aug. 5, 1995, at A8 (reporting a Long Island, New York man's conviction in Vermont for murder and rape of his wife after he strangled her and "sodomized her so violently that she would have needed stitches [had she survived]").


102. See Men, Women and Rape, supra note 97, at 149 (noting the feminists have argued that "all non-consensual sex should be understood as rape and prosecuted as such").

103. See John D. Harman, Consent, Harm, and Marital Rape, 22 J. Fam. L. 423, 429 (1983-84) ("The idea that adequate reform of the marital exemption must criminalize all intercourse but that expressly consented to leads to difficulties that detract from the effort to protect women from domestic violence—the professed goal of most reformers.").
wife is ‘coerced’ into unwanted sex by threats to leave, to cut off her source of money or to humiliate her in some way.”

He suggests that reformers who advocate characterizing rape as any intercourse to which the wife does not expressly consent, shift the focus from an act of violence to one of “unwanted sex.” Critics must distinguish between the stereotypical scenario in which a wife first declines to have sex and later indulges her husband, and those situations in which women suffer from real harm and violence.

The legal system can, however, effectively protect victims without opening the floodgates to frivolous litigation. In People v. Naylor, for example, a jury convicted an estranged husband of sexual abuse in the third degree after he sexually assaulted his sleeping wife. Although the act involved no force, the court found that the victim’s lack of consent was sufficient to constitute a crime.

104. Id. at 430.

105. Id.

106. See Raquel K. Bergen, Surviving Wife Rape: How Women Define and Cope With the Violence, 1 VIOLENCE AGAINST WOMEN 117, 120 (1995) (“Within larger society, there is often an understanding that wife rape is a relatively innocuous incident in which a husband wants to have sex, his wife rejects him, and he holds her down on the bed and has intercourse with her. . . . [T]his scenario was far from the norm.”).

107. See ACQUAINTANCE RAPE, supra note 43, at 328 (noting that many marital rapes take place in an environment of domestic violence); Bergen, supra note 106, at 121 (stating that for many women physical violence accompanies sexual assault); Jacquelyn C. Campbell & Peggy Alford, The Dark Consequences of Marital Rape, 89 AM. J. NURSING 946, 947 (July 1989) (finding that marital rape victims report “being forced into homosexual sex, sex with animals, prostitution, public exposure, and other acts of extreme degradation”).

108. See Augustine, supra note 28, at 577 (“[T]he unfortunate reality is that even with the abrogation of the marital rape exemption, many spousal rapes will never be reported [and] states that have abolished the exemption have not experienced an unmanageable amount of spousal rape cases.”).

109. 609 N.Y.S.2d 954.

110. See N.Y. PENAL LAW § 130.55 (McKinney 1987). This section provides in part: “A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter’s consent . . . .” Id.

111. Naylor, 609 N.Y.S.2d at 954. In Naylor, the defendant broke into his estranged wife’s apartment while she was asleep and began to fondle her breasts and genitals. Id. at 955. He was convicted of sexual abuse in the third degree. The defendant argued that his conviction was improper because he and the victim were married at the time of the incident and not legally separated. The Appellate Division found that “the marital exemption is also inapplicable to a crime which does not have force as a predicate, but is based upon lack of consent alone.” Id.

112. The court stated that forcible compulsion need not be proven for sexual abuse in the third degree. Id. At the State’s request, the jury was instructed that if the victim did not explicitly acquiesce in the defendant’s conduct, the jury could return a guilty verdict. Id. See N.Y. PENAL LAW § 130.05(2)(c).

113. Naylor, 609 N.Y.S.2d at 955. The Appellate division found that in those cases in which the couple is estranged, the Libertea rationale applies. The court noted that
3. Prosecutorial Discretion and Marital Rape

"Prosecutorial discretion" refers to a prosecutor's power to decide whether to seek a conviction in a given case. Several factors might influence a prosecutor's decision not to prosecute a marital rape case. Those factors include the victim's reluctance to proceed, lack of corroboration, victim credibility, and public skepticism about the crime of marital rape. When prosecutors continually refuse to prosecute marital rape cases, law enforcement concludes that these acts are not worth the time and effort required to make arrests. Moreover, prosecutorial reluctance to proceed with these cases diminishes judicial exposure to the recurrence of spousal rape.

Prosecutors often choose not to file charges in marital rape cases because the victim refuses to testify against her husband.

the parties were living in separate residences, had become involved in new relationships, and had taken steps to obtain a divorce but lacked the funds. Id. See Gary Spencer, Appeals Court Extends Voiding of Marital Exemption, N.Y. L.J., Apr. 8, 1994, at 1. Although the court limited its holding to situations where the parties are estranged, the decision represents a starting point.

114. See Jane W. Ellis, Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue, 75 J. CRIM. L. & CRIMINOLOGY 56, 58 (1984). Limited funds, a need for prosecutors to evaluate each case on its own merits, and the interests of the public and the criminal justice system are some of the reasons given for a prosecutor's power to charge. Id. at 59-60. In Manhattan District Attorney's Office, assistant district attorneys "interview the arresting officer, assess the evidence, determine the charges on which defendants are arraigned, and dismiss those cases where criminal prosecution is unwarranted." Robert M. Morgenthau, The Appropriate Use of Prosecutorial Discretion, N.Y. L.J., Oct. 31, 1988, at 1.

