

ALASKA LEGISLATURE COMMITTEE FILES 1905-1900

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(FILE 1)

COURT OF APPEALS  
STATE OF NEW YORK

Twenty Minutes Argument  
Requested by Sarah Wunsch  
(212) 674-3303

-----X  
PEOPLE OF THE STATE OF NEW YORK, :  
 :  
 Respondent, :  
 :  
 v. :  
 :  
 MARIO LIBERTA, :  
 :  
 Defendant-Appellant. :  
 :  
-----X

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BRIEF AMICUS CURIAE OF  
ALBANY COUNTY RAPE CRISIS CENTER; ALTERNATIVES FOR BATTERED  
WOMEN, INC.; CAROL BELLAMY, NEW YORK CITY COUNCIL PRESIDENT;  
BROOKLYN WOMEN'S ANTI-RAPE EXCHANGE; BUFFALO CHAPTER OF  
NATIONAL ORGANIZATION FOR WOMEN; CENTER FOR THE ELIMINATION  
OF VIOLENCE IN THE FAMILY, INC.; COALITION FOR ABUSED WOMEN,  
INC.; ERIE COUNTY CITIZENS' COMMITTEE ON RAPE AND SEXUAL  
ASSAULT; FAMILY ADULT SHELTER; ITHACA RAPE CRISIS, INC.;  
JEFFERSON COUNTY WOMEN'S CENTER, INC.; LONG ISLAND WOMEN'S  
COALITION; METROPOLITAN ASSISTANCE CORPORATION (VICTIM  
SERVICES/TRAVELERS AID); NATIONAL ASSOCIATION OF SOCIAL  
[continued on inside cover]

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Dated: September 18, 1984  
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## INTEREST OF AMICI CURIAE

Amici are 36 national, New York State, and local organizations and an individual representing the interests of women. Exhibit A contains the Statements of Interest of amici. Many of them provide shelter, counseling and advocacy for rape victims and battered women from all social and economic classes. Amici have first hand knowledge of the serious physical and psychological injury to married women caused by New York's forcible marital rape and sodomy exemptions at issue in this case. Amici share the belief that the exemption of forcible marital rape and sodomy from criminal penalty licenses husbands to rape their wives, deprives married women of their fundamental rights to privacy, bodily integrity and equal protection, and perpetuates the historical inferior legal status and stereotypical role of women in marriage. Amici represent the only voice for married women whose rights are directly affected by this case and urge the Court to hear this voice and take cognizance of their claims in ruling on the constitutionality of the forcible marital rape and sodomy exemptions.

### Introduction

This appeal challenges the constitutionality of New York's criminal forcible rape and sodomy laws which exempt women married to the perpetrator from their protection.<sup>1</sup> Amici submit that the

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<sup>1</sup>Penal Law §130.35(1):

A male is guilty of rape in the first degree when he engages  
(Footnote Continued)

exemption should be struck down, but that the defendant's conviction should be affirmed.

The defendant-appellant, Mario Liberta, a married man treated as unmarried by virtue of a court order of protection directing him in effect to live apart from his wife, argues that he is deprived of the equal protection of the laws by these statutes since other married men are permitted to forcibly rape and sodomize their wives while he is not permitted to do so. (Appellant's Brief, pp. 15-19.) As to his claim, the People need prove a rational basis for treating Liberta as an unmarried rapist and not punishing married rapists. People v. Onofre, 51 N.Y.2d 476, 491-92, 434 N.Y.S.2d 947, 953 (1980).

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.(Footnote continued)

in sexual intercourse with a female ... by forcible compulsion.

Penal Law §130.00(4):

"Female" means any female person who is not married to the actor.

[Not married is defined as lack of a marital relationship recognized by law or as the living apart of a husband and wife and the existence of a court order requiring the husband and wife to live apart or a separation agreement specially acknowledged providing that rape may be charged.]

Penal Law §130.50(1):

A person is guilty of sodomy in the first degree when he engages in deviate sexual intercourse with another person ... by forcible compulsion.

Penal Law §130.00(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.

But before this Court rules upon the showing necessary to uphold the classification of this rapist as unmarried, the Court is urged to acknowledge the real victims of this statutory classification -- married women who have no protection against forced violent sexual assaults by their husbands.<sup>2</sup>

For the woman who is not yet divorced, for the wife who cannot afford to go to court or is in the process of obtaining a court order, for the woman who by religious or other belief continues to live with her husband, and for every wife who, for reasons of her own, wishes on a particular occasion not to engage in sexual activity -- as to these women, the statutes deprive them of the fundamental right to privacy and control of their bodies and deny them the equal protection of the laws. People v. Cnoire, 51 N.Y.2d 476.

The existence of a criminal law which excludes a category of people from its protection is an anomaly in our modern legal system. Indeed, Justice White in Linda R.S. v. Richard D., 410 U.S. 614, 621 (1973) (dissent), posed a hypothetical law to which there would be universal opposition: "If a State were to pass a law that made only the murder of a white person a crime, I would

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<sup>2</sup>This Court may consider the claims of the women victims on the assertion of the defendant that the exemption is unconstitutional. The issue "raised is of sufficient public importance" that the merits should be reached "despite [his] individual lack of standing." People v. Parker 41 N.Y.2d 21, 15, 390 N.Y.S.2d 837, 840 (1976). Cf., People v. DeStefano, 121 Misc.2d 223, 467 N.Y.S.2d 506, 509 (Suffolk Co. Ct. 1983) (equal protection rights of married women considered in challenge by male defendant to marital rape exemption).

think that Negroes as a class would have sufficient interest to seek a declaration that the law invidiously discriminated against them." There was, however, an era when the criminal laws regularly operated in this fashion. For example:

The criminal offence of assault and battery cannot, at common law, be committed on the person of a slave. For notwithstanding for some purposes a slave is regarded in law as a person, yet generally he is a mere chattel personal, and his right of personal protection belongs to his master, who can maintain an action for trespass for the battery of his slave.

State v. Maner, 2 Hill's S.C. Rept. 453 (1834), cited in J. Wheeler, A Practical Treatise on the Law of Slavery (1837) (reprinted Negro Universities Press, 1968).

[T]he violation of the person of a female slave, carries with it no other punishment than the damages which the master may recover for the trespass of his property.

T.R. Cobb, An Inquiry into the Law of Negro Slavery in the United States of America (1858) (reprinted Negro Universities Press, 1968), §107 at 99.

Whoever shall unlawfully and carnally know any white woman against her will or consent, or by force, or while she is insensible, shall be guilty of rape, and shall be punished by confinement in the penitentiary for a period of not less than ten nor more than twenty years, or by death, in the discretion of the jury.

Kentucky Laws, Adj. Sess., 1869 (chap. 1659), p.52, cited in K. Stamp, ed., The Civil Rights Record: Black Americans and the Law, 1849-1970 (1981) at 81 (emphasis added).

Today, we look upon these laws with deep shame. They excluded from the protection of the criminal law slaves and black women even after the Civil War. Just as the slave codes condoned brutality against one class of people by calling the victims chattel or property, and by cautioning against state interference with a private relationship between master and slave, so does the wife rape exemption at issue in this case. It is derived historically from a conception of women as inferior beings, the

property of their husbands, lacking a separate legal identity, or by law presumptively consenting to all acts of their husbands against them. Note, The Marital Rape Exemption, 52 N.Y.U. L. Rev. 306 (1977) (hereinafter "NYU Note"). The modern attempts to justify such laws are but a new variant on the old theme.

One New York trial court recently found the wife rape exemption unconstitutional as a vestige of archaic notions of the status of women in marriage which deprives them of the equal protection of the laws without reasonable government justification. People v. DeStefano, 121 Misc.2d 223, 467 N.Y.S.2d 506, 516 (Suffolk Co.Ct. 1983.) The highest courts in other jurisdictions have rejected every rationale put forward as support for the wife rape exemption. State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981); State v. Smith, 401 So.2d 1126 (Fla.District Ct.App. 1981); State v. Rider, 9 Fla. Law Weekly 887 (Fla.District Ct.App., Apr. 27, 1984); State v. Chretien, 417 N.E.2d 1203 (Mass. 1981).

This Court has both an opportunity and a duty in this case to end a shameful episode of New York legal history and bring the criminal law into line with the principles of the equality and autonomy of women it has enunciated in other areas. Amici ask the Court to hold that the wife rape exemption stigmatizes married women as inferior, and deprives them of their fundamental right to privacy, bodily integrity and autonomy, and of the equal protection and due process of law, all protected by both the New York and United States Constitutions.

I.

WIFE RAPE IS A SERIOUS PROBLEM CAUSING  
INJURY TO A SIGNIFICANT NUMBER OF WOMEN.

Wife rape is brutal, violent sexual attack often committed in the context of battering or against a wife who no longer lives with her husband. It is often, as in this case, a sexual assault committed intentionally in front of a child. Frieze, Investigating the Causes and Consequences of Marital Rape, Signs: Journal of Women in Culture and Society 532, 535 (1983) (hereinafter "Frieze"). The unsupported fear of some that an end to the marital rape exemption will cause improper state interference with consensual sexual conduct in the marital bedroom is a red herring. Marriage is not consent to rape; it is consent to voluntary sexual relations for mutual gratification, companionship and procreation. Private consensual sexual activity between adults must be distinguished from its antithesis-- non-consensual, violent sexual attack. Cf., People v. Onofre, 51 N.Y.2d at 490.

Just as assault and murder are crimes when committed by the victim's husband or a stranger, so too a rape is a violent act done to injure, degrade and humiliate the victim. A rape is "a hit-and-run attack, a brief expression of physical power, a conscious process of intimidation, a blunt, ugly sexual invasion with possible lasting psychological effects on all women." S. Brownmiller, Against Our Will: Men, Women and Rape, 423-24 (1975) (hereinafter "Brownmiller"). "Rape is not the aggressive expression of sexuality. It is the sexual expression of aggression." Groth & Gary, Marital Rape: Forced Sex in Marriage

in Medical Aspects of Human Sexuality (1980) (hereinafter "Groth and Gary"). "In terms of the perpetrator's motives, rape bears a closer resemblance to violent crimes such as assault and robbery than it does to sexual intercourse with a consenting woman." Law Enforcement Assistance Administration, Dept. of Justice, A Prescriptive Package: Rape and Its Victims 149 (1979). Groth's studies show that "forcible sexual assault is motivated more by retaliatory and compensatory motives than by sexual ones." Groth, Men Who Rape: The Psychology of the Offender 2 (1979).

The harm caused by rape is exacerbated in the marital relationship because it is a violation of trust. It is more severe and longlasting than when a woman is raped by someone she does not know. D. Russell, Rape in Marriage 190-99 (1982) (hereinafter "Russell"); D. Martin, Battered Wives, 181-82 (1976); Finklehor and Yllo, Rape in Marriage, in The Dark Side of Families: Current Family Violence Research 119, 126-27 (1983). The harm is both physical and psychological. It is an assault on her autonomy and decision-making about her sexual behavior. Finklehor and Yllo, Rape in Marriage at 126-27; Geis, Rape-in-Marriage: Law and Law Reform in the United Kingdom, United States, and Sweden, 6 Adel. L. Rev. 284, 303 (1979) (hereinafter "Geis"). It is a present injury that carries the potential of long-term consequences.

If we divide rapists into categories based on intimacy with the victim -- stranger, acquaintance, date, relative, and lover or husband -- we find that the incidence of adverse sexual effects rises by leaps and bounds, from less than a third of the cases of rape by a stranger to nearly three-quarters of the cases of rape by a lover or husband...

Bart, Rape Doesn't End With a Kiss, *Viva* 39,41-42 (June, 1975).  
See also Galles, Violence in the Family, 132-33 (1979); Russell,  
at 190-205 (marital rape, along with childhood incest, has the  
greatest long-term effects of any rape experience); Finkelhor &  
Yllo, Forced Sex in Marriage: A Preliminary Research Report, 28  
*Crime & Delinquency* 459 (1982).

When a woman is raped in marriage, she cannot walk away  
from the criminal. A comparison therefore can be made to the  
plight of a prison rape victim. A prisoner who is raped in jail  
suffers in a setting where he is locked in a cage with the  
offender. Similarly, a wife who is abused and raped is locked  
into a situation where the offender comes home every day with the  
real possibility of raping her. In one study, half of the  
victims "had been sexually assaulted twenty times or more by  
their husbands. They lived for months, sometimes years, with  
ongoing violation....this took its toll in the form of chronic  
terror..." D. Finklehor, Marital Rape: The Misunderstood Crime,  
Address to the New York County Lawyers Association 3-4 (May 3,  
1984) (hereinafter "Marital Rape Address") (Attached hereto as  
Exhibit E). Even if the woman moves out of her home, she is not  
protected against rape by her husband until she has obtained a  
court order. Penal Law §130.00(4)(b). Thus, wife rape invades  
and permanently changes the woman's sense of self as an  
autonomous human being.

In addition to being a violent crime, a betrayal of  
inter-spousal trust, and more emotionally and psychologically  
damaging than stranger rape, wife rape often occurs in the

context of an ongoing violent relationship, part of or as a sequel to a battering. Russell, at 88; Finklehor and Yllo, Rape in Marriage at 120. In one reported study, 93% of the victims of marital rape were also victims of wife battering. Russell, at 88. Moreover, wives who are raped by their husbands, are likely to have been abused by their husbands more often than wives who were abused but not raped. J. Doron, Conflict and Violence in Intimate Relationships: Focus on Marital Rape 5 (paper presented to the American Sociological Association, August 1980).

The reality of the violence and harm of wife rape can best be seen in the record of this case. On the day Denise Liberta was raped, she was intimidated by death threats and physically abused. Her husband threatened to kill her if she screamed.<sup>3</sup> He also inflicted scratch and dig marks all over her neck, bumps and bruises on her head, and a bruise four inches wide on her back.<sup>4</sup> He then forced her to perform fellatio and have sexual intercourse with him in front of their son.<sup>5</sup> A study of marital rape shows this kind of violence to be typical. Finklehor, Marital Rape Address. Of fifty women raped by their husbands,

one had been raped at knife point by a husband who held her up against the wall and threatened to kill her....one was jumped in the dark by her husband and raped in the anus....One had her baby kidnapped by an estranged husband who compelled her to have sex as a condition for returning the child....One had a six

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<sup>3</sup> Trial transcript at 52.

<sup>4</sup> Id. at 55, 98, 99.

<sup>5</sup> Id. at 52-53.

centimeter gash ripped in her vagina by a husband who was trying 'to pull her vagina out.'

Finklehor, Marital Rape Address at 1.

The prevalence of wife rape has only recently been documented.<sup>6</sup> In a major random sample study, 14% of the 644 married women in the sample were raped by their husbands. Russell at 57-58.<sup>7</sup> See Statements of Interest of Amici (Exhibit A heretc) which detail the prevalence of marital rape in New York State. See also Finklehor and Yllo, Rape in Marriage, at 119-121.

The New York marital rape exemption, by refusing to treat marital rape as a crime, effectively grants married men a license

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<sup>6</sup> Marital rape may be the most frequent but unrecognized and therefore unreported form of rape in our society. Frieze, at 536 and 543. Married women themselves have learned that the word "rape" does not apply to what has been done to them. Finklehor and Yllo, Rape in Marriage at 121.

<sup>7</sup> These results are generally viewed as underreporting the actual incidence of wife rape. Interviewers often ask only about "intercourse," which for most people would exclude other forced sex activity such as oral, anal, or digital. Women studied are usually in fixed abodes, which excludes those who reside in institutions, such as mental hospitals, prisons, shelters, nursing homes, or halfway houses; "it seems probable that women who have been subjected to very traumatic experiences including wife rape are over-represented in institutions, or among street people," Russell, at 59. Studies do not include women who are no longer alive, either as a result of suicide or murder, and cannot report that they were raped. Battered women are more likely to be murdered by their husbands, and 33% of all battered wives are also raped. Russell, at 59. This estimate also appears to be low. See Frieze, at 542 (34% of battered women reported rape); Pagelow, Does the Law Help Battered Women: Some Research Notes (unpublished paper) (37%), cited in Russell at 61. The Women's Crisis Center in Brattleboro, Vermont, reported 60% of their married clients reported rape. Clancy, Equal Protection Considerations of the Spousal Assault Exclusion, 16 N. Eng. L. Rev. 1, 25 n.150 (1980) (hereinafter "Equal Protection Considerations").

to rape their wives. It not only encourages the commission of the acts, but also exacerbates the harm.

[W]hile all rape victims suffer shame and stigma, few suffer the total isolation of marital rape. No relatives or friends commiserated with these women about the pain. No police or court confirmed the judgment that they had been wronged. In their isolation they usually blamed themselves....It was a profound psychological scar that was difficult to erase....Unfortunately, when people suffer from non-problems, they tend to become non-persons, both in their own eyes and in the eyes of others. Making marital rape a crime will put a few offenders out of our community, but it will bring a whole lot of victims back in.

Finklehor, Marital Rape Address at 4.

The physical injury, trauma, betrayal and sense of inferiority which result from being brutalized by a husband are compounded by the knowledge that the law authorizes the harm. The exemption must be struck down, not only to deter husbands from raping wives, but also to bring to an end another example of anachronistic views of women and their role in society.

## II.

### THE MARITAL RAPE EXEMPTION IS BASED ON ARCHAIC VIEWS ABOUT WOMEN

#### A. Historical Background

The wife rape exemption is a shocking vestige of the common law system that viewed women as inferior to men and as subjects of their husbands. This view was reflected in various concepts and doctrines which today are viewed as archaic and intolerable. At the core of this system was the view that a woman is the property of either her father or her husband. The purpose of rape laws generally was to preserve the "value" of the sexual object. See Brownmiller at 6-22; NYU Note at 309. For example,

under Mosaic law the rapist of a virgin was penalized by forcing him to pay the bride price to the father and to marry the woman. Deuteronomy 22:13-29. Similarly, under ancient Babylonian law, criminal rape was "the theft of virginity, an embezzlement of (the woman's) fair price on the market." Brownmiller, at 9.

These ancient ideas continued into Western law. At common law, the woman victim could save her attacker from the death sentence or blinding and castration by accepting him as her husband; marriage might be said to be repayment for the destruction of her marriage value by rape, that is, the ruination of property. Note, Rape and Battery Between Husband and Wife, 6 Stan. L. Rev. 719, 724 & n.26 (1954).

Within the family and against third parties, "the husband ... had a property [interest] in the body, and a right to the personal enjoyment, of his wife..." Oppenheim v. Kridel, 140 N.E. 227, 228 (1923). See also, Kline v. Ansell, 414 A.2d 929, 930 (Md. 1980). Since the wife was viewed as the husband's property, courts were reluctant to interfere in the relationship.

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer.

1 W. Blackstone, Commentaries on the Laws of England 444 (Garland, 1978).<sup>8</sup>

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<sup>8</sup>By 1823, the New York courts had rejected the common law standard. People v. Winters, 2 Park. 10 (N.Y. 1823).

The common law embodied the wife's duty of service (or the husband's ownership of her service) in a number of causes of action. Criminal conversation was a husband's action against a third party for adultery committed with his wife. "The husband's cause of action [was] based upon his proprietary right in the person of his wife.... predicated upon the possessory right of the superior being in the body of the inferior." Oppenheim v. Kridel, 140 N.E. at 228. Modern courts have rejected this concept. Kline v. Ansell, 414 A.2d at 930.

Loss of consortium was also a cause of action originally granted only to the husband. Damages for loss of consortium were meant to cover "deprivation of the society, fellowship and affectionate relations of the wife ... and the sexual intercourse with the wife, together with any estimated loss in the future." Prosser, The Law of Torts, §125 at 890 (1971). Blackstone explained the absence of a wife's cause of action for loss of consortium as stemming from the inequality inherent in the relationship:<sup>8</sup>

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related ... while the loss of the inferior by such injuries is totally unregarded.

3 Blackstone Commentaries on the Laws of England 143 (Garland, 1978).

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<sup>8</sup>In Bennett v. Bennett, 23 N.E. 17 (1889), this Court rationalized the wife's inability to sue for loss of consortium is a procedural one. In theory, the wife had the same rights as the husband, but was just unable to enforce them since she could not sue in her own name.

This concept of the woman as the property of her husband has been squarely repudiated by every court that has ruled on wife rape exemptions. "Of course, the theory has no validity in this country and nowhere in modern society is a woman regarded as a chattel." DeStefano, 467 N.Y.S.2d at 512, citing Trammel v. United States, 445 U.S. 40 (1980). See also State v. Smith, 426 A.2d at 43-44; Clancy, Equal Protection Considerations at 17.

Consistent with the notion of woman as the property of her husband that underlay the general rape laws, the married woman was viewed as merged in her husband's identity, subject to his authority and duty-bound to provide sexual as well as other services.

By 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 ... into that of the husband, under whose wing, protection and cover she performs everything..."

1 Blackstone, Commentaries on the Laws of England 442 (Garland, 1978). Accordingly, with wives having no distinct legal identities, a husband could not be convicted of raping himself. See NYU Note at 310.<sup>10</sup>

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<sup>10</sup>This merger of legal existence also gave the husband the power legally to act for this wife. "[H]e was regarded as her head and representative in the social state..." Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J. concurring). A married woman could not bind herself by contract; her contracts were considered void, as an infant's, not just voidable. Her husband gained control and management of her real property and complete ownership of her personal property. Her services belonged to her husband and therefore he had sole right to any wages she earned outside the home. His domicile became hers. She could not sue or be sued; her husband had to be joined

(Footnote Continued)

The passage of the Married Women's Property Act in 1848, now codified at N.Y. Dom. Rel. Law, §§50-61 (McKinney 1977), established a wife's separate legal identity and her right to contract and acquire and dispose of property. "Chip by chip, over the years these archaic notions have been cast aside so that '[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'" Trammel v. United States, 445 U.S. at 52, citing Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

Within the context of the views of women as property and as having no separate legal identity in marriage there arose a third justification for the marital rape exemption -- usually attributed to Sir Matthew Hale, the 17th Century English jurist noted for his misogyny.<sup>11</sup> Hale wrote:

But the husband cannot be guilty of 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.

Hale, Historia Placitorum Corone (History of the Pleas of the Crown) 629 (pub. posthumously 1736), cited in People v. DeStefano, 467 N.Y.S. 2d at 510. This statement of the wife's irrevocable consent and contract to all sexual intercourse with

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(Footnote Continued)  
in any legal action. If any recovery was obtained through a suit, the money belonged to him. Babcock, Freedman, Norton and Ross, Sex Discrimination and the Law: Causes and Remedies 575 et seq. (1975).

<sup>11</sup> Lord Hale's "judicial opinions and his homiletic writings are strikingly antagonistic to the interests of women." Geis, at 286.

her husband was made without any supporting citations to authority. Indeed, today it has been subject to extensive criticism for failing to be an accurate statement of the law even in Hale's time.<sup>12</sup>

Despite Hale's failure to cite any authority for his statement, the principle was adopted by many states in enacting their rape statutes or was recognized as a defense at common law. Legislators and judges acted upon the view of society of their time that women were simply not equal to the males they married and owed sexual service to their husbands and were presumed to consent. Since consent marks the essential distinction between rape and sexuality, how could a married woman be raped? This notion--that married women lack legal capacity to refuse sex--flies in the face of modern recognition of the right of every person to make these decisions. Point III., infra.

#### B. History of the New York Marital Rape Exemption

Prior to the passage of a comprehensive penal code in 1881, New York statutes defined rape as "(1) By carnally and unlawfully knowing any female child under age of ten years; or, (2) by forcibly ravishing any woman of the age of ten years or upwards." Revised Statutes of the State of New York, Vol. II, Part IV, ch.

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<sup>12</sup> See, People v. DeStefano, 467 N.Y.S.2d at 510; State v. Smith, 426 A.2d at 41; Griffin, In 44 States, It's Legal to Rape Your Wife, Student Lawyer, (Sept. 1980) 21; NYU Note, supra; Geis, supra; Gonring, Spousal Exemption to Rape, 65 Marq. L. Rev. 120 (1981); Dearrows, Abolishing the Marital Exemption for Rape, 1983 U.Ill.L. Rev. 201; Drucker, Comment, The Common Law Does Not Support a Marital Exemption for Forcible Rape, 5 Women's Rights L. Rep. 181 (1979).

I., Title II., §22 at 849 (4th ed. 1852). Although no explicit marital exemption appears, a contemporary treatise on New York criminal law claimed that a husband's immunity at English common law was considered part of the statute. "A man cannot be guilty of a rape upon his own wife, for the matrimonial consent cannot be retracted." Farbour, Treatise on the Criminal Law of the State of New York 71 (2d ed. 1852).

The first comprehensive penal code, passed in 1881, enacted the marital rape exemption. "Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will or without her consent." Penal Code of the State of New York §278 (1881). The legislative history fails to reveal why the exemption was made explicit or if it was considered part of the law prior to the 1881 code. Rather, the authors of the code claimed that the code "makes little or no new law; ... its provisions are almost entirely a codification either of common law regarding crime or of the state statutes on the subject." New York Tribune, Dec. 1, 1881, at 8.

Subsequently, the New York courts adopted Hale's explanation that a husband could not be guilty of raping his wife "because the husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given and which she cannot retract." People v. Meli, 193 N.Y.S. 365 (1922).

In 1978, the New York Legislature restricted the marital exemption, by broadening the statutory definition of "not married." Penal Law §130.00(4). A court order requiring living

apart or a particular type of separation agreement now define the couple as not married for purposes of forcible rape and sodomy prosecutions. This amendment was seen as "a logical extension of the substantive and procedural changes in our sex crimes law of recent years which have recognized and given effect to the rights of women-victims." Penal Law §130.00, 1978 Supplementary Practice Commentaries, Arnold D. Hechtman, Pocket Part p. 288 at 289 (McKinney's Supp. 1983), cited in People v. DeStefano, 467 N.Y.S.2d at 511 (emphasis added).

The sponsor of the amendment, Senator Manfred Ohrenstein, stated in a letter to the Governor (dated August 8, 1978 at p.1) (attached hereto as Exhibit C) that "the change...is demanded by the growing recognition of equality between men and women." Ohrenstein noted that the common law wife rape exemption "rests upon the view that a wife is merely the property of her husband and like his other property he is free to do with her as he pleases." Id. The Senator recognized that this view and the view that the woman's legal identity merged with the husband's had been abandoned. He suggested, therefore, that "[s]ince the basis for the rape exemption has fallen, it seems anomalous that the ancient structure should remain standing." Id. at p.2.

Despite the legislative intent to repeal an "outdated vestige of discarded legal concepts," (Ohrenstein letter at p.3) most married women are still subject to the archaic view of their role as wives which underlies the exemption. They are obligated to submit to their husband's violent enforcement of the marital "contract." The 1978 amendment was a step in the right

direction; but the step not taken--the continued license to rape within an ongoing marriage, or to rape a wife who has separated from her husband--is not constitutionally tolerable.

### III.

#### THE MARITAL EXEMPTIONS DEPRIVE WOMEN OF THE RIGHT TO PRIVACY PROTECTED BY THE NEW YORK AND U.S. CONSTITUTIONS.

The forcible marital rape and sodomy exemptions constitute a license for husbands to sexually attack their wives. The state thereby has authorized interference with a wife's fundamental right to privacy which includes the right to make decisions about childbearing, contraception, engaging in private consensual sexual activity and the right to bodily autonomy and integrity. All of these rights are denied when it is lawful for a man to rape his wife.

People v. Onofre, 51 N.Y.2d at 485, compels invalidation of the exemption on privacy grounds. There, this Court described the right to privacy as "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by government restraint... The right ... has been called 'the most comprehensive of rights and the right most valued by civilized men...'" (citations omitted.) Decisions protected by this privacy right include "personal decisions relating to marriage (Loving v. Virginia, 388 U.S. 1, 12); procreation (Skinner v. Oklahoma, 316 U.S. 525); contraception (Eisenstadt v. Baird, 405 U.S. 438); ... and abortion (Roe v. Wade, 410 U.S. 113)." Onofre, 51 N.Y.2d at 486.

Most pointedly, this Court held that "the right of privacy [protects] individual decisions as to indulgence in acts of sexual intimacy...so long as the decisions are voluntarily made by adults in a noncommercial, private setting." Onofre, 51 N.Y.2d at 488. In Onofre, the issue was whether unmarried persons had this right which was assumed to be an entitlement of the married. Here the issue is whether that right is shared by both partners to the marital relationship. The U.S. Supreme Court addressed that question in Eisenstadt v. Baird, 405 U.S. 438 (1972), uttering words which this Court recognized as the cornerstone of its decision in Onofre:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. at 453 (emphasis in original); see also, People v. Onofre, 51 N.Y.2d at 487; Carey v. Population Services International, 431 U.S. 678, 688 (1977) (underscoring the individual nature of the interests). Today, women have the constitutional right to choose to have an abortion without the consent of their husbands (Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)), or choose to have a hysterectomy (Murray v. Vandevander, 522 P.2d 302 (Okla.App. 1974)) or be sterilized (Ponter v. Ponter, 135 N.J.Super. 50, 342 A.2d 574 (1975)). In New York, a wife has the unilateral right to practice birth control. Zagarow v. Zagarow, 105 Misc.2d 1054, 430 N.Y.S.2d 247 (S.Ct., Sp. Term, Suffolk Co., 1980).

The right to make private decisions about reproduction and sexual intimacy is founded on the right of bodily integrity and the right of personal autonomy in the definition and determination of one's person and one's life. Union Pacific Railway v. Botsford, 141 U.S. 250 (1891); Olmstead v. United States, 277 U.S. 438 (1928); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Stanley v. Illinois, 405 U.S. 645 (1972); Roe v. Wade, 410 U.S. 113 (1973).<sup>13</sup>

The right to control one's own body means two things: the right to preserve and enjoy one's capacities free of unwarranted interference by the state; and the right not to be compelled by a third party to use or dispose of one's body or labor against one's will. As the Supreme Court recognized in Union Pacific Railway v. Botsford, 141 U.S. at 251:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others....'The right to one's person may be said to be a right of complete immunity; to be let alone.'  
(citation omitted.)

Constitutional protection of this right was later recognized in Skinner v. Oklahoma, 316 U.S. 535. As amici discuss in Point

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<sup>13</sup>The New York State Constitution provides at least equal if not greater protection for fundamental rights than the U.S. Constitution. Cooper v. Morin, 49 N.Y.2d 69, 79-80 (1979), cert. denied sub. nom. Lombard v. Cooper, 446 U.S. 984 (1980); People v. Isaacson 44 N.Y.2d 511, 519 (1978); Sharrock v. Del' Buick, 45 N.Y.2d 152, 159-60 (1978).

VI., infra, the right to own one's body and the labor and service of which it is capable is at the heart of the 13th Amendment--the prohibition against involuntary servitude.

The right to bodily integrity cannot be subordinated to either the whims or the profound personal goals of another person. "Human rights theory posits that the moral imperative of treating persons as equals requires that each person's capacity for autonomy be accorded equal value." Richards, The Individual, the Family and the Constitution: A Jurisprudential Perspective, 55 N.Y.U. L. Rev. 1, 8-9 (1980). See generally, Henkin, Privacy and Autonomy, 74 Col. L. Rev. 1410 (1974); Eichbaum, Towards an Autonomy-Based Theory of Constitutional Privacy Beyond the Ideology of Familial Privacy, 14 Harv. Civ. R. L. L. Rev. 361 (1979).

By permitting men to rape their wives, the New York law licenses destruction of the right of the woman to make decisions not simply about whether or not to engage in sex (People v. Onofre), but also about whether or not to use contraceptives or natural birth control methods (Griswold), and whether or not to undertake procreation (Skinner v. Oklahoma; Roe v. Wade). This wholesale destruction of rights thus denies a married woman her right to autonomy in the use of her body.

Violent sexual attack by males on their wives is often justified by the knowledge that the law gives the man the right to rape.

He approached me sexually when I was still very injured, and I said, "No, please don't. Not now..." His reaction was, "I have rights and you're my wife, and as long as you're my wife, it is my conjugal right. So don't fight me..." When

I saw that he was determined to go ahead, I really couldn't believe it, and I started crying. He proceeded, and when he was finished he left the room and slammed the door.

Mrs. White, rape victim, in Russell, Rape in Marriage, at 169 (emphasis added).

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It was a very brutal marriage. He was so patriarchal. He felt he owned me and the children -- that I was his property. In the first three weeks of our marriage, he told me to regard him as God and his word as gospel. If I didn't want sex and he did, my wishes didn't matter. Our third child was a result of out-and-out rape.

Mrs. Kearney, rape victim, Russell at 123 (emphasis added).

As the Statements of Interest of the amici demonstrate, these stories are not unique. Women have become pregnant as a result of being raped by their husbands. The marital rape and forcible sodomy exemptions constitute marriage licenses to deprive wives of fundamental liberties.

A male who believes he is being denied his right to engage in sex with his wife as a result of her choices has a remedy in divorce. He has no right to destroy by force her right to decide when and how to engage in sex. Just as a man could not obtain a court injunction ordering his wife to submit to sex or childbearing (Bank v. Bank, 180 Md. 254, 23 A.2d 700, 705 (1942); Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128, 132 (1974)), so too the state may not deny the woman's right to privacy by a statute which licenses rape.

New York's legal license for rape within marriage impermissibly forces women to choose between the fundamental right of privacy and the fundamental right to marry. Zablocki v. Redhail, 434 U.S. 374, 375 (1978); Loving v. Virginia, 388 U.S. 1 (1967); Cooper v. Morin, 49 N.Y.2d at 80. Women are deterred

from marrying because they do not wish to be subjected to or risk legalized rape. One victim of marital rape stated:

I vowed I'd never ever marry again. I'd never be in a position where men have authority over me. Marriage is license to do anything you want. You're not a whole person because no one respects your rights as a human being.

Mrs. James, rape victim, cited in Russell, at 196.

Where a statutory classification burdens or infringes a fundamental right, the state must establish that the classification is "'necessary to the achievement of a compelling state interest..." Onofre, 51 N.Y.2d at 492, n.6, citing Eisenstadt v. Baird, 405 U.S. at 447, n.7 (emphasis in original.) See also, Shapiro v. Thomson, 394 U.S. 618, 634 (1969); Zablocki v. Redhail, 434 U.S. at 383. As demonstrated above, the historical reasons for the wife rape exemption have been rejected as archaic and inhumane. In Point V., amici will show that the more modern justifications are simply less crass, but no less inimical to the fundamental rights of married women to privacy, bodily integrity and autonomy.

#### IV.

#### THE FORCIBLE MARITAL RAPE AND SODOMY EXEMPTIONS DENY MARRIED WOMEN THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE NEW YORK AND U.S. CONSTITUTIONS.

Article 1, §11 of the New York Constitution states in part that "No person shall be denied the equal protection of the laws of this state..." The Fourteenth Amendment to the United States Constitution provides similarly. One of the central purposes of the Fourteenth Amendment was to remedy the failure of states

equally to protect persons from injury to life, liberty and property:

[N]en were murdered, houses were burned, women were outraged, men were scourged ... and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent.

Cong. Globe, 42nd Cong., 1st Sess., App. 428 (1871), cited in Monroe v. Pape, 365 U.S. 167, 175 (1960). But a state's failure to enforce its laws equally was not the clearest problem to be remedied by the Fourteenth Amendment and the Civil Rights Acts passed to enforce it. There was no disagreement that

'If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection.'

Monroe v. Pape, 365 U.S. at 178, citing Cong. Globe, 42nd Cong., 1st Sess., App. 315 (emphasis supplied).

As detailed above, married women who are forcibly raped or sodomized by their husbands suffer serious physical and psychological injury. They are denied the basic right to protection from physical harm which the state provides without regard to marital status for every other violent crime. There is no other physical harm intentionally inflicted on a wife by her husband which is not punishable through the criminal laws. Here, the state itself has recognized that forcible rape and sodomy are criminal acts. Yet, the state has chosen to exempt married women raped by their husbands from the protection of these statutes. This failure to provide the most basic of protections--safety for

one's life and liberty--is a classification based on sex and marital status that cannot survive constitutional scrutiny.

A. Sex Based Classification

The concepts that women are the property of their husbands or fathers and that they lose their separate legal identity upon marriage have been solidly rejected in other contexts. See Point II., supra. As we have shown, the forcible marital rape and sodomy exemptions are vestiges of these doctrines and the general legal inferiority of women. While these forcible exemptions appear to be classifications based on marriage, the origins of the exemptions lie in the discriminatory attitude that women are inferior and are subject to the commands of the men they marry.<sup>14</sup>

In Trammel v. United States, 445 U.S. 40 (1980), a privilege against adverse spousal testimony which, on its face, applied neutrally to both husbands and wives, was examined in light of its sex biased origins. The Court found that the privilege derived, in part, from the same concept on which the marital rape exemption is based, namely, the view that "the women had no recognized separate legal existence..." apart from their husbands. Id. at 44. As with the marital rape exemption, the

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<sup>14</sup>The forcible rape marital exemption burdens one group of females, those who marry. This Court has recognized that sex discrimination underlies acts directed at only certain groups of women. For example, discrimination against pregnant women has been viewed as sex discrimination by New York courts despite contrary rulings by the U.S. Supreme Court. Brooklyn Union Gas Co. v. Appeal Bd., 41 N.Y.2d 84 (1976); Union Free School District No. 6 v. N.Y.S. Human Rights Appeal Bd., 35 N.Y.2d 371 (1974).

common law rule was maintained over the years until "it was deemed so well established a proposition as to 'hardly requir[e] mention.'" Id. at 44 (citation omitted.)

Despite the modern justifications for the privilege, the Court recognized its sex discriminatory origins. Id. at 53. In striking down the privilege, the Court firmly grounded its determination on the fact that

[t]he ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world--indeed in any modern society--is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.

Id. at 52. Cf. Kline v. Ansell, 414 A.2d 929, 933 (Md. 1980)

(striking sex-based rule and refusing to render it gender neutral since rule was based on repudiated ideology that husband has property interest in wife).<sup>15</sup>

Here, the maintenance of forcible marital rape and sodomy exemptions not only licenses physical and mental harm, but also "perpetuat[es] 'archaic and stereotypic notions'" and "stigmatiz[es] members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community." Heckler v. Mathews, \_\_\_ U.S. \_\_\_, 104 S.Ct. 1387, 1395 (1984), citing Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982). Cf. Strauder v. West Virginia,

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<sup>15</sup>The elimination of the marital exemption here, not sex-neutralizing it, is required by the fact that deprivation of the right to privacy cannot be justified on the grounds of equal "non-protection."

100 U.S. 303, 308 (1980) (statute excluding black men from juries constitutes "a brand upon them, affixed by the law; an assertion of inferiority and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.")

Because the wife rape exemption is at heart an invidious gender-based classification which stimulates prejudice and rewards brutal disrespect (see Point II, supra.), it can only be upheld if it serves an important governmental objective and is substantially related to the achievement of that objective. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976). The New York Constitution, like the federal Constitution, requires that gender classifications be "substantially related" to achievement of "important government objectives." People v. Whidden, 51 N.Y.2d 457, 460 (1980).

As will be shown infra at Point V, this standard cannot be met by current justifications for the marital rape and forcible sodomy exemptions and they must be struck down as violative of the right to equal protection.

#### B. Marital Status

In addition to constituting discrimination on the basis of sex, the definitional sections of the law which create the exemptions constitute on their face classifications based on marriage. Penal Law §§130.00(4), 130.00(2). Women who are married to their rapists are treated differently than women who are raped by someone other than their spouse. A classification

based on marriage, as in Onofre, is normally judged by "whether there is, as a minimum, 'some ground of difference that rationally explains the different treatment accorded married and unmarried persons' under the statute." 51 N.Y.2d at 491, citing Eisenstadt v. Baird, 405 U.S. at 447. It is, however, apparent that even using this least strict standard, the marital exemptions cannot be justified. Point V. infra.

V.

THE JUSTIFICATIONS FOR THE FORCIBLE MARITAL  
RAPE AND SODOMY EXEMPTIONS FAIL TO MEET  
THE REQUIRED COMPELLING INTEREST, SUBSTANTIAL  
OR EVEN RATIONAL, BASIS TESTS

Penal Law §130.35(1), in conjunction with Penal Law §130.00(4), criminalizes rape committed by a man against a woman to whom he is not married, while legally permitting a man to rape his wife. Penal Laws §130.50(1) and §130.00(2) discriminate between married persons and unmarried persons, punishing nonconsensual sodomy when performed by the unmarried. These laws have a classification similar to that which this Court found to constitute an interference with the right to privacy and to deny the equal protection of the law on the basis of marriage. People v. Onofre, 51 N.Y.2d 476 (1981). This Court held that no rational showing could be made by the state to justify punishing unmarried persons who engaged in consensual sodomy. Here the converse is true. No rational justification or compelling interest can be

provided for failing to punish males who forcibly rape their wives.<sup>16</sup>

Modern arguments in support of maintaining the wife rape exemption rely on the implied consent or contract theory as well as claims that to punish males for raping or forcibly sodomizing their wives would interfere with "marital privacy," prevent efforts at reconciliation, lead women to fabricate criminal complaints, and weaken the legal system by creating a crime difficult to prove.

None of these claims has any rational basis,<sup>17</sup> a substantial relationship to important governmental interests, or a compelling state interest. They have been rejected by virtually every commentator,<sup>18</sup> including the Attorney General of the State of New

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<sup>16</sup>The man who rapes his wife has no claim to the protection afforded private consensual sexual activity between adults which was at issue in Onofre. On the other hand, married women who are raped by their husbands do have a privacy right at stake and are entitled to the equal protection of the laws. Thus, instead of striking the law in its entirety, as was required in Onofre, this Court should extend the protection of the rape law to all women. See infra Point IX.

<sup>17</sup>In New York, the mere assertion of legitimate state objectives is insufficient to meet the requirements of the rational basis test. This Court has demanded a showing by the state that the classification in the statute actually furthers the societal interests asserted. People v. Onofre, 51 N.Y.2d at 492, 434 N.Y.S.2d at 953.

<sup>18</sup>See, e.g., Clancy, Equal Protection Considerations of the Spousal Sexual Assault Exclusion, 16 N. Eng. L. Rev. 1, 17-28; Note, Abolishing the Marital Exemption for Rape, 1 Univ. of Ill. L. Rev. 200, 205-12 (1983); NYU Note, at 307-16; Note, Spousal Exemption to Rape, 65 Marquette L. Rev. 120, 125-28 (1981); Schwartz, The Spousal Exemption for Criminal Rape Prosecution, 7 Vt. L. Rev. 33, 42-54 (1982); Price, Issues in Marital Rape  
(Footnote Continued)

York, who has stated that "[t]he reasons traditionally given for not prosecuting husbands who rape their wives simply do not hold up." R. Abrams, N.Y. Attorney General, Remarks Before N.Y. County Lawyers' Assn., May 3, 1984, p. 1 (Attached hereto as Exhibit D.)

These justifications have also been rejected consistently by courts as lacking even a rational basis. See People v. DeStefano, 467 N.Y.S.2d 506 (1983); State v. Smith, 85 N.J. 193, 426 A.2d 38 (1981); State v. Chretien, 417 N.E.2d 1203 (Mass. 1981); State v. Smith, 401 So.2d 1126 (Fla. Dist. Ct. App. 1981).

#### 1. The Implied Consent Rationale

As noted above, Lord Hale stated the view that by marrying, a woman has given her consent and contracted to engage in sexual relations with her husband. The District Attorney in this case used the implied consent argument as his sole argument in the Appellate Division to justify the (Respondent's Brief, App. Div.: Fourth Dept. at 14-16). He claimed that the doctrine of implied consent "protect[s] the institution of marriage." Id. at 14. This assertion, without any showing of validity, fails to meet the rational basis test, as well as the stricter tests. It completely ignores the fact that the exemption actually licenses behavior which destroys marriage, and deters women from marrying

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(Footnote Continued)

Exemption Dictate Abandonment of Doctrine, N.Y. Law J., May 1, 1984, at 38, col. 1. But cf., Hilf, Marital Privacy and Spousal Rape, 16 N. Eng. L. Rev. 31 (1980).

by giving husbands a legal license for forced sex. Points I and III, supra.

In fact, New York State's position is completely the opposite of that asserted here by the People. The state is on record as not tolerating violence within marriage. Bruno v. Codd, 47 N.Y.2d 582, 419 N.Y.S.2d 901, 903-906 (1979); Ch.444,L.1977; Ch.628,629,L.1978; Ch.530,531,532,843,L.1980; Ch.143, 416, L.1981; Ch.925, L.1983. In his approval message for chapters 530, 531 and 532, Laws of 1980, eliminating Family Court jurisdiction over assault in the first degree between spouses, the Governor adopted the justification presented by the Task Force on Domestic Violence.

As the Justice Subcommittee stated in regard to this significant jurisdictional change:

'This exclusion, like the present exclusion of attempted murder, is a public statement that serious acts of violence between family members will not be tolerated. Violence in the home is as serious a breach of public order and safety as violence in the streets....Strengthening of legal sanctions against violence in the home is a step toward stopping it in individual cases, and toward educating the public that violence in the homes is as much a criminal act as violence in a public place.'

McKinney's 1980 Session Laws of New York A329, 330. Thus, the public policy of this state is that the marriage is protected by strong efforts to stop violence within that institution.

The idea that marriage constitutes a contract for forced sexual relations at any time is not supported by New York law. Under certain circumstances, New York courts recognize the right of a wife to refuse to have sexual relations with her husband without creating a cause of action for divorce. Ancelis v. Ancelis, 54 A.D.2d 1088, 388 N.Y.S.2d 744, aff'd. 388 N.Y.S.2d

1023 (1976). The implied consent theory infringes on the wife's individual right to privacy which encompasses the right to make decisions about engaging in sex (People v. Onofre, 51 N.Y.2d at 485-88), procreation, contraception, and bodily integrity and autonomy. People v. DeStefano, 467 N.Y.S.2d at 513.

The rulings discussed in Point III, supra, which articulate the woman's constitutional right to choose to have an abortion, a hysterectomy, to be sterilized, or to use birth control without her husband's consent make the forcible rape and sodomy exemptions unsupportable on implied consent grounds. "The logical extension of these holdings is that if a wife may unilaterally prevent or terminate a pregnancy does she not also unilaterally possess a right to refuse the physical act which leads to such pregnancy." DeStefano, 467 N.Y.S.2d at 513. Moreover, as Judge Rohl noted in DeStefano, "the implied consent rationale, besides being offensive to the right to control over one's own body is illogical where marriage itself is not irrevocable." Id. at 514, citing N.Y. Dom. Rel. Law §170, subd. 1 (McKinney 1977) (divorce permitted for cruel and inhuman treatment or constructive sexual abandonment).

Moreover, in the realm of ordinary contracts for personal service, there is simply no contract which is enforceable by one party through self-help or the use of force; nor could a husband invoke the equitable power of the court to enforce such an agreement. The notion of "implied consent" is a holdover from the days when women were legally inferior to and the possessions of their husbands. "The equality principle of modern marital

relations have relegated the implied contract theory to the history books--it has no place in the world of the living." DeStefano, 467 N.Y.S.2d at 515.

### 3. Interference with Marital Privacy

Some argue that a prohibition against marital rape would infringe upon the right of "marital privacy." Hilf, Marital Privacy and Spousal Rape, 16 N. Eng. L. Rev. 31 (1980). The cases relied upon to support this right, however, involve purely voluntary conduct. Hilf at 35-40 and cases cited therein. There has never been a ruling that the right to marital privacy protects non-consensual, violent sexual assault. The right of personal privacy involves "a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." Doe v. Doe, 314 N.E.2d 128, 130 (Mass. 1974).

Marital privacy is not inviolate. The state has acted to impinge on the marital relationship in many ways. Inter-spousal tort immunity has been abolished. Gen. Obligations Law §3-313, subd. 2. In Trammel v. United States, 445 U.S. at 44-45, married women were held to be permitted to testify against their husbands despite an assertion that the r privilege against adverse spousal testimony was necessary to foster the harmony and sanctity of the marriage relationship." Cf. Planned Parenthood v. Danforth, 428 U.S. at 71 (state cannot give husband veto over wife's abortion in name of furthering marital harmony and mutuality of decision making.)

Married women are protected by the criminal law from all other non-sexual assaults by their husbands. Penal Law Art. 120. The state determines who may marry and how marriages are solemnized. D.R.L. Art. 3. Finally, the state determines the circumstances under which a marriage may be dissolved. D.R.L. Art. 10. All of this indicates the irrationality of justifying a wife rape exemption on grounds of marital privacy, particularly where the wife has asked the state to intervene by seeking to file criminal charges and where her own privacy rights must be protected.

A justification related to the marital privacy argument is the argument that marital rape prosecution would destroy marriages by preventing reconciliation. "Not only is this claim ludicrous, but it hardly appears to be an expected or likely consequence of a relationship that has deteriorated to the point of forcible and unwanted sexual contact." DeStefano, 467 N.Y.S.2d at 515. Accord, Trammel v. United States, 445 U.S. at 52. Moreover, "other remedies" are inadequate<sup>19</sup> and offer little

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<sup>19</sup> Until a woman has been able to obtain counsel and go to court to obtain a court order, she has no protection from rape by her husband. She may be forced to resort to self-defense as her only remedy when her husband resorts to forcible rape and sodomy to self-enforce his marital "contract." See e.g., People v. Hartwell, No. 75-091591-FM (Wayne Co., Mich.Cir.Ct., Mar. 16, 1976) cited in NYU Note at 321 (woman raped by her husband killed him in self-defense).

protection. The serious nature of the crime of rape makes this justification irrational and inadequate.<sup>20</sup>

Criminal laws serve to deter the commission of harmful acts as well as to punish offenders. Schwartz, The Spousal Exemption, at 50. The marital rape exemption in fact licenses actions by husbands which will undermine the marriage, certainly not strengthen or protect it. Finklehor and Yllo, Rape in Marriage at 129.

### 3. Abuse of the Criminal Justice System

The claim is also made that criminalization of wife rape will lead to a deluge of possibly fabricated complaints. See Genring at 126; Schwartz, The Spousal Rape Exemption for Criminal Rape Prosecution, 7 Vt. L. Rev. 33 (1982). This claim has been disproven when used to counter rape shield laws,<sup>21</sup> rape corroboration requirements, and removal of interspousal tort immunity.<sup>22</sup>

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<sup>20</sup> In California, wife-beating was made a more serious crime than other assaults. That classification was upheld on the grounds that "the state has a greater interest in deterring crimes which disrupt the marriage relationship..". People v. Cameron, 126 Cal.Rptr. 44, 48 (1976). This too indicates the irrationality of permitting wife rape and forcible sodomy on the grounds that it will protect the institution of marriage.

<sup>21</sup> See Schwartz & Clear, Toward a New Law on Rape, 26 Crime & Delinquency 129 (1980).

<sup>22</sup> See Schwartz & Clear, Toward a New Law on Rape, 26 Crime & Delin. 129 (1980); Schwartz & Clear, Feminism and Rape Law Reform, 5 Bull. Am. Acad. Psych. & Law 313 (1978); Woods, Mitigation on Behalf of Battered Women, 7 Women's Rights L.Rep. 39 (1981).

The legislative history of the corroboration requirement in New York, for example, demonstrates that this false complaint concern is gender-biased and unwarranted. Prior to 1972, New York had the most stringent corroboration requirement for forcible sex offenses: it extended to every element of the crime. People v. Radunovic, 21 N.Y.2d 186, 287 N.Y.S.2d 33, 35 (1967). Rape is the only crime in New York which by definition is committed against women only. Penal Law §130.35. It is the only crime of violence for which corroboration was ever required. Hechtman, Practice Commentaries to Penal Law §130.16, 39 McKinney's 456-58 (1975). The 1974 amendment to Penal Law §130.16 eliminated the corroboration requirement for first degree forcible sex offenses. The Governor's approval message underscored the sex discrimination inherent in the corroboration requirement.

Furthermore, the implicit suggestion in the corroboration rule that the testimony of women, who are most often complainants in sex cases, is inherently suspect and should not be trusted without the support of the independent evidence, is without justification and contrary to our strong belief in the principle of complete equality for women in our society.

Governor's Approval Memorandum, c.14, L. 1974, Feb. 19, 1974, McKinney's Session Laws of New York A-113, 114 (1974). In the ten years since repeal of the corroboration requirement, there has been no scholarly or other evidence claiming an increase in false complaints or urging reenactment of the corroboration requirement.

Raising the charge of rape has the built-in disincentives of publicity and social stigma. Schwartz, The Spousal Exemption, at

52-53. Myths about rape and rape victims discourage victims from reporting. It is commonly believed that a woman cannot be raped unless she lets it happen; women charge rape falsely; and women precipitate rape by seductive behavior. 3 Forcible Rape: A National Survey of the Response by Prosecutors 4-5, Law Enforcement Assistance Administration, 1977. These attitudes produce prejudices against rape victims which often result in harsh treatment in the criminal justice system. Id. at 6-7.<sup>23</sup>

The experience of California, New Jersey, Massachusetts, Florida and Oregon, as well as Sweden, Denmark, the Soviet Union, Czechoslovakia, and Poland demonstrates that permitting prosecution for wife rape does not produce a flood of criminal charges. DeStefano, 467 N.Y.S.2d at 515; Russell at 344; see also Geis at 302; Brownmiller at 428-29.

Moreover, there is no reason to presume that the entire criminal justice system, including its nature as a "truth seeking system" and the use of prosecutorial discretion, will fail for cases of marital rape. DeStefano, 467 N.Y.S.2d at 515. As pointed out in the Governor's Memorandum approving repeal of corroboration for forcible rape,

For those who express concern over the possibility of false charges being brought, it should be pointed out that our legal system protects innocent persons through many procedural safeguards, ...and through the normal screening process in our criminal justice system whereby unwarranted charges may be dismissed before trial....

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<sup>23</sup> See also Kalven & Zeisel, The American Jury 248-57 (1966); Field & Bioren, Jurors and Rape 74-88, 91, 141-42 (1980); The Rape Corroboration Requirement: Repeal, Not Reform, 81 Yale L.J. (Footnote Continued)

Governor's Approval Memorandum, c.14, L.1974, McKinney's Session Laws of New York at A-114. The legal system can determine when these complaints are fabricated, to the same extent that it can determine when any charge is false. The very assertion that spurned or vengeful wives are likely to fabricate charges against their husbands reflects a bias and hostility against women which has no place in our system of laws.

The fact that a crime is difficult to prove has not led legislatures to ignore the crime itself.<sup>24</sup> Sex crimes against children, non-sexual spousal assaults, and other offenses against spouses are heard by the courts.

Clearly no argument can be raised in today's society to justify a husband's being exempted from raping his wife. She has a right to the protection the law provides for non-spouses and has been denied equal protection of the law by the existence of the immunity. No governmental interest can be served by its continued existence and it bears no reasonable relation to the class it should protect.

DeStefano, 467 N.Y.S.2d at 515.

If the justifications asserted cannot surmount the "rational basis" test, a fortiori it cannot be demonstrated that the exemption is necessary to achieve a compelling state interest, in order to justify interference with fundamental rights. In this

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(Footnote Continued)

1265-91 (1972); Schwartz & Clear, Feminism and Rape Law Reform, Bull. of Amer. Academy of Psychiatry and the Law 313-21 (1978).

<sup>24</sup> It is easy to foresee difficulties involved in proving that a person has engaged in a sex act with an animal or a corpse, both crimes under New York law. Penal Law §130.20(3) (McKinney's 1975). Despite the potential difficulties, the legislature was not deterred from making these acts criminal. Ironically, corpses and animals appear to have greater protection from rape than wives in this state.

situation, the marital rape and forcible sodomy exemptions must be declared violative of the right to privacy and to the equal protection of the laws, guaranteed by the New York and United States Constitutions.

VI.  
THE MARITAL RAPE EXEMPTION  
VIOLATES THE THIRTEENTH AMENDMENT.

The Thirteenth Amendment to the U.S. Constitution prohibits all slavery and involuntary servitude, "irrespective of the manner or authority by which it is created." Clvatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 430 (1905). "While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons..." Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 146, 151 (1911). The prohibition applies to both private and state action. Pollock v. Williams, 322 U.S. 4, 7-11 (1944). State statutes and practices contrary to that prohibition can be invalidated. Pollock v. Williams, 322 U.S. at 25; People v. Lavender, 48 N.Y.2d 334, 338-39 (1979); Dale v. State, 355 A.D.2d 384, 355 N.Y.S.2d 485, 488-89 (3d Dept. 1974), aff'd without opinion, 36 N.Y.2d 833 (1975); Jobson v. Henne, 355 F.2d 129, 132 n.3 (2d Cir. 1966). The New York marital rape exemption violates this constitutional command and should be struck down.

A. The Exemption Imposes Involuntary  
Servitude on Married Women.

By withholding the protection of the criminal law from married women, the state forces them to provide involuntary sexual services to their husbands. This is an actual, presently imposed servitude, created and sanctioned by law, in violation of

the Thirteenth Amendment. The exemption, by declaring that a husband's sexual force against his wife is not criminal, leaves the wife with no choice but compliance. The exemption "compels performance or a continuation of the service." Clvatt v. United States, 25 S.Ct. at 430. The Supreme Court in Clvatt pointed out that the inability to break a contract, and pay damages for breach if necessary, is the essence of involuntary servitude. The common law has never required specific performance of contracts for personal service, even if the contract was initially wholly voluntary. The Case of Mary Clark, 1 Blackf.122 (Ind. 1821) (the attempt to continue involuntarily an originally voluntary indenture for personal service was void under a state constitutional provision banning involuntary servitude).

Even if this Court accepts the argument that a wife, upon marrying, contracts to provide sexual services to her husband, a law that requires continued performance under all circumstances is unconstitutional.<sup>25</sup> A wife's remedy through legal separation or divorce is insufficient. D. R. L. §§170, 200. A principal function of the criminal law is deterring potential violations. F. Zimring and G. Hawkins, Deterrence: The Legal Threat in Crime Control, 71 (1973). The exemption not only fails to deter husbands but affirmatively sanctions behavior that is otherwise criminal and subject to severe punishment. Nor is it possible for a woman, by moving out of the marital residence, to end the

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<sup>25</sup> Point V., supra, discusses the contract argument.

threat of forced sex with her husband. The exemption follows her. The prospect of civil relief some months hence does nothing to deter a husband from rape.<sup>26</sup>

B. The Exemption Carries Forward the Historical Involuntary Servitude of Women.

The sexual servitude imposed on married women by the exemption is a continuation of what was once the total legal subordination of women to their husbands. Point II., supra. This subordination was explicitly sexual. The husband's right to his wife's body and sexual services was unilateral and virtually absolute, as seen in the actions for criminal conversation<sup>27</sup> and loss of consortium.<sup>28</sup>

Sexual subordination was part of a regime of "civil death" for wives. They were unable to own property, were unable to enter into contracts without their husbands' consent, and were required to make his domicile their own.<sup>29</sup> The husband owned all

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<sup>26</sup>This is another reason for this Court to affirm the finding below that the issuance of an Order of Protection operates to eliminate the husband's exempt status. Point VII infra.

<sup>27</sup>The husband had "personal and exclusive rights" in his wife's body, Tinker v. Colwell, 193 U.S. 473, 481 (1903). See also Oppenheim v. Kridel, 140 N.E. 227, 228-29 (N.Y. 1923).

<sup>28</sup>See Kronenbitter v. Washburn Wire Co., 4 N.Y.2d 524, 527 (1958) ("the wife was regarded in law in some respects as her husband's chattel.") A gender-neutral action for loss of consortium was recognized in Millington v. Southeastern Elevator Co., 22 N.Y.2d 498 (1968).

<sup>29</sup>These conditions were altered by statute in New York. Dom. Rel. Law §§50-61; Real Property Law §§11, 302; General Obligations Law §3-301 (McKinney 1978). The view that "the  
(Footnote Continued)

of his wife's assets and could dispose of them as he pleased. Ryder v. Hulse, 24 N.Y. 372 (1862). This state of unfreedom, created and enforced by law, shared many of the attributes of chattel slavery in the United States.<sup>30</sup> It is entirely incompatible with the "universal civil freedom" declared by the Thirteenth Amendment. The maintenance of any present vestiges of it, such as the marital rape exemption, violates the Constitution and should be ended.

#### VII.

#### THE ORDER OF THE FAMILY COURT SATISFIES THE CRITERIA OF PENAL LAW §130.00(4)(b)(i).

Amici urge this Court to adopt the holding of the Appellate Division, 90 A.D.2d 681, that an Order of Protection issued pursuant to Family Court Act article 8 is the type of court order contemplated in Penal Law §130.00(4)(b) which provides that "the female and the actor are living apart...pursuant to a valid and effective: (i) order issued by a court of competent jurisdiction

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(Footnote Continued)

domicile of the wife is the place where the husband has his domicile," Vetrano v. Vetrano, 54 N.Y.S.2d 537, 538 (Sup.Ct. Queens Co. 1945), has been tenacious. "The law is clear that the wife must go to the home which her husband provides (citations omitted)." Fox v. Fox, 186 N.Y.S.2d 542, 547 (Sup.Ct. N.Y. Co. 1958). This has obvious implications for a husband's exercise of his "right" to his wife's sexual services.

<sup>30</sup>Married non-slave women were, of course, not subject to some of the most inhumane aspects of the slavery system: being the literal property of another, subject to sale at any time; being unable to contract a legal marriage; and having no protection whatever from rape by any man (the remedies were the master's for trespass). See Introduction at 3-4. The marital rape exemption is analogous to the slave woman's legal vulnerability to rape: the law has defined a particular group of women who can be raped by a particular group of men, wholly as an incident to their legal status.

which by its terms or in its effect requires such living apart..."

The Order of Protection in the instant case by its terms and in its effect, required the spouses to live apart. The Order required both that defendant move out of the specified marital residence and that he remain away from his wife's home. Appellant's Appendix, A-37.

The New York Legislature intended that Penal Law §130.00(4)(b)(i) apply to Orders of Protection. The Appellate Division, on the motion to dismiss the indictment, held:

Not only does the legislative history...support the conclusion that the Legislature intended to extend the protection of the rape statute to a wife who is living apart pursuant to a Family Court order of protection, but the language of the statute itself leads to the same conclusion.

People v. Liberta, 90 A.D.2d 681,682 (1982). The Appellate Division based this conclusion on its review of the original bill, the amended and final version and the sponsor's memorandum which stated that "unmarried" included those spouses living apart based on "a court determination that the spouses should, for the well being of one or both, live apart." Quoted at 90 A.D.2d at 682.

To hold otherwise is irrational and would deny protection to those wives most in need: women who have obtained Orders of Protection from the Family Court. These women have been found to be victims of assault or attempted assault. Family Court Act §§12(1); 821; 832.

Research shows that spouse abuse is likely to increase when the victim attempts to leave the marriage or seek outside help.

"[T]he period during and after the breakup of the relationship may indeed be one of high vulnerability for marital rape."

Finklehor, Forced Sex in Marriage, at 477. It is precisely those women who have been victims of domestic violence during the ongoing marriage and have sought intervention by the Family Court to protect themselves, who are most in need of the full protection of the Penal Law.

#### VIII.

#### THE UNIQUE STATUTORY SCHEME OF ARTICLE 130 OF THE NEW YORK PENAL LAW PERMITS THE GENDER-SPECIFIC ASPECT OF PENAL LAW §130.35 TO WITHSTAND CONSTITUTIONAL SCRUTINY

Defendant's claim that New York's gender-specific rape provision, Penal Law §130.35, unconstitutionally discriminates on the basis of sex, is without merit.<sup>31</sup> The unique nature of New York's statutory scheme under Article 130 of the Penal Law needs to be examined before declaring a particular provision unconstitutional. Men are protected from, and women can be prosecuted for, violent acts defined and punished equally by the

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<sup>31</sup>As pointed out by the Appellate Division, Fourth Department, in its Order and Memorandum, dated March 6, 1984 (unanimously affirming defendant Liberta's conviction for rape and sodomy), New York's gender-based rape statute has consistently withstood constitutional challenge in New York's lower courts. This Court can also construe the statute in a way that preserves its constitutionality. It is an accepted technique of statutory construction to read a statute in a way that avoids constitutional questions. New York courts have applied this technique to preserve statutory schemes from challenge as sex discriminatory. See, e.g., Matter of Carter v. Carter, 58 A.D.2d 432, 397 N.Y.S.2d 88 (2d Dept. 1977) (court read former sections 413 and 414 of Family Court Act together, excising part of Sec. 414 so that "there is no unequal treatment ... on the basis of .. sex.") 58 A.D.2d at 447.

various provision of the state's statutory scheme. Thus, the defendant has no equal protection claim.

New York's statutory scheme is divided into categories based upon the type of sexual assault, with rape being only one of several types. Under Article 130 of the New York Penal law, women are criminally liable for sexual assaults upon men for forcible sodomy,<sup>32</sup> sexual abuse,<sup>33</sup> aggravated sexual abuse,<sup>34</sup> and sexual misconduct.<sup>35</sup> Thus, any type of sexual assault that a female can perpetrate against a male is punished in New York under one of these four provisions. Only New York's rape provisions<sup>36</sup> provide that males alone can be prosecuted for these acts against females.<sup>37</sup>

The validity of the Art. 130 statutory scheme is further shown by an examination of the penalties it prescribes. The penalties for rape and forcible sodomy are equal: First degree rape (P.L. §130.35) and sodomy (P.L. §130.50) are class B felonies; second degree rape (P.L. §130.30) and sodomy (P.L. §130.45) are class D felonies; third degree rape (P.L. §130.25)

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<sup>32</sup> Penal Law §§130.40, 130.45, 130.50.

<sup>33</sup> Penal Law §§130.55, 130.60, 130.65.

<sup>34</sup> Penal Law §130.70.

<sup>35</sup> Penal Law §130.20, subd. 2 and 3.

<sup>36</sup> Penal Law §§130.25, 130.30, 130.35.

<sup>37</sup> It is significant that females cannot be prosecuted for raping females under New York's rape provision. As with males, females can be prosecuted for all forms of sexual offenses committed against other females under the other four provisions.

and sodomy (P.L. §130.40) are class E felonies. The sexual abuse provisions (P.L. §§130.55, 130.50, 130.65) are gender-neutral. Offenses under §130.20 (sexual misconduct) are class A misdemeanors, subjecting both male and female perpetrators to equal punishment.

Thus, all types of sexual assault are outlawed in New York. Men are therefore protected when they are sexually assaulted by females (or males), and women are subject to prosecution when they sexually assault any person. It is not the defendant, or male sexual assault victims who are denied equal protection under New York's statutory scheme; rather it is women who have been raped or sodomized by their husbands.

IX.  
ALTHOUGH THE MARITAL RAPE AND FORCIBLE  
SODOMY EXEMPTIONS ARE INVALID, THE  
DEFENDANT'S CONVICTION SHOULD BE UPHOLD.

As a general rule, parts of a statute or an act may be upheld as valid by a court while the invalid parts are severed. 1 McKinney's Statutes, §150 (1971). This principle of severability should be applied where the remaining valid portions can stand on their own and where the legislature would have wanted the valid portion to remain. Id. See I.N.S. v. Chadha, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2764, 2774-75 (1983); Champion Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932); People v. Marcuso, 255 N.Y. 463, 472-73 (1931); 2 Sands, Sutherland Statutory Construction, Ch. 44 (1972).

In New York, "[t]he whole tendency during recent years ... has been to apply the principle of severance with increasing liberality. 'Severance' we have said ... 'does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment... The principle

of division is not a principle of form. It is a principle of function' 'Our duty is to save unless in saving we pervert.'

\* \* \*

'The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether.' [Citations omitted.]

People v. Mancuso, 255 N.Y. at 473-74.

In this case, the marital exemptions can be struck down as unconstitutional, while the remaining forcible rape and sodomy statutes can survive on their own. It is inconceivable that the legislature would not agree with this result. Rape and forcible sodomy are universally condemned as crimes. Surely our lawmakers would continue to punish those acts even if they were not constitutionally permitted to exempt forcible rape and sodomy of wives by husbands.

Penal Law §130.35(1), the rape statute, may be read by itself to define the crime of rape without reference to the odd definition of "female" contained in Penal Law §130.00(4) that creates the marital exemption. The common definition of "female" is sufficient. 1 McKinney's Statutes §232. Penal Law §130.50(1), the forcible sodomy statute, and Penal Law §130.00(2) may be upheld by severing the phrase "not married to each other" contained in Penal Law §130.00(2). This severability process has been applied to statutes involving definitions, Matter of Patricia A., 31 N.Y.2d 83 (1972), and criminal statutes, People v. Ditta, 52 N.Y.2d 657, 439 N.Y.S.2d 855 (1981).

Amici have devoted significant attention to the question of remedy in this case because of the importance of the general

rule, grounded in the separation of powers, that legislatures and not courts are responsible for establishing criminal sanctions. People v. Ryan, 267 N.Y. 133, 195 N.E. 882 (1935) (definition of substantive criminal offense is legislative function). Upholding the forcible rape and sodomy statutes while striking the marital exemptions would not cause the Court to be engaged improperly in the legislative process of creating crimes. State v. Smith, 401 So.2d at 1127 (exemption does not affect definition of rape, only goes to existence of element of consent). The Legislature has criminalized the commission of non-consensual forcible sex acts. The unconstitutional exclusion of a particular class from protection against those criminal acts is separate from the creating of the crime and prescription of penalties. As this Court noted in People v. Ditta, 52 N.Y.2d at 660, 439 N.Y.S.2d at 857, "[c]riminal liability is imposed under section §130.65, not under §130.00, the definitional section" (crime of sexual abuse in the first degree).

Moreover, a distinction must be drawn between legislative definitions which set out the component acts of a crime (People v. Shapiro, 4 N.Y.2d 597, 601 (1958)), and a definition of the crime victims which by invidious discrimination excludes members of a particular class from protection by the statute, and violates the strictures of the New York Constitution and the 13th and 14th Amendments of the U.S. Constitution. Here, the substance of the crime would be unchanged. Cf. United States v. Jackson, 390 U.S. 570, 585-86 (1968) (substance of crime of kidnapping unchanged by severing capital punishment clause). In

striking the marital exemptions, the Court would not be "extending" the definition of the crime, but remedying the discriminatory underinclusion in the class of victims.

Courts have remedied invidious underinclusion by extension in criminal cases such as Welsh v. United States, 398 U.S. 333 (1970), as well as in the civil area, where the extension of a statute to remedy invidious underinclusion is commonplace. See e.g., Califano v. Westcott, 443 U.S. 76, 89-90 (1979).

This case is particularly appropriate for the Court to strike the marital exemptions while upholding the rape and sodomy statutes. The defendant falls within the present definition of "unmarried" in Penal Law §130.00(4). The Court, therefore, may affirm his conviction while striking the marital exemption, because his exposure to criminal prosecution is not newly created or increased thereby. His situation is not that of a married man who could claim lack of notice if charged with a rape committed before the exemption was struck down.

The public policy of this state is to punish those who commit forcible sexual attacks on others. The appropriate outcome of this case is to extend that protection to women who marry, while upholding the defendant's conviction. Defendant's actions come squarely within the prohibitions of the criminal laws as now written.

### CONCLUSION

As a vestige of the "antediluvian assumptions concerning the role and status of women in marriage and society," People v. DeStefano, 467 N.Y.S.2d at 515-16, the marital rape and forcible sodomy exemptions have no place in the statute books of New York State.

Justice Holmes put the matter succinctly:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

The marital exemptions should be struck down as unconstitutional and the remaining rape and forcible sodomy provisions should be upheld.

Respectfully submitted,

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AMICI'S STATEMENT OF INTEREST

Albany County Rape Crisis Center

Albany County Rape Crisis Center is a not-for-profit agency funded by Albany County, New York. Our services to rape victims include 24-hour crisis intervention counseling, short term professional counseling, legal and medical advocacy, and referrals to other community service agencies.

Since its inception ten years ago, the Center has been contacted by over a thousand rape victims, many of whom were married to their assailants. A woman who is sexually assaulted by her husband suffers the same physical and psychological reactions as a woman whose assailant was someone other than her husband. While other victims who are rendered helpless during the assault are often able to recover their lost sense of power and control over their lives by seeing the assailant prosecuted, no such avenue of recovery is available to the victim who is married to her offender. She is rendered totally helpless because she is unable to pursue the legal process. She is, in effect, being told by the legal system that the assault did not really occur. Her experience is invalidated, creating a situation that makes recovery all the more difficult. We support a change in the law that will assure legal rights to all victims of sexual assault.

Alternatives For Battered Women, Inc.

Alternatives for Battered Women, Inc. (ABW) is a not-for-profit corporation in the State of New York, providing shelter, counseling, a 24-hour Hotline, referral, information, and advocacy for battered women and their children. ABW's clients are battered women of Rochester, Monroe County, and the surrounding area, and represent persons in every social, educational and economic group. We serve approximately 1,200 hotline (non-residents) clients per year, and 160 women and their 220 children per year.

Women who sought shelter at ABW reported being punched, slapped, choked, kicked, burned, stabbed, threatened or hit with a gun, and sexually attacked. Sexual assault occurs frequently, but is rarely reported to the authorities. A current resident of our shelter has been physically ill since the beginning of her pregnancy. Her husband has demanded daily intercourse with her despite her illness. When she refuses to comply, she is beaten. She believed that she had no recourse for this sexual abuse because she is married to her abuser. It was only when she came into the shelter, eight months pregnant, and was able to escape her husband's abuse that her physical illness finally subsided. All ABW staff who regularly see women affected by marital rape, strongly support an end to the marital rape exemption.

### Brooklyn Women's Anti-Rape Exchange

The Brooklyn Women's Anti-Rape Exchange (BWARE) is a non-profit organization providing telephone counseling to victims of sexual assault in the borough of Brooklyn, community education about the crime of rape and training for community organizations serving rape victims. Approximately one-third of all rapes reported to the New York City Police Department occur in the borough of Brooklyn.

BWARE provides counseling to married women who have been raped by their husbands, and our experience has shown us that marital rape is at least as traumatic to those victimized as is rape by a stranger. It is imperative that the law afford these women protection from sexual assault by their husbands so that the marriage license no longer be tantamount to a license to rape.

### Buffalo Chapter of the National Organization For Women

The Buffalo Chapter of the National Organization for Women (Buffalo NOW) is a not-for-profit unincorporated organization seeking to bring women into the mainstream of American society on an equal basis with men. Buffalo NOW has approximately 600 members.

Buffalo NOW activities include working for changes in laws more equitable to women and repealing discriminatory laws;

educating the public on their rights under the law; providing referral services to support agencies and groups, and working for programs addressing women's needs. Buffalo NOW opposes the marital rape exemption because of its discriminatory nature: women who are raped by their husbands are denied the same protection as other rape victims.

Center for the Elimination of Violence in the Family, Inc.

Center for the Elimination of Violence in the Family, Inc. (CEVFI) is a not-for-profit corporation in New York State that sponsors programs to service victims of domestic violence. Our major program is a residential shelter for battered women, Women's Survival Space.

Almost all of the battered women we work with report being raped by husbands and boyfriends. Significantly, they describe rape but rarely use that term. Clearly, part of their physical and mental abuse is their loss of rights over their own body. For some, it's "be raped" or "be beaten." For others, it's be beaten and raped. Rape is an integral component of the violence. Children in these families are traumatized by what they've seen.

Coalition For Abused Women, Inc.

The Coalition for Abused Women is a not-for-profit corporation incorporated in New York State whose clients are victims of domestic violence residing in Nassau County, New York. The Coalition provides a hotline, counseling, legal services, emergency housing, information and referrals, community education and training.

An analysis of 25 reported cases of rape by a spouse cohabitant, close friend or relative (21 of whom were married) collected by the Coalition over a nine-month period revealed that: (1) The rapes occurred among all racial and religious groups which proportionately reflected the overall population of Nassau County; (2) The rapes were often accompanied by physical threats, beating, and/or the victim was physically restrained or tied. In three cases a gun was used; (3) Protest or resistance by the victim could lead to additional beating; (4) The victims reacted with fear, terror, fright and enormous emotional trauma; (5) In some cases children were involved as observers; over 50 percent of these children were victims of abuse themselves (sometimes sexual) by the woman's husband or partner.

Erie County Citizens' Committee on Rape and Sexual Assault

The Erie County Citizens' Committee on Rape and Sexual Assault is an unincorporated, not-for profit advisory board

composed of private citizens. The Committee is mandated by the Erie County Charter to coordinate the existing public and private services available to victims of rape and sexual assault and to provide support and assistance to victims and their families.

The Committee has provided direct services to at least 1000 rape and sexual assault victims in the last three (3) years. The marital rape victims we have seen exhibit as much trauma as those victims raped by non-spouses. The marital rape exemption deters victims of spousal rape from reporting the crime and obtaining relief through the criminal justice system.

#### Family Adult Shelter

The Family Adult Shelter is a non-profit agency located in Woodstock, New York, which provides shelter, counseling and advocacy for women and children who are victims of domestic violence. In the past four years we have served and sheltered approximately 500 women and many have been victims of marital rape. We feel strongly that women's rights and dignity cannot be protected in New York State without strong laws to protect women from marital rape.

#### Ithaca Rape Crisis, Inc.

Ithaca Rape Crisis, Inc. is a not-for-profit corporation

incorporated in the state of New York. Ithaca Rape Crisis provides counseling, referral and advocacy services to victims of rape and other forms of sexual assault, as well as providing educational and preventive information to the community at large. Approximately 100 sexual assault victims per year request services from Ithaca Rape Crisis.

Our clients who are victims of marital rape have limited access to the criminal justice system. New York's marital rape exemption denies most marital rape clients the same protection afforded to unmarried victims, and we believe interferes with and hinders our ability to assist these clients.

Jefferson County Women's Center, Inc.

The Jefferson County Women's Center is a not-for-profit corporation in New York State whose purpose it is to assist women in crisis situations, particularly battered women.

Jefferson County with a population of 88,151, is a rural area in Northern New York. In the last five years, over 1,000 women have come to the Women's Center for help, most of whom were married. One-third of those married experienced rape and/or sodomy as one form of the abuse they suffered. The following excerpt from a four-part series on battered women in Jefferson County in the Watertown Daily Times, May 31, 1983, tells how one client was affected by marital rape: "Another time, Debbie

spurned Jimmy's sexual advances. 'He beat me with a belt and said he'd kill me. I almost passed out. So, I did what he wanted.' Debbie was raped and sodomized countless times. Jimmy regarded the sexual abuse as a punishment for Debbie's shortcomings. Debbie says of the sexual abuse, 'You can get over the pain of a slapping, but not the emotional pain of that kind of humiliation.'"

#### Long Island Women's Coalition

The Long Island Women's Coalition is a not-for-profit, tax exemption organization. The Long Island Women's Coalition, Inc. established in 1976, provides services and shelter to battered women and their minor children, primarily in Suffolk County, through a network of volunteer safe-homes, a shelter facility which accomodates up to eighteen people, a 24-hour hotline, a paid staff of fifteen counselors, shelter workers, child care and administrative personnel, and approximately 40 volunteers.

#### Metropolitan Assistance (Victim Services/Travelers Aid) Corp.

Metropolitan Assistance Corporation (MAC) is a not-for-profit corporation of New York State. MAC provides crisis counseling and services to more than 90,000 victims of crime in New York City. MAC operates programs within the Criminal and

Family Courts in New York City as well as in nine community offices throughout the City's five boroughs. Recent figures indicate that the Corporation serves 15,000 victims of rape and battering each year.

The majority of our clients are at the poverty level and are unable to obtain readily the services of attorneys for divorce proceedings (Legal Services programs often have waiting lists extending for several years). The marital rape exemption is particularly dangerous for indigent women who often must remain legally married and in the same household as their husbands for far longer periods than they would like or feel it is safe.

National Association of Social Workers, New York State Chapter

The New York State Chapter of the National Association of Social Workers represents more than 7,000 of the 90,000 members of NASW, the largest professional association for social workers in the world.

Historically, we have had a commitment to issues of concern to women, and for that reason have supported legislation to strike down the marital exemption regarding rape. It is our contention that the exemption unlawfully discriminates against women on the basis of sex and marital status.

National Association of Social Workers, Inc., (Massau Division)

The National Association of Social Workers, Inc. is the United States professional organization for persons with a Bachelor's of Social Work, Masters of Social Work or Doctor of Social Work, degree. It is a not-for-profit corporation that represents both the professionals within the discipline and the clients with whom they work.

The Massau Division of NASAW, which is the largest individual unit under the New York State Chapter, has a membership of over 1,500 persons including students and active and retired social workers. Our members are people who work at agencies such as Nassau County Rape Crisis hotline, South Nassau Hospital rape counseling program, Coalition for Abused Women, Inc. and Nassau County's Family Service Association to name a few.

The primary professional concern of our members is their ability to improve the quality of life for their clients. Our concern in this case is that rape is a crime of violence. It should make no difference whether or not the victim knows the perpetrator, or whether or not the victim is married to the assailant. To be forced to give your own body in an act against your will is to create deep psychological scars.

### National Clearinghouse on Marital Rape

The National Clearinghouse on Marital Rape is a project of the Women's History Research Center, Inc., which is a non-profit, tax-exempt foundation and a New York corporation qualified to do business in California. The Clearinghouse maintains a reference library on all aspects of marital rape and works to eliminate the marital exemption from state laws through education, research, and victim assistance. Our services and publications are used by prosecutors, family lawyers, attorneys for marital rape survivors, state Attorney Generals and judges.

The Clearinghouse collects information and statistics on marital rape prosecutions. Our statistics show that between 1980-1983, (1) Out of 80 cases in California, there were 58 convictions (72.5%); (2) Out of 51 cases outside of California, there were 29 convictions (57% conviction rate). These conviction rates are higher than those in most other serious crimes.

### National Organization for Women - New York State

The National Organization for Women of New York State is the state affiliate of the National Organization for Women, Inc. which is incorporated in Washington, D.C. as a non-profit organization. NOW-NYS has 37 chapters in New York and over 17,000 members. Our membership is dedicated to achieving social and legal equality for women.

A major priority area for NOW-NYS is combatting violence against women. NOW-NYS has worked actively with other organizations to establish and maintain shelters, counseling, and other support systems for battered women and rape victims. NOW-NYS has been active in supporting through legislative reform the elimination of the marital rape exemption.

#### National Organization for Women, New York City Chapter

The National Organization for Women, New York City Chapter is a not-for-profit unincorporated association dedicated to bringing women into the mainstream of American society. We lobby on legislation; provide a Women's Help Hotline to refer women for emergency and other services; and provide legal seminars on women's rights during the separation and divorce process. We believe that continuation of the marital rape exemption perpetuates women's unequal status in society by treating a wife as the "property" of her husband.

#### New York City Advisory Task Force on Rape

The New York City Advisory Task Force on Rape is a network of 35 public and private agencies in New York City who provide services to rape victims and public education about rape. Members include representatives from the New York City Police Department, the five District Attorneys' offices, the Human Resources Administration, hospital and health service providers,

and grassroot community groups. The marital rape exemption has been of major concern to Task Force members. We have found in our work with marital rape victims that the inability to prosecute for rape has caused trauma additional to that of the rape.

#### New York City Commission on the Status of Women

The New York Commission on the Status of Women was established by Mayoral Executive Order in 1975 to advise the Mayor of New York City on issues affecting the City's 3.5 million women, to support and promote the rights of women in the private and public sectors of New York City and to advocate change to promote women's equality.

We are aware from frequent calls received by our office from New York City women that marital rape is a pervasive problem in this City and that the marital exemption from prosecution in these cases has given license to men to rape their wives without the slightest fear of punishment. The existence of the marital exemption has caused immeasurable harm and suffering by thousands of women who have no legal recourse when their husbands force them to submit to sexual acts. Eighteen states, including Connecticut and New Jersey, now recognize rape of a wife by a cohabiting husband as a prosecutable offense. New York State law should not tolerate a definition of marriage that makes a woman the sexual property of her husband and denies her control of her body and protection of the law.

New York City Council President Carol Bellamy

Carol Bellamy, a taxpayer and citizen of the State of New York, is a citywide elected official of the City of New York, President of its City Council, and is charged with the responsibility to represent the interest of the people of New York City as Ombudsman. In that capacity, she has received numerous complaints from women and women's representatives regarding violence against them by their husbands, and believes that the marital rape exemption contributes to that violence.

New York State Coalition Against Domestic Violence (NYSCADV)

The New York State Coalition Against Domestic Violence (NYSCADV) is a not-for-profit membership organization made up of battered women's shelters, safe home projects, counseling and advocacy programs, and individuals working to eliminate domestic violence in New York State. NYSCADV sponsors two projects: The New York State Domestic Violence Hotline, and the Newsletter/Data Collection Project. The New York State Domestic Violence Hotline receives at least 4,000 calls per year, and provides crisis counseling to callers and referrals to local services. Many of these callers are women who have been raped by their husbands. Clients who call the NYSCADV Hotline, as well as battered women in shelters, are unable to get adequate legal relief if they are raped by their husbands.

### New York Women Against Rape

New York Women Against Rape (NYWAR) is a not-for-profit organization in New York City that offers counseling, information and referrals to sexual assault victims. We also provide training to social workers, police officers, hospital personnel and other professionals. NYWAR opened in 1973 and has served over 15,000 victims, many of whom have been raped by their husbands. Helping marital rape victims has been difficult because many live with their assailants and because the victimization is currently legal. We have found that assaults in which the rapist is known to the victim are particularly damaging because of the violation of trust. Some of these cases have resulted in institutionalization of the victim, suicide or murder.

### Older Women's League, Nassau Chapter

The Older Women's League (OWL), Nassau Chapter is a not-for-profit organization. We are a local chapter of National OWL with headquarters in Washington, D.C. and chapters across the country. National OWL has about 7,000 members; our chapter has over 200 members.

The purpose of our organization is public education and advocacy. We are committed to correcting the social, political and economic inequities faced by midlife and older women. One of our priority areas is adult abuse; all forms of such abuse, including marital rape, are of concern.

### The Park Slope Safe Homes Project

The Park Slope Safe Homes Project is sponsored by the Good Shepherd Services, Inc., an unincorporated not-for-profit organization in New York State. The Project provides a hotline, short-term shelter and counseling for battered women and their children in Park Slope, Brooklyn. Two-thirds of the women we serve are married, and we have found that approximately forty (40) percent have been raped and/or sexually abused by their male partner.

Married women report having their clothes torn off, being burned by cigarettes, and being threatened with weapons if they refuse to have sex with their husbands. One woman who had been separated from her husband for several months was asleep when her husband climbed through the bedroom window of her apartment and raped her. Her humiliation and emotional injury were compounded by an unwanted pregnancy that seriously hampered her attempts to reconstruct her life for herself and her 18 month old daughter. These examples are only a small sample of the kind of sexual coercion and abuse suffered by women in the "safety" of their own homes.

### Planned Parenthood of Schenectady and Affiliated Counties, Inc.

The Rape Crisis Service is a program of Planned Parenthood of Schenectady and Affiliated Counties, Inc., a non-profit

women's health care agency. The Rape Crisis Service provides supportive services to victims of rape and their families, and develops community awareness about the problem of violence against women through public education programs. In our ten years of operation, Rape Crisis Service has assisted over 2,000 hotline callers.

We feel strongly that all women in New York State should be protected against sexual assault and that all men who commit these crimes should be prosecuted, regardless of the relationship between victim and assailant. More women are raped by their husbands each year than by strangers, acquaintances or other persons. Nearly 6 million wives will be abused by their husbands in any one year, and rape is usually a form of this abuse.

#### The Rape Crisis Coalition of Eastern New York

The Rape Crisis Coalition of Eastern New York was formed four years ago and represents rape crisis programs from 10 counties in New York. Collectively we have assisted hundreds of women who have been sexually assaulted by their husbands. On numerous occasions, crisis counselors have encountered resistance from law enforcement officers to taking a formal complaint, and reluctance by Emergency Room physicians to examine and collect medical evidence from women victimized by their husbands. We believe that if the marital rape exemption was eliminated these women would receive adequate medical attention and legal recourse through the courts.

Rape Crisis Service of Planned Parenthood of Rochester and Monroe County, Inc.

The Planned Parenthood Rape Crisis Service is a not-for-profit corporation serving Monroe County. It provides 24-hour crisis intervention, counseling, advocacy, and professional and community education on sexual assault issues. In 1983, the Rape Crisis Service had contact with 392 clients. Many had been sexually assaulted by their husbands and the marital exemption limited their options to have the perpetrator held responsible. This directly effected their safety as well as their ability to recover emotionally.

Rockland Family Shelter for Victims of Domestic Violence

Rockland Family Shelter, Inc., is a private not-for-profit corporation located in Spring Valley, New York, that provides a 24-hour crisis hotline, emergency shelter, second stage housing and supportive services, advocacy and counseling to victims of domestic violence and rape and their family members. Since opening in 1979, we have assisted over 4,000 families through our domestic violence services.

Many of our clients have been raped and sexually abused by their mates. We found that one-half of our shelter residents in 1984 had been raped during their marriage or were victims of incest. Melinda B. came to the shelter due to a serious assault;

each of her three children most probably were conceived during episodes of rape.

In 1983, Sue B. had secured a temporary Order of Protection against her abusive husband. In July, 1984, her husband became abusive again and she went bank to Family Court and filed a new petition. After receiving her Order of Protection in July, 1984, Sue's husband sodomized her and then spread semen all over her body. She wanted to press criminal charges but was told she could not do so because she was married. Instead, she filed a complaint for assault which was eventually dropped.

#### Schenectady YWCA Services to Families in Violence

Schenectady YWCA Services to Families in Violence is a not-for-profit corporation serving battered women and their children. It has been in existence 5 years, has served 2,200 women and sheltered over 600 battered women and 1,200 children, primarily from Schenectady and Albany county, but also from across New York state and from many distant states. Our hotline has handled more than 20,000 phone calls.

We estimate that about 90 percent of our cases include marital rape. Most of these women are repeatedly attacked sexually by their husbands. Most of the women who come to us do not have any money and will be unable to afford a divorce for years to come. The local Legal Aid Society stopped helping these women obtain divorces because of a 4-year backlog.

One of our clients had an Order of Protection, and was living separately from her husband. She went back to the marital home for some clothing and was raped by her husband. Another client's husband held her child hostage until she submitted sexually. He held her prisoner and raped her repeatedly over 18 hours; he later killed himself and their child.

Tompkins County Task Force for Battered Women, Inc.

The Tompkins County Task Force for Battered Women, Inc., is a private, not-for-profit corporation in New York State. The Task Force provides peer counseling, information and referral, advocacy and shelter to battered women and their children. Approximately 270 battered women and 40 sexually abused children use our services each year. Many of the battered women we work with are affected by marital rape: the issue comes up frequently in our support groups and in one-to-one discussions between volunteer advocates and battered women.

Unity House Families in Crisis Program

Unity House is a not-for-profit corporation in New York State, incorporated under the Diocesan Health and Social Services of Albany, Catholic Diocese. We provide shelter, counseling, advocacy and children's programming for battered women and their families.

### Victims Information Bureau of Suffolk, Inc.

The Victims Information Bureau is a not-for-profit agency that provides a 24-hour hotline, client advocacy services and on-going therapeutic counseling to victims of rape and family abuse. Approximately 6,700 women sought services from our agency in 1983. In 1983 and 1984, our agency worked with approximately 67 women who identified occasions of fear, force and intimidation by their spouses for the purpose of sexual contact. Some of these cases involved the use of a weapon; in some cases the husband literally beat the woman helpless in order to gain physical control of her and her body. In some cases the husband used intimidation and threats against the woman or their children. Had these situations occurred outside the partnership of marriage, the women involved would have had legal recourse.

### Women Against Pornography

Women Against Pornography is a not-for-profit corporation whose purpose is to educate the public about the myths pornography perpetuates about women's sexuality, i.e., that women enjoy being raped, beaten, harassed and molested. We have a membership of over 10,000. Some of our members have come to us specifically because they have been victims of a sex crime from their husbands or boyfriends.

Women's Bar Association of the State of New York

The Women's Bar Association of the State of New York, which is comprised of 14 chapters and approximately 2,000 members, joins in the submission of the ant amicus brief. The Association endorses the positions herein, namely that the lower court was correct in ruling that an Order of Protection is sufficient to terminate the marital rape exemption and further that the marital rape exemption unconstitutionally discriminates against married women on the basis of sex and marital status.

Yonkers Women's Task Force, Inc.

Yonkers Women's Task Force is a not-for-profit corporation and sponsors the Shelter for Victims of Domestic Violence. The Shelter serves abused women and their children from Westchester County, and provides emergency housing, a 24-hour hotline, advocacy and referral. We have served 388 abused women and 526 children over the last five years. Approximately five percent of our clients admit to having been victims of marital rape. Presently, we have a 19-year old mother of two children who is now pregnant as the result of a forcible sexual assault by her husband.

YWCA Hall House and Rape Crisis Services

YWCA Hall House and Rape Crisis Services is a not-for-profit organization incorporated in New York State that provides crisis