

GENDER, VICTIMIZATION, AND EVOLVING STATE  
STANDARDS: A STUDY OF NEW YORK AND MICHIGAN  
SEXUAL ASSAULT LEGISLATION

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I. INTRODUCTION

Over the last forty years, state legislation on sexual assault has evolved. Some states have made changes through amendments while keeping some parts of the statute intact.<sup>1</sup> However, other states have stricken the former law entirely and drafted new statutes from scratch.<sup>2</sup> About one half of states have a semi-broad definition of rape whereas the other twenty-five states' rape statutes remain narrow in scope.<sup>3</sup> This article puts forth the argument that a broader definition of rape is more appropriate than a narrow one. Two states with different laws illustrate this contention: Michigan has a very broad definition of rape and New York has a very narrow definition of rape.

To illustrate: Michigan's law would cover a circumstance in which a boy was raped as the same crime as if a female was vaginally raped, whereas New York's law would not. This work reviews the history and evolution of rape laws in Michigan and New York. This paper raises, but does not entirely cover, why New York is reluctant to adopt a gender-neutral statute.

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<sup>1</sup> See, e.g., *infra* note 15 and accompanying text.

<sup>2</sup> See, e.g., *infra* note 34 and accompanying text.

<sup>3</sup> See *Perez-Gonzalez v. Holder*, 667 F.3d 622, 627 (5th Cir. 2012).

## II. HISTORICAL CONTEXT

Rape has traditionally been regarded as a crime against community, family, and property.<sup>4</sup> Thus, rather than the law focusing on addressing the physical harm, violation, and psychological injury to the victim, the law has focused on the harm as damaging chastity and assurance of family lineage.<sup>5</sup> Consequently, as states drafted criminal codes after the post-colonial period, legislatures adopted narrow definitions of rape largely ignoring the trauma to the victim but focusing on vaginal penetration as the harm of the crime.<sup>6</sup> Thus, the only victims of rape would logically always be a woman. As society has evolved, more is understood regarding the personal and psychological damage to the individual caused by rape.

## III. MARITAL RAPE

Historically, a husband could not be charged with the rape of his wife because the marriage contract essentially gave the woman to the man in such a way that she could not retract her consent to sexual acts.<sup>7</sup> The first American case that recognized the idea of a marital exemption was the 1857 case of *Commonwealth v. Fogerty*,<sup>8</sup> which stated that “it would always be competent for a party indicted to show, in defence [sic] of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife.”<sup>9</sup> This rule was valid even if the couple was no longer living together.<sup>10</sup> Another notion was that with a marriage begins a unit so the couple is one person as opposed to separate people.<sup>11</sup> Remnants of this idea remain today in various incarnations, which will be explored herein. New York’s marital

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<sup>4</sup> See *People v. Liberta*, 474 N.E.2d 567, 576 (N.Y. 1984); *Feminist Perspectives on Rape*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/feminism-rape/> (last updated Aug. 14, 2013).

<sup>5</sup> See *Liberta*, 474 N.E.2d at 576.

<sup>6</sup> See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1494 (2000); Estelle B. Freedman, *Women’s Long Battle to Define Rape*, WASH. POST (August 24, 2012), [https://www.washingtonpost.com/opinions/womens-long-battle-to-define-rape/2012/08/24/aa960280-ed34-11e1-a80b-9f898562d010\\_story.html](https://www.washingtonpost.com/opinions/womens-long-battle-to-define-rape/2012/08/24/aa960280-ed34-11e1-a80b-9f898562d010_story.html).

<sup>7</sup> See Hasday, *supra* note 6, at 1397.

<sup>8</sup> *Commonwealth v. Fogerty*, 74 Mass. 489 (1857).

<sup>9</sup> *Id.* at 491.

<sup>10</sup> Statutes specified that in order for a husband’s forced sexual intercourse on his wife to be considered rape, the couple must not only be living apart, but one of the spouses must also have filed for divorce. See Hasday, *supra* note 6, at 1484 nn.408–09.

<sup>11</sup> See *People v. Liberta* 474 N.E.2d 567, 573 (N.Y. 1984).

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exemption was reversed in the 1984 case of *People v. Liberta*, after the Court of Appeals determined that there was “no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales . . . are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny.”<sup>12</sup> The movement for this change took hold in states in the 1970s;<sup>13</sup> for example, Nebraska changed its law in 1976.<sup>14</sup>

However, New York has been relatively late to change sexual assault laws generally. For example, although the changes had essentially been made through the *Liberta* case, the criminalization of marital rape was not codified into New York law as “rape” until the relatively late amendments of 2003.<sup>15</sup> Moreover, as explained below in greater detail, questions remain regarding the State of New York’s hesitancy to move forward with assault laws and why it is reluctant to codify gender-neutral concepts of rape.

#### IV. OVERVIEW OF NEW YORK’S RAPE LAW

Currently, New York has defined thirteen separate sexual offenses, five of which may be charged in various degrees.<sup>16</sup> These crimes include: sexual misconduct, rape, criminal sexual act, forcible touching, persistent sexual abuse, sexual abuse, aggravated sexual abuse, course of sexual conduct against a child, female genital mutilation, facilitating a sex offense with a controlled substance, sexually motivated felony, predatory sexual assault, and predatory sexual assault against a child.<sup>17</sup>

New York’s rape statutes are as follows:

A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person: (1) [b]y forcible compulsion; or (2) [w]ho is incapable of consent

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<sup>12</sup> *Id.*

<sup>13</sup> See BATTERED WOMEN’S JUSTICE PROJECT/CIVIL, MARITAL RAPE: A CALL TO ADVOCACY 4, <http://s3.documentcloud.org/documents/413656/marital-rape.pdf> (last visited Sept. 20, 2016); RAQUEL KENNEDY BERGEN, MARITAL RAPE: NEW RESEARCH AND DIRECTIONS 1 (2006), [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_MaritalRapeRevised.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_MaritalRapeRevised.pdf).

<sup>14</sup> See NEB. REV. STAT. ANN. § 28-318 (2005); BATTERED WOMEN’S JUSTICE PROJECT/CIVIL, *supra* note 13, at 4.

<sup>15</sup> See N.Y. PENAL LAW §§ 130.00, 130.35 (McKinney 2005).

<sup>16</sup> See *generally id.* §§ 130.00–130.96 (listing New York’s thirteen sexual offenses and describing how sexual conduct against a child can be charged in two different degrees; rape, criminal sexual act, and sexual abuse can be charged in three different degrees; and aggravated sexual abuse can be charged in four separate degrees).

<sup>17</sup> *See id.*

by reason of being physically helpless; or (3) [w]ho is less than eleven years old; or (4) [w]ho is less than thirteen years old and the actor is eighteen years old or more.<sup>18</sup>

A person is guilty of rape in the second degree when: (1) being eighteen years old or more, he or she engages in sexual intercourse with another person less than fifteen years old; or (2) he or she engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated. It shall be an affirmative defense to the crime of rape in the second degree as defined in subdivision one of this section that the defendant was less than four years older than the victim at the time of the act.<sup>19</sup>

A person is guilty of rape in the third degree when: (1) [h]e or she engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old; (2) [b]eing twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old; or (3) [h]e or she engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent.<sup>20</sup>

New York's statutory rape provisions are noted throughout each rape statute as well, as each one contains provisions related to the age of the offender and the age of the victim.<sup>21</sup>

Rape in the first, second, and third degrees are all felony offenses, as are criminal sexual acts in the first, second, and third degrees.<sup>22</sup> They also fall under the same classes of felonies depending upon the degree of the offense with the same range of penalties depending upon whether the offense was violent.<sup>23</sup>

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<sup>18</sup> *Id.* § 130.35.

<sup>19</sup> *Id.* § 130.30.

<sup>20</sup> *Id.* § 130.25.

<sup>21</sup> *See, e.g., id.*

<sup>22</sup> *See id.* §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50.

<sup>23</sup> *Compare id.* § 130.25 (describing rape in the third degree as a class E felony), *and id.* § 130.30 (describing rape in the second degree as a class D felony), *and id.* § 130.35 (describing rape in the first degree as a class B felony and including "forcible compulsion" as a factor considered), *with id.* § 130.40 (describing criminal sexual acts in the third degree as a class E felony), *and id.* § 130.45 (describing criminal sexual acts in the second degree as a class D felony), *and id.* § 130.50 (describing criminal sexual acts in the first degree as a class B felony and including "forcible compulsion" as a factor considered).

### A. *A Critique of New York's Rape Law*

New York's rape law, however, has its limitations and does not cover the circumstances for forced oral or anal penetration as "rape,"<sup>24</sup> and the law is heavily focused on traditional gendered notions of rape.<sup>25</sup> Thus, the reality of how persons are violated is not adequately acknowledged or prosecuted.<sup>26</sup> Advocates of rape law reform argue, however, that while "legislation does not provide" complete "solutions to problems" of rape law, legislation establishes a policy that the law supports the rape victim.<sup>27</sup> This policy, in turn, influences public attitudes toward the victim.

New York's explanation of "sexual intercourse" is that it "has its ordinary meaning and occurs upon any penetration, however slight."<sup>28</sup> Accordingly, penetration of the female sexual organ is required for sexual intercourse to occur. Intercourse has been a necessary element for New York's rape statute;<sup>29</sup> therefore, oral and anal rape are not considered general "rape" under current New York law.

Furthermore, a male-male sexual attack is not considered rape under the law. Any other type of sexual contact—including oral or anal conduct—is instead dealt with as a criminal sexual act, which has three separate degrees.<sup>30</sup> The degrees mimic the language of New York's rape statutes, except that "[a] person is guilty of criminal sexual act . . . [when h]e or she engages in oral sexual conduct or anal sexual conduct with another person . . ."<sup>31</sup> Thus, a male-male sexual attack would be dealt with under the criminal sexual act statute, but not the rape law.

## V. OVERVIEW OF MICHIGAN'S RAPE LAW

Michigan's rape law demonstrates a contrast to New York's rape law in statutory structure. In the 1970s, the women's movement in the United States gained traction.<sup>32</sup> Furthermore, during the 1970s the discourse around violent crime was high and state legislatures

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<sup>24</sup> See *id.* §§ 130.25, 130.30, 130.35 (describing rape as sexual intercourse).

<sup>25</sup> See *id.*

<sup>26</sup> See JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 4 (1982).

<sup>27</sup> See *id.*

<sup>28</sup> N.Y. PENAL LAW § 130.00.

<sup>29</sup> See *id.* § 130.35.

<sup>30</sup> See *id.* §§ 130.40, 130.45, 130.50.

<sup>31</sup> *Id.* § 130.40.

<sup>32</sup> See NANCY WHITTIER, *FEMINIST GENERATIONS: THE PERSISTENCE OF THE RADICAL WOMEN'S MOVEMENT I* (Ronnie J. Steinberg ed., 1995).

began taking actions in these matters by redrafting their criminal codes.<sup>33</sup>

In 1974, the Michigan legislature drafted four degrees of criminal sexual conduct (CSC) to replace the previous rape law.<sup>34</sup> The degrees of sexual assault charges vary depending on whether sexual penetration or sexual contact and another circumstance has occurred.<sup>35</sup> This bill broke with tradition because Michigan used gender-neutral terms for both the victim and the perpetrator/actor.<sup>36</sup> According to the definition section of the statute, the actor is the one accused of committing the crime and the victim (non-gendered) is the person against whom the crime has been committed.<sup>37</sup> “The purpose of the new [criminal sexual conduct] statute was to codify, consolidate, define, and prescribe punishment for a number of sexually assaultive crimes under one heading.”<sup>38</sup> This change in the Michigan Code was in part from the efforts of the anti-rape movement activists to desexualize rape that occurred as part of the 1970s larger women’s movement.<sup>39</sup>

In Michigan, both first and third degree CSC statutes require forced or coerced sexual penetration with a body part or object.<sup>40</sup> Michigan does not distinguish between intercourse and penetration and does not define intercourse in the CSC statute. According to Michigan law, “[s]exual penetration” for first and third degree CSC “means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.”<sup>41</sup>

Both second and fourth degree CSC require forced or coerced sexual contact, including touching of intimate parts or clothing covering these parts for the purpose of sexual arousal or gratification.<sup>42</sup> Aggravating factors distinguishing third and fourth degree criminal sexual conduct from first and second degree conduct

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<sup>33</sup> See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 14 (2d ed. 2004).

<sup>34</sup> See MICH. COMP. LAWS §§ 750.520b, 750.520c, 750.520d, 750.520e (2016).

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* § 750.520a(a), (s).

<sup>37</sup> See *id.* § 750.520a(a).

<sup>38</sup> *People v. Cash*, 351 N.W.2d 822, 823 n.1 (Mich. 1984) (citing *People v. Johnson*, 279 N.W.2d 534, 536–38 (Mich. 1979)).

<sup>39</sup> See Jan BenDor, *Justice after Rape: Legal Reform in Michigan*, in *SEXUAL ASSAULT: THE VICTIM AND THE RAPIST* 149, 152 (Marcia J. Walker & Stanley L. Brodsky eds., 1976).

<sup>40</sup> See MICH. COMP. LAWS §§ 750.520b(1)(f), 750.520d(1)(b).

<sup>41</sup> *Id.* § 750.520a(r).

<sup>42</sup> See *id.* §§ 750.520c(1)(f), 750.520e(1)(b).

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(depending upon whether penetration has occurred), include circumstances such as: age and capacity of the victim; use of a weapon; the commission of another felony by the actor during the CSC; injury to the victim; status of the actor as a family member “by blood or affinity;” and status of the actor as a foster parent or educational or mental health care professional or authority figure.<sup>43</sup>

For example, although first degree CSC requires penetration whereas second degree CSC does not require penetration, both first and second degree CSC require similar circumstances, such as the person alleging to have been subjected to criminal sexual conduct “is under 13 years of age . . . [or] is at least 13 but less than 16 years of age and . . . [t]he actor is a member of the same household as the victim . . . [or] is related to the victim by blood or affinity to the fourth degree.”<sup>44</sup>

First, second, and third degree criminal sexual conduct are felonies, whereas fourth degree criminal sexual conduct is a misdemeanor offense.<sup>45</sup> A conviction for first degree CSC may result in a term of years up to life imprisonment and lifetime electronic monitoring.<sup>46</sup> Second and third degree criminal sexual conduct may result in up to fifteen years imprisonment.<sup>47</sup> And fourth degree criminal sexual conduct may result in up to two years in prison and/or a \$500 fine.<sup>48</sup>

The Michigan law was seen as the model for many other states. Other states followed suit, such as South Carolina and Florida, and<sup>49</sup> Minnesota’s law in particular is very similar in the four categories.<sup>50</sup>

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<sup>43</sup> See *id.* §§ 750.520b(1), 750.520c(1), 750.520d(1), 750.520e(1).

<sup>44</sup> *Id.* §§ 750.520b(1)(a)–(b), 750.520c(1)(a)–(b).

<sup>45</sup> See *id.* §§ 750.520b(2), 750.520c(2), 750.520d(2), 750.520e(2).

<sup>46</sup> See *id.* §§ 750.520b(2), 750.520n(1).

<sup>47</sup> See *id.* §§ 750.520c(2), 750.520d(2).

<sup>48</sup> *Id.* § 750.520e(2).

<sup>49</sup> South Carolina has three degrees of criminal sexual conduct and three degrees of criminal sexual conduct with a minor. See S.C. CODE ANN. §§ 16–3–652 to 16–3–655 (2010). The Florida statute words the offense as “[s]exual battery.” FLA. STAT. § 794.011 (2016). This offense is categorized by degree depending upon the age of the victims and the circumstances of the battery. See *id.*

<sup>50</sup> See MINN. STAT. §§ 609.342–609.345 (2015). Minnesota law also has a fifth degree of criminal sexual conduct: “(1) if the person engages in nonconsensual sexual contact; or (2) the person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present.” *Id.* § 609.3451(1).

## VI. THE CASE OF LYDIA CUOMO

So how have New York's current statutes actually functioned in a prosecution for rape? The case against Michael Pena provides a recent example.

The facts brought out at trial and afterward are as follows: On August 19, 2011, just after 6:15 a.m., Pena, an off-duty police officer at the time of the incidents, forcibly assaulted a twenty-five-year-old woman.<sup>51</sup> The woman, Lydia Cuomo, was waiting outside her school principal's apartment building in the Inwood neighborhood in Manhattan to get a ride to her new job on her first day as an elementary school teacher in the Bronx.<sup>52</sup> While she was waiting for the school principal to pick her up, Officer Pena, who was not in uniform at the time, asked for directions to the subway and suggested that she accompany him.<sup>53</sup> Pena had been drinking the night before,<sup>54</sup> and he had been at a bar where there were strippers.<sup>55</sup> When Cuomo refused the offer to accompany Pena, he revealed a nine millimeter Glock pistol underneath his t-shirt.<sup>56</sup> Pena led Cuomo down a narrow alley surrounded by several apartment buildings and garages and sexually assaulted her.<sup>57</sup> Pena stated that he would shoot Cuomo in the face if she screamed or opened her eyes.<sup>58</sup> Ultimately, a resident of one of the surrounding buildings called the police after becoming concerned by the woman's tone of voice and the fact that she was covering her eyes and mouth with her own hands.<sup>59</sup>

Both prosecution and defense agreed on the events leading up to the attack, but defense counsel maintained that DNA evidence and eyewitness accounts did not prove that Pena had vaginally

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<sup>51</sup> See Russ Buettner, *Facts Conceded at Officer's Rape Trial*, N.Y. TIMES (Mar. 15, 2012), [http://www.nytimes.com/2012/03/16/nyregion/defense-concedes-a-lot-in-rape-case-of-police-officer-michael-pena.html?\\_r=0](http://www.nytimes.com/2012/03/16/nyregion/defense-concedes-a-lot-in-rape-case-of-police-officer-michael-pena.html?_r=0); Kenneth Lovett, *Survivor of Brutal Attack by Police Officer Heads to Albany to Expand State's Definition of 'Rape' to Include Forced Oral and Anal Sex: 'Rape is Rape'*, N.Y. DAILY NEWS (Feb. 11, 2013), <http://www.nydailynews.com/new-york/survivor-expand-ny-rape-statutes-article-1.1260437>.

<sup>52</sup> See Buettner, *supra* note 51; Lovett, *supra* note 51.

<sup>53</sup> See Buettner, *supra* note 51.

<sup>54</sup> See *Teacher Assaulted by Off-Duty Cop Wants Albany to Change Rape Laws*, CBS (Feb. 11, 2013), <http://newyork.cbslocal.com/2013/02/11/teacher-assaulted-by-off-duty-cop-wants-albany-to-change-rape-laws/>.

<sup>55</sup> See Buettner, *supra* note 51.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See Laura Italiano, *Cop Sex Fiend Found Guilty*, N.Y. POST (Mar. 28, 2012), <http://ny.post.com/2012/03/28/cop-sex-fiend-found-guilty/>.

<sup>59</sup> See Buettner, *supra* note 51.



penetrated the victim, which is a necessary element of proving rape.<sup>60</sup> Despite defense counsel's contention, semen with Pena's DNA was found on Cuomo's underwear, Cuomo's genitals were described as red,<sup>61</sup> and Cuomo stated that she knew she had been vaginally penetrated because "[i]t hurt."<sup>62</sup> In addition, eyewitnesses saw that Cuomo was dragged into a courtyard at Park Terrace West and West 217<sup>th</sup>,<sup>63</sup> where one witness saw Pena from twelve feet away raping Cuomo on a wooden table and another witness stated they saw "joyless sex."<sup>64</sup>

In March 2012, the Pena case went to trial at the Supreme Court of New York in Manhattan, and Pena was charged with rape, criminal sexual act, and as a result of the use of a gun, predatory sexual conduct.<sup>65</sup> The jury convicted Pena of predatory sexual assault, but was deadlocked on the rape charges.<sup>66</sup> There was some confusion as to why the jury did not find Pena guilty of the charge of rape. The comments of a juror demonstrates that the jury believed that Pena's penis had made oral and anal contact with Cuomo, but the jurors couldn't agree on whether he'd *vaginally* penetrated her.<sup>67</sup> Also, a juror was unconvinced of Cuomo's memory because she did not recall the color of a nearby car.<sup>68</sup> Finally, three jurors would not find him guilty of the two counts of rape because they "felt the rape charges had not been sufficiently proved . . ."<sup>69</sup>

On March 28, 2012, New York State Supreme Court Justice Richard Carruthers declared a mistrial on the charge of rape.<sup>70</sup> Thus, although the jury was convinced that several other charges

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<sup>60</sup> See *id.*

<sup>61</sup> See *Mistrial in Cop's Rape Case: A Closer Look at the Evidence and the Defense's Arguments*, N.Y. DAILY NEWS (Mar. 29, 2012), <http://www.nydailynews.com/new-york/mistrial-rape-case-closer-evidence-defense-arguments-article-1.1052563>.

<sup>62</sup> See Stephanie Hughes, *When the Law Won't Call it Rape*, SALON (Jan. 26, 2013), [http://www.salon.com/2013/01/26/when\\_the\\_law\\_wont\\_call\\_it\\_rape/](http://www.salon.com/2013/01/26/when_the_law_wont_call_it_rape/); Italiano, *supra* note 58.

<sup>63</sup> See Lovett, *supra* note 51.

<sup>64</sup> See Hughes, *supra* note 62; *Mistrial in Cop's Rape Case*, *supra* note 61.

<sup>65</sup> See Buettner, *supra* note 51; Russ Buettner, *Mistrial on Final Charges Day after Officer's Conviction in Sex Attack*, N.Y. TIMES (Mar. 28, 2012), <http://www.nytimes.com/2012/03/29/nyregion/mistrial-declared-on-remaining-charges-day-after-officers-conviction-in-sex-attack.html>; see also N.Y. PENAL LAW § 130.95 (McKinney 2016) (describing the offense of predatory sexual assault in New York State).

<sup>66</sup> See Buettner, *supra* note 65.

<sup>67</sup> See Melissa Grace et al., *Jury Focuses on 'Odd Points,' Refuse to Convict Cop on Rape Charge*, N.Y. DAILY NEWS (Mar. 29, 2012), <http://www.nydailynews.com/new-york/jury-refused-convict-nypd-michael-pena-rape-victim-couldn-remember-color-parked-car-article-1.1053186>.

<sup>68</sup> See Lovett, *supra* note 51.

<sup>69</sup> Buettner, *supra* note 65.

<sup>70</sup> See *id.*

had occurred, including sexual misconduct by forcible oral and anal penetration, they were not convinced of forcible vaginal penetration, which was required for a rape conviction.<sup>71</sup> Three months after the judge declared a mistrial, Pena pled guilty to the two rape charges that had deadlocked the jury (rather than going to trial again), admitting that he had forcible intercourse with the woman.<sup>72</sup>

This case highlights the difficulties in rape prosecution in New York State. The jury was able to find Pena guilty of predatory sexual assault, an A-II felony, but was not able to find him guilty of rape due, at least in part, to concerns about vaginal penetration.<sup>73</sup> There has since been a push in New York to change the rape law<sup>74</sup> because the current law defines rape for only cases with vaginal penetration,<sup>75</sup> and anal and oral penetration are considered criminal sexual acts and are an entirely different crime than rape.<sup>76</sup>

## VII. BILLS IN THE NEW YORK STATE LEGISLATURE

The hesitation of New York to change its rape laws can be demonstrated by the disagreement between the New York State Assembly and the New York State Senate about how the law should be revised and how much change is possible at the current time.<sup>77</sup>

After extensive lobbying by Lydia Cuomo and various non-profit groups in New York, the New York State Assembly and the New York State Senate introduced various bills.<sup>78</sup> Assemblymember and Chair of the Task Force on Women's Issues, Aravella Simotas, a democrat representing Astoria, Queens,<sup>79</sup> introduced New York's "Rape is Rape" bill