115. See Telephone Interview with Lisa Linsky, Chief, Child Abuse and Sex Crimes Bureau, Westchester County District Attorney's Office (Dec. 18, 1995) (stating that in most marital rape cases, the victim's reluctance to go forward factors into a prosecutor's decision to proceed with the case).


117. See Schelong, supra note 4, at 111 (noting that some prosecutors treat statements made by abused women against their husbands with suspicion).

118. See Augustine, supra note 28, at 588-89 (stating that a jury's reluctance to convict husbands is probably based upon the public perception that marital rape is an impossibility).

119. See Ellis, supra note 114, at 58.

120. See id. A prosecutor's decision to charge an offender in spousal assault cases is crucial to the complete elimination of the marital exemption. See id. at 58-59. See also Schelong, supra note 4, at 110 ("The marital rape exemption will never be truly abrogated and domestic abuse uniformly punished until prosecutors pursue criminal charges.").

121. See Schelong, supra note 4, at 111. See also James, supra note 3, at B5 ("In all but a few [marital rape] cases, the men are not convicted, often because the woman decides not to pursue the case.").
Although a victim’s reluctance to testify is generally a problem in most rape cases, marital rape victims are even more reluctant to proceed for many reasons.\textsuperscript{122} Unsuccessful prosecution, they often assume, will leave them living unprotected with an angry spouse.\textsuperscript{123} Many women depend on their husbands for financial support.\textsuperscript{124} Marital rape prosecutions also often founder because the victims themselves fail to perceive marital rape as a crime.\textsuperscript{125}

Victim credibility also persuades many prosecutors not to prosecute marital rape cases.\textsuperscript{126} The general suspicion is that vindictiveness motivates victims who seek prosecution.\textsuperscript{127} In acquaintance rape cases, which account for more than eighty percent of rape cases,\textsuperscript{128} the defense focuses on the victim’s credibility.\textsuperscript{129} Without corroborating evidence, a prosecutor’s decision to press charges

\begin{itemize}
\item \textsuperscript{122} See Jeffords, supra note 116, at 422.
\item \textsuperscript{123} \textit{National Conference of State Trial Judges, American Bar Association & the National Judicial College, The Judge’s Book} 111-12 (2d ed. 1994) [hereinafter The Judge’s Book] (finding that judges need to be aware of some of the reasons why women withdraw complaints filed against their husbands including family and church pressure, economic dependency and increased violence by the husband).
\item \textsuperscript{124} See Telephone Interview with Lisa Friel, Deputy Unit Chief, New York County District Attorney’s Office (Nov. 30, 1995). According to one New York County assistant district attorney, victims in marital rape cases are reluctant to proceed because, either they do not want husbands charged with a serious crime such as rape or they are reluctant to send them to jail because they are financially dependent. \textit{Id.}
\item \textsuperscript{125} See Telephone Interview with Lisa Linsky, supra note 115 (stating that victims are unaware that marital rape is a crime). \textit{See also} Telephone Interview with Lisa Friel, supra note 124 (stating that initially most victims contact law enforcement after a physical assault and prosecutors later discover that marital rape is a part of an overall pattern of spousal abuse); Caher, supra note 1, at A1 (quoting an Albany County Rape Crisis Center director who stated that marital rape victims do not describe the behavior they are subjected to as rape, but describe other abuses).
\item \textsuperscript{126} See Schelong, supra note 4, at 111. If the victim is credible, prosecutors will seek an indictment in marital rape cases. The problem lies not with the prosecutor in deciding whether to charge, but in convincing the trier of fact that a rape occurred. Telephone Interview with Lisa Friel, supra note 124.
\item \textsuperscript{127} \textit{See} Schelong, supra note 4, at 116 (arguing that “a significant element in laws (and attitudes) condoning marital rape” is the general belief that women are vindictive liars).
\item \textsuperscript{129} \textit{Id.} (noting that nonstranger rape cases do not overwhelmingly result in convictions because juries, persuaded by the defense, do not believe victims).
\end{itemize}
becomes complicated. Prosecutors often require a greater amount of evidence in cases involving victims of domestic violence than in those cases involving violence between strangers. Marital rape, like domestic violence, rarely occurs in the presence of witnesses. Prosecutors face the difficult task of convincing a jury that a rape occurred. If additional evidence boosts the victim's credibility, the prosecutor might then proceed.

The public perception that marital rape is less severe than nonmarital rape also factors into a prosecutor's decision not to go forward with the case. Many people differentiate between marital and nonmarital rape, and would more likely accept a law criminalizing marital rape that punished it less severely than stranger rape. Many who would stop short of invoking Hale's notion of "implied consent" to rape would nevertheless consider a marital rape victim who remains with an abusive spouse, to have taken some responsibility for her situation, and are accordingly less sym-

130. Judith A. Lincoln, Note, Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape, 35 WAYNE L. REV. 1219, 1248 (1989). Corroboration rules in rape cases developed from a general distrust of women. See Russell, supra note 7, at 18 (noting that at one time juries were routinely instructed that the charge of rape was easy to make but difficult to defend against).

131. See Schelong, supra note 4, at 111 ("Greater levels of proof are often required to support charges of domestic abuse rather than those required in cases of violence between strangers."); Jeffords, supra note 116, at 423 (stating that prosecutors were reluctant to file charges based solely on the complainant's word).

132. See Lincoln, supra note 130, at 1248.

133. See Telephone Interview with Lisa Friel, supra note 124. A prosecutor's decision to proceed will not necessarily result in a grand jury indictment. In one New York case, a marital rape victim testified at a grand jury hearing that after her husband moved out of their home by court order of protection, he raped her in front of their two young children. See Caher, supra note 1, at A1. The defendant denied the charges and eventually pleaded guilty to a misdemeanor contempt charge for violating the court order of protection. Id. The prosecutor, who felt she had a good case, said the case was an example of the difficulties prosecutors face in bringing marital rape charges. Id. According to one prosecutor, the general attitude is that "a man can do whatever he wants to his wife." Id. See Alan Abrahamson, Defendant Says He Has Right to Sex With Wife, L.A. TIMES, Jan. 29, 1996, at B1 (reporting that man accused of attempting to rape his wife said that his religion gave him the right to have sex with his wife).

134. See Telephone Interview with Lisa Friel, supra note 124. Prosecutors recognize that victims are reluctant and embarrassed to tell anyone about the rape. If, however, they have told a friend or family member about the incident, it makes the case stronger. Id.

135. Jeffords, supra note 116, at 423. One Westchester County assistant district attorney stated that her office will seek an indictment for first degree rape where legally sufficient evidence exists and will prosecute if the grand jury hands down an indictment. See Telephone Interview with Lisa Linsky, supra note 115.


137. See Hale, supra note 28 and accompanying text.
pathetic to her plight than to that of stranger rape victims.\textsuperscript{138} Although marital rapes are easier to investigate because victims can readily identify their assailants, victims undoubtedly face a more difficult process in the criminal justice system because of public attitudes.\textsuperscript{139}

4. Gender Bias in New York’s Courts

Judges should decide cases without bias or prejudice.\textsuperscript{140} In 1986, however, the New York Task Force on Women in the Courts (“Task Force”) concluded that women litigants, especially poor and minority women,\textsuperscript{141} lacked full access to the courts, encountered judges and juries that questioned their credibility, and faced a judiciary that had no knowledge of issues that were important to women.\textsuperscript{142} The Task Force concluded that gender bias pervades New York’s court system.

Task forces across the country discovered that gender bias undermines women’s credibility.\textsuperscript{143} “[B]oth women and men perceive

\begin{itemize}
\item \textsuperscript{138} See Family Violence, supra note 128, at 232 (“[In nonstranger rape cases], the defense still blames the victim for some aspect of the crime that makes it a victim-precipitated case: it happened because of something she did to encourage or allow the attack to occur.”).
\item \textsuperscript{139} Id.
\item \textsuperscript{140} See Model Code of Judicial Conduct Canon 3(B)(5) (1990). It provides: A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.
\item \textsuperscript{141} Although not specifically addressed in the Task Force Report, battered women reportedly encountered judicial actions that varied depending upon the victim’s race or class. See Sarah Eaton & Ariella Hyman, The Domestic Violence Component of the New York Task Force Report on Women in the Courts: An Evaluation and Assessment of New York City Courts, 19 Fordham Urb. L.J. 391, 407 (1992). Judges also lacked an awareness of the racism faced by women of color in the courts. Id.
\item \textsuperscript{142} See New York Task Force, supra note 72, at 26-27. The gender bias task force movement began in the early 1980s. The New York Task Force set out to investigate gender bias in New York courts. Its many activities included a review of a number of articles on women in the courts, four public hearings, and regional meetings with judges and attorneys. Id. at 19-21. The Task Force also conducted a survey of attorneys to obtain their views and experiences on gender bias in the courts. Id. at 23. The Task Force found that myths about women’s roles in the family and society affected judicial decisions. See id. at 27. Women had difficulty effectively pleading their cases because they could not afford to retain counsel and they faced an inhospitable environment in the courthouse in which they were dismissed as “burdensome children” or disrespected as “sexual objects.” Id.
\item \textsuperscript{143} The Judge’s Book, supra note 123, at 109 (“In the courts gender bias distorts decision making and creates a courtroom environment that undermines women’s credibility.”).
\end{itemize}
females, as a group, as less credible than males. In rape cases, the victim's credibility suffered if she knew the rapist. In New York, for example, juries were found to be extremely skeptical of the alleged rape victim's credibility. This led juries to make decisions, not based wholly on the merits of the case, but on prejudicial views about sex roles and women's subordination to men in marriage. Although thousands of battered women seek protection from abuse each year, they face courts that trivialize the abusive situation.

The New York Task Force also found that judges lacked an understanding of the nature of domestic violence. Some judges even required visible physical injuries before granting orders of protection to victims of spousal abuse. This lack of understand-

144. Id. at 110. Credibility is essential for all participants in the legal process. Research shows that women continue to be perceived "as no more credible than children in the context of judicial decision making." Id.

145. Id. at 114-15. Since most rapes occurred between people who knew one another, this fact was significant and disturbing. Id. at 115. The New York Task Force recommended that judges become familiar with the nature of rape and the seriousness of acquaintance rape. NEW YORK TASK FORCE, supra note 72, at 63.

146. NEW YORK TASK FORCE, supra note 72, at 53. Juries were found to presuppose that women invite sexual assault. Id.

147. Id. at 27.

148. THE JUDGE'S BOOK, supra note 123, at 111. Courts treat these matters as family problems that should be resolved outside the courtroom setting. In a recent New York domestic violence case, Judge Lorin Duckman freed Benito Oliver, a convicted rapist, after his former girlfriend, Galina Komar, sought protection from the court. Oliver later killed Komar. See Don Van Natta Jr., Judge Under Challenge is an Eccentric Idealist, N.Y. TIMES, Feb. 20, 1996, at B3. The judge reportedly believed that Oliver would leave Komar alone if she returned his dog to him. "Komar later told prosecutors that the judge cared more about the dog than her." Id.

149. NEW YORK TASK FORCE, supra note 72, at 31. Judges failed to recognize battered women's syndrome. Oftentimes battered women withdraw their complaints resulting in the court's frustration and a perception that women are indecisive and manipulative. THE JUDGE'S BOOK, supra note 123, at 111-12.

150. NEW YORK TASK FORCE, supra note 72, at 31. This requirement poses particular problems for African-American women whose bruises may not be as visible. In addition, there is a presumption that violence is normal in the African-American community. "Clearly this attitude subverts equal protection of the law and exposes black women to life-threatening assaults." THE JUDGE'S BOOK, supra note 123, at 113. See also Schafran, supra note 99, at 443 (noting that in one New York rape case, the judge accepted the absence of bruises, scratches and genital lesions as proof that the victim was not violently raped); Don Van Natta Jr., Judge Rebuked After a Woman is Slain, N.Y. TIMES, Feb. 15, 1996, at B3 (quoting Brooklyn Judge Lorin Duckman's response to prosecutors who argued that a convicted rapist who beat his former girlfriend should remain in prison) ("I am not suggesting that bruising is nice, but there is no disfigurement. There are no broken bones. There are no serious physical injury charges, are there?").
ing, coupled with the victim's psychological state, prevented women from receiving the relief they sought.151

Prosecutors continue to treat rape victims as if they are on trial.152 Judges allow improper questioning of the victim's sexual behavior and lifestyle.153 The New York Task Force recommended that judges understand the difference between cross-examination that protects defendants' rights and improper questioning and harassment of rape victims.154

Community bias against rape victims translates into juror bias in the courtroom.155 The defense attorney’s stereotypical portrayal of the victim often influences jurors.156 Moreover, judges occasionally allow their own biases to appear in a jury charge.157

To ensure that New York’s marital rape victims receive the full protection Liberta affords, courts must eliminate the gender bias that pervades the legal system. Gender bias affects not only judicial decisions but the treatment of domestic violence and rape vic-

151. See New York Task Force, supra note 72, at 31. Moreover, judges failed to sanction batterers even in cases of severe injuries. The Judge’s Book, supra note 123, at 112.

152. The Judge’s Book, supra note 123, at 114.

153. Id. This subtle questioning results in an impeachment of the victim’s credibility.


155. See The Judge’s Book, supra note 123, at 114. Jurors often “‘held sex-role conservative attitudes.’” Id. (quoting Gary LaFree & Barbara Reskin, Structural Analysis of Jurors’ Verdict in Rape Trials: Final Report to the National Institute of Mental Health, Grant #R01 MH 29727 8 (1985)). Jurors believe that “nice girls” are not raped and women with active sex lives invite rape. New York Task Force, supra note 72, at 54 (citations omitted).

156. New York Task Force, supra note 72, at 56. A defense based on stereotypes leads to acquittals based on bias not on the evidence.

157. One Westchester County prosecutor reported that she does not generally see gender bias against the victim in the courtroom. She stated that occasionally, however, a prosecutor will encounter a judge who is biased against marital rape victims and such bias may result in the defendant’s choice to proceed with a non-jury trial, ultimately resulting in dismissal of the case. Telephone Interview with Lisa Linsky, supra note 115. See also Telephone Interview with Lisa Friel, supra note 124 (noting that some judges have the attitude that marital rape is not a crime and they subtly convey those feelings to the jury); The Judge’s Book, supra note 123, at 131 (finding “that judicial beliefs about guilt or innocence seemed to ‘leak’ to the juries in purely nonverbal forms of communication”) (footnote omitted).

A New York County prosecutor stated that gender bias in the courts has improved in the last ten years. As younger judges are elected, they are more likely to charge juries on the law without influence. Telephone Interview with Lisa Friel, supra note 124. But cf. Lynn Hecht Schafran, There’s No Accounting for Judges, 58 Alb. L. Rev. 1063, 1067 (1995) (noting that despite the hope that younger judges will not manifest gender bias in the courtroom, some judges still fail to protect domestic violence victims by giving favorable treatment to offenders).
tims in the courts. Gender bias impedes the efficacy of major law reforms affecting rights for women. Cultural stereotypes that sanction abuse and treat wives as chattel influence judicial decisions. Similarly, bias against domestic violence victims reflects the historical treatment of women as property. Although rape laws that historically discouraged the prosecution of rape offenders have changed, bias against victims, especially victims of marital rape, remains. One way to ensure that judges do not rely on the statutory language to dismiss sexual assault cases involving married persons, is to explicitly repeal the marital exemption for all sex offenses.

III. A Call for Statutory Reform

A. The Importance of Legislative Action

Opponents of a statutory amendment might argue that Liberta repealed the marital rape exemption, rendering legislative action unnecessary. Nevertheless rape law reformers argue that legislative action represents a change in policy that is publicly visible. Visible legal changes influence public attitudes toward criminal acts. Moreover, a statutory amendment ensures that a judge

158. Donald C. Nugent, Judicial Bias, 42 CLEV. ST. L. REV. 1, 41 (1994) ("The literature on the topic is replete with accounts of cases in which judges blame the victim for inviting the violence while forgiving the offender.").

159. THE JUDGE'S BOOK, supra note 123, at 109 ("[L]aws are only as effective as the judges who interpret and enforce them.").

160. See Lynn Hecht Schafran, Overwhelming Evidence: Reports on Gender Bias in the Courts, 26 TRIAL 28, 30 (Feb. 1990).

161. See id. See also discussion supra part I.A.

162. See THE JUDGE'S BOOK, supra note 123, at 109. See also Schafran, supra note 160, at 30. In rape cases, the victim continues to be put on trial. Her conduct and dress are the focus rather than the offender's behavior. Id. Moreover, nonstranger rapes are "still minimized and trivialized." Id.

163. SPOHN & HORNEY, supra note 44, at 175. Some who have studied rape law reforms concluded that the new laws had little impact. For example, despite the repeal of corroboration and resistance requirement laws, the presence of both is essential to obtaining rape convictions. Id. at 162. Advocates of rape law reform argue, however, that while legislation does not provide complete solutions to problems of rape law, legislation establishes a policy that the law supports the rape victim. This policy in turn, influences public attitudes toward the victim. JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM 4 (1982).

164. Despite the different strategies used to address the rape problem, legislative reform is still the "strategy of choice." MARSH, supra note 163, at 2. The law is "an instrument of social change" and "a means by which groups and organizations can participate in the determination of public policy." Id.
cannot rely on the current statutory language to dismiss a case.\textsuperscript{165} If one case is dismissed based on the exemption, that is one case too many.\textsuperscript{166}

B. An Analysis of the Proposed Statute

In 1986 the New York State Law Revision Commission ("Commission") issued a report recommending that the Legislature codify \textit{Liberta}.\textsuperscript{167} The Commission recommended that the Legislature repeal certain sections of article 130 of the New York Penal Law containing a marital exemption and redefine some terms in gender-neutral language. The following proposed statute incorporates some of the Commission's recommendations and includes some statutory language from other state statutes for sex offenses that contain no marital exemption. The proposed statute also redefines several terms in the current Penal Law and repeals others. Its fundamental purpose is to delete all references to the marital exemption for sex offenses.

In the "Definitions of Terms" section of the proposed statute, the term "sexual penetration" replaces the current Penal Law terms "sexual intercourse" and "deviate sexual intercourse."\textsuperscript{168} "Deviate sexual intercourse," which the Penal Law defines as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva," incorporates the marital exemption.\textsuperscript{169} The Commission recommended that the marital exemption be

\textsuperscript{165} Telephone Interview with Lisa Friel, \textit{supra} note 124 (noting that the statute should explicitly state the law). See also Vitello, \textit{supra} note 86 and accompanying text.

\textsuperscript{166} See Telephone Interview with Lisa Friel, \textit{supra} note 124.

\textsuperscript{167} \textsc{State of New York, Annual Report of the Law Revision Comm'n, Report to the 209th Gen. Assembly} (1986) [hereinafter \textsc{Commission}]. Senate Bill No. 9348 was referred to the Committee on Rules on June 12, 1986. See N.Y. S.B. 9348, 209th Gen. Assembly (1986). Assembly Bill No. 11402 was referred to the Committee on Codes on June 4, 1986. See N.Y. A.B. 11402, 209th Gen. Assembly (1986). See also N.Y. \textsc{Legislative Digest}, 209th Reg. Sess. (1986). Both bills remained in Committee. The Legislature did not pass either bill nor were they reintroduced to the Legislature.


\textsuperscript{169} See N.Y. \textsc{Penal Law} § 130.00(2) (McKinney 1987).
struck from the definition of "deviate sexual intercourse." An amendment of this section in the proposed statute codifies the Liberta decision, in which the court declared the marital exemption for first degree sodomy unconstitutional.

"Deviate sexual intercourse" is the basis for all of the sodomy offenses in the Penal Law. Beyond striking the marital exemption from the definition for "deviate sexual intercourse," the Commission recommended repealing N.Y. Penal Law § 130.38, Consensual Sodomy. The Commission expressed concern that by striking the marital exemption from "deviate sexual intercourse," courts might construe section 130.38 to criminalize this conduct between married persons. The proposed statute follows the Commission's recommendation and repeals section 130.38.

In addition, the proposed statute repeals all of the sodomy statutes by repealing section 130.00(2), which provides the definition for "deviate sexual intercourse." The term "sexual penetration" includes sexual conduct that the statute currently defines as sodomy. Thus, a separate sodomy statute is unnecessary. Substituting the term "deviate sexual intercourse" with the term and definition for "sexual penetration" ensures that these offenses remain criminalized.

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170. COMMISSION, supra note 167, at 10 ("[T]he most direct way to conform the first degree sodomy statute to the Court of Appeals holding . . . is by striking the marital exemption from the definition of deviate sexual intercourse.").

171. See Liberta, 474 N.E.2d at 578.

172. See COMMISSION, supra note 167, at 10 n.7. Section 130.38 provides: "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person. Consensual sodomy is a class B misdemeanor." N.Y. PENAL LAW § 130.38 (McKinney 1987).


The proposed statute eliminates the definition for "sexual intercourse" and replaces it with the term "sexual penetration." Although this change is not necessary to codify Liberta, "sexual penetration" encompasses the definitions for both "sexual intercourse" and "deviate sexual intercourse" and obviates the need for separate definitions for those terms.

The proposed statute makes two additional changes to the "Definitions of Terms" section. First, the proposed statute redefines the term "sexual contact." The "sexual abuse" statutes use the term "sexual contact" in their current definitions. The Penal Law defines "sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party." This proposed statute redefines "sexual contact" to remove the marital exemption. This change incorporates the Commission’s recommendation to amend sections 130.60 and 130.65 of the Penal Law. The Commission reasoned that the language for first degree "sexual abuse" parallels the language for first degree rape and sodomy and therefore, the rationale of the Liberta decision "applies with equal force" to this section. With respect to second degree "sexual

175. See N.Y. PENAL LAW § 130.00(1) (McKinney 1987). This section provides: "'Sexual intercourse' has its ordinary meaning and occurs upon any penetration, however slight."

176. See N.Y. PENAL LAW §§ 130.55, 130.60, 130.65 (McKinney 1987).

177. N.Y. PENAL LAW § 130.00(3) (McKinney 1987).


179. See COMMISSION, supra note 167, at 12-13. Section 130.60 provides: "A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old; or
2. Less than fourteen years old.

Sexual abuse in the second degree is a class A misdemeanor." N.Y. PENAL LAW § 130.60 (McKinney 1987). Section 130.65 provides: "A person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact:

1. By forcible compulsion; or
2. When the other person is incapable of consent by reason of being physically helpless; or
3. When the other person is less than eleven years old.

Sexual abuse in the first degree is a class D felony." N.Y. PENAL LAW § 130.65 (McKinney 1987).

180. COMMISSION, supra note 167, at 13.
abuse,” the Commission said that when a victim is mentally defective, mentally incapacitated or physically helpless, “a person should be criminally liable . . . even if the actor is married to the victim.”

The second change involves the term “female,” found in the first degree rape statute and in the “sexual misconduct” statute. In the Penal Law, the term “female” describes the victim and “male” describes the actor. The current Penal Law defines “female” as “any female person who is not married to the actor.” The definition for the term “female” in section 130.00(4) incorporates the marital exemption and the Commission recommended that the Legislature repeal the section. A repeal of this section amends both the “first degree rape” statute and the “sexual misconduct” statute, and codifies Liberta. Finally, to further codify Liberta, the Commission recommended that the Legislature rewrite any statutes using the term “female” in gender-neutral terms. The proposed statute incorporates these recommendations.

The proposed statute redefines the element “forcible compulsion.” The current statute defines “forcible compulsion” as physical force or a threat, express or implied that places the person in fear of death or injury. Specifically, the proposed statute redefines the term “physical force” to mean the force used to achieve sexual penetration without the victim’s affirmative consent.

The statutory rape statutes provide that certain classifications of victims, namely those who are under age seventeen and those who are mentally and physically incapacitated, are deemed incapable of consent. The statutory rape statutes in the New York Penal Law

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181. Id.
182. See N.Y. Penal Law § 130.35 (McKinney 1987).
184. See N.Y. Penal Law § 130.00(4) (McKinney 1987).
185. Commission, supra note 167, at 8.
186. See id. at 7-8. The Commission stated that although the codification of Liberta required an amendment to that section of the first degree rape statute in which rape is accomplished by force only, its rationale should apply in those cases when the victim is physically helpless and unable to consent and when the victim is less than 11 years old. Id. at 8 n.5. See also N.Y. Penal Law § 130.25 (McKinney 1987).
187. See Commission, supra note 167, at 8. The Commission recommended that the language in section 130.35 be amended by deleting the terms “male” and “female” and replacing them with “person.” Id. at 17-18.
188. See N.Y. Penal Law § 130.00(8) (McKinney 1987).
189. See id.
190. See In re M.T.S., 609 A.2d at 1279; Naylor, 609 N.Y.S.2d at 955.
191. See N.Y. Penal Law § 130.05(3) (McKinney 1987). This section provides:
   “A person is deemed incapable of consent when he is:
   a) less than seventeen years old; or
   b) mentally defective; or
currently provide a marital exemption for those situations in which the victim is incapable of consent based upon age or incapacity. The Commission recommended, however, retaining the marital exemption for those sex offenses in which age alone is the basis for lack of consent. The proposed statute adds a section to selected statutory rape statutes to explicitly state that sexual conduct between married persons does not constitute a criminal offense when "lack of consent" is based upon age alone.

In addition to retaining the marital exemption for certain statutory rape statutes, the Commission also recommended that the

c) mentally incapacitated; or

d) physically helpless.

192. See N.Y. PENAL LAW § 130.25 (McKinney 1987). Section 130.25, third degree rape, states in part:

"A person is guilty of rape in the third degree when:
1. He or she engages in sexual intercourse with another person to whom the actor is not married who is incapable of consent by reason of some factor other than being less than seventeen years old; or
2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than seventeen years old."

N.Y. PENAL LAW § 130.30 (McKinney 1987). Section 130.30, second degree rape, states in part:

"A person is guilty of rape in the second degree when, being eighteen years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than fourteen years old."

193. COMMISSION, supra note 167, at 8-9. The Commission did not want to criminalize sexual conduct between married teenagers. According to the Commission, only the marital exemption in section 130.25(1), which states that a person is guilty of third degree rape if that person has sexual intercourse with another incapable of consent for some reason other than being less than 17, see supra note 192, need be removed. This section, according to the Commission, could not "withstand an equal protection challenge" since it does not serve the governmental interest of preventing teenage pregnancies. See id. at 9 n.5. See also N.Y. PENAL LAW § 130.25(1) (McKinney 1987). But see Augustine, supra note 28, at 583 (arguing that married teenage victims are most in need of the protection of the rape statutes); Jaye Sitton, Comment, Old Wine in New Bottles: The Marital Rape Allowance, 72 N.C. L. REV. 261, 280 (1993) ("[O]ne must question the wisdom of a statutory scheme permitting individuals to marry at an age when they are not considered competent to consent to sexual intercourse.").

The minimum age one is permitted to marry in New York is 16, with parental consent, and if under age 16, the minimum age is 14 with parental and judicial consent. See N.Y. DOM. REL. LAW § 15 (McKinney 1988). The law prohibits the marriage of anyone under age 14. See N.Y. DOM. REL. LAW § 15-a (McKinney 1988).

194. For example in the proposed statute, sections 130.30 and 130.35, which prescribe sexual penetration with victims less than 14 years old and 11 years old respectively, do not provide the section on conduct between married couples since New York State prohibits the marriage of any person under age 14. See N.Y. DOM. REL. LAW § 15-a (McKinney 1988). The same is true for sections 130.60 and 130.65. See infra part III.C.
statutory rape statutes retain the gender-based language. The United States Supreme Court, in *Michael M. v. Superior Court of Sonoma County*,\(^{195}\) found gender-based statutory rape statutes constitutional.\(^{196}\) The Court said that "young men and young women are not similarly situated with respect to the problems and the risks of [engaging in] sexual intercourse."\(^{197}\) According to the Court, a state may enact a statute criminalizing sexual intercourse with minor females and not minor males in order to further the state's interest in preventing teenage pregnancies.\(^{198}\) Based on that decision, the Commission found that the State had a legitimate interest in making a distinction between males and females and the Legislature should retain the gender-based language in the statute.\(^{199}\) Despite the Commission's recommendation, the Legislature amended sections 130.25 and 130.30 to incorporate gender-neutral language in those statutes that had previously applied to males only.\(^{200}\) The proposed statute retains the gender-neutral language in the statutory rape statutes.\(^{201}\)

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196. *Id.* at 470-73. In *Michael M.*, the 17-year-old male petitioner challenged, on equal protection grounds, the California penal code that made it unlawful for males to have sexual intercourse with females under the age of 18. The Supreme Court held that states had a legitimate interest in prohibiting teenage pregnancies and therefore gender-based statutory rape statutes bore a substantial relationship to an important governmental interest. *Id.* at 472-73. In People v. Whidden, 415 N.E.2d 927, 929 (N.Y. 1980), *appeal dismissed*, 454 U.S. 803 (1981), the New York Court of Appeals also declared the statutory rape statutes constitutional.
198. *Id.* at 470. States have an interest, not only in reducing the number of abortions occurring as a result of teenage pregnancies, but in reducing the number of children that become wards of the state. *Id.* at 471.
199. See *Commission, supra* note 167, at 9.
200. See Act of July 30, 1987, ch. 510, 1987 N.Y. Laws 858 (codified in N.Y. Penal Law §§ 130.25, 130.30 (McKinney 1987)). An unintended effect of the amendment extended the marital exemption to wives who raped their husbands. See Robin West, *Equality Theory, Marital Rape and the Promise of the Fourteenth Amendment*, 42 Fla. L. Rev. 45, 46-47 (1990) ("Some states, ironically in the name of reform, may have worsened the problem of marital rape by extending the exemption to include women who rape their husbands in order to make the exemptions appear 'gender neutral.' ").
201. The proposed statute retains the gender-neutral language in deference to the New York Legislature. Despite the Supreme Court's decision in *Michael M.*, no evidence exists that the gender-based classifications in the New York statutory rape statutes serve an important governmental purpose. See Whidden, 415 N.E.2d at 929-31 (Meyer, J., dissenting).
C. A Proposed Statute

NEW YORK PENAL LAW - SEX OFFENSES

§ 130.00 Sex Offenses; Definitions of Terms

The following definitions apply to this article:

1. "Actor" means a person accused of an offense;
2. "Victim" means the person alleged to have been subjected to the offense;
3. "Sexual penetration" means vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or foreign object into the anus or vagina either by the actor or upon the actor's instruction. The depth of insertion shall not be relevant as to the question of commission of the crime;
4. "Sexual contact" means an intentional touching by the victim or the actor of the victim's or actor's intimate parts directly or through the clothing;
5. "Intimate parts" means the sexual organs, genital area, anal area, inner thigh, buttock or breast of a person;
6. "Mentally defective" means that a person suffers from a mental disease or defect that renders the person incapable of appraising the nature of his or her conduct;
7. "Mentally incapacitated" means that a person is rendered temporarily incapable of understanding or controlling his or her conduct due to the influence of a narcotic, intoxicant or other substance administered to that person without his or her consent or prior knowledge, or to any other act committed upon him or her without his or her consent;
8. "Physically helpless" means that a person is unconscious or physically unable to flee or is physically unable to communicate unwillingness to an act;
9. "Forcible compulsion" means to compel by:
   a) the force necessary to achieve sexual penetration without the affirmative and freely-given acquiescence of the victim; or
   b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.
10. "Foreign object" means any instrument or article which, when inserted in the vagina, urethra, penis or rectum, is capable of causing physical injury.
§ 130.05 Sex Offenses; Lack of Consent

1. Whether or not specifically stated, an element of every offense defined in this article is the victim's lack of consent.

2. Lack of consent results from:
   a) Forcible compulsion, defined as the force necessary to achieve sexual penetration without the victim's affirmative and freely-given acquiescence; or
   b) Incapacity to consent;

3. A person is deemed incapable of consent when that person is:
   a) Less than seventeen (17) years old; or
   b) Mentally defective; or
   c) Mentally incapacitated; or
   d) Physically helpless.

§ 130.20 Sexual Misconduct

An actor is guilty of sexual misconduct when:

1. The actor engages in sexual penetration with the victim without the victim's consent; or

2. The actor engages in sexual conduct with an animal or a dead human body.

Sexual misconduct is a class A misdemeanor.

§ 130.25 Sexual Assault in the Third Degree

An actor is guilty of sexual assault in the third degree when:

1. The actor commits sexual penetration with the victim who is incapable of consent because of some factor other than being less than seventeen (17) years old; or

2. Being twenty-one (21) years old or more, the actor commits sexual penetration with a victim less than seventeen (17) years old.

3. No offense is committed under this section for sexual conduct between persons who are married to one another and lack of consent is based solely upon the victim's age.

Sexual assault in the third degree is a class E felony.

§ 130.30 Sexual Assault in the Second Degree

An actor is guilty of sexual assault in the second degree when, being eighteen (18) years old or more, the actor commits sexual penetration with a victim less than fourteen (14) years old.

Sexual assault in the second degree is a class D felony.
§ 130.35 Sexual Assault in the First Degree

An actor is guilty of sexual assault in the first degree when he commits an act of sexual penetration with a victim:
1. By forcible compulsion; or
2. Who is incapable of consent because of being physically helpless; or
3. Who is less than eleven (11) years old;

Sexual assault in the first degree is a class B felony.

§ 130.38 Consensual Sodomy - repealed

§ 130.40 Sodomy in the Third Degree - repealed

§ 130.45 Sodomy in the Second Degree - repealed.

§ 130.50 Sodomy in the First Degree - repealed.

§ 130.55 Sexual Abuse in the Third Degree

An actor is guilty of sexual abuse in the third degree when the actor subjects the victim to sexual contact without the victim's consent;
1. Except in any prosecution under this section, an affirmative defense is:
   a) the victim's lack of consent was due solely to incapacity to consent because of being less than seventeen (17) years old, and
   b) the victim was more than fourteen (14) years old, and
   c) the actor was less than five (5) years older than the victim.
2. No offense is committed under this section for sexual conduct between persons who are married to one another and lack of consent is based solely upon the victim's age.

Sexual abuse in the third degree is a class B misdemeanor.

§ 130.60 Sexual Abuse in the Second Degree

An actor is guilty of sexual abuse in the second degree when the actor subjects the victim to sexual contact and when the victim is:
1. Incapable of consent because of some factor other than being less than seventeen (17) years old; or
2. Less than fourteen (14) years old.

Sexual abuse in the second degree is a class A misdemeanor.

§ 130.65 Sexual Abuse in the First Degree

An actor is guilty of sexual abuse in the first degree when the actor subjects the victim to sexual contact:
1. By forcible compulsion; or
2. When the victim is incapable of consent because of being physically helpless; or
3. When the victim is less than eleven (11) years old.
Sexual abuse in the first degree in a class D felony.

§ 130.67 Aggravated Sexual Abuse in the Second Degree

1. An actor is guilty of aggravated sexual abuse in the second degree when the actor inserts a finger in the vagina, urethra, penis, or rectum of the victim causing physical injury to the victim:
   a) By forcible compulsion; or
   b) When the victim is incapable of consent by reason of being physically helpless; or
   c) When the victim is less than eleven (11) years old.
2. Conduct performed for a valid medical purpose does not violate the provisions of this section.
Aggravated sexual abuse is the second degree is a class C felony.

§ 130.70 Aggravated Sexual Abuse in the First Degree

1. An actor is guilty of aggravated sexual abuse in the first degree when the actor inserts a foreign object in the vagina, urethra, penis or rectum of the victim causing physical injury to the victim:
   a) By forcible compulsion; or
   b) When the victim is incapable of consent because of being physically helpless; or
   c) When the victim is less than eleven (11) years old.
2. Conduct performed for a valid medical purpose does not violate the provisions of this section.
Aggravated sexual abuse in the first degree is a class B felony.

Conclusion

The New York Legislature should repeal the marital exemption for all sex offenses in the New York Penal Law. The Court of Appeals decided *Liberta* more than ten years ago and most of the courts have adopted the rationale of the *Liberta* court to strike down the marital exemption for sex offenses. Nevertheless, the facially unconstitutional statute remains on the books and is incongruous with the current law. As a result, some lower courts still rely on the exemption to deny victims of marital sexual assault their due relief.
New York prosecutors report that they seek prosecution in those cases in which they have a credible witness. They admit, however, that prosecuting marital rape cases is difficult, at best. Prosecutors find it difficult to convince triers of fact and the victims themselves that marital rape is a crime.

Advocates of rape law reform argue that legislation establishes a strong policy that supports victims and influences the public attitude toward the new law. If victims of marital sexual assault are to receive full protection, the Legislature must amend the statute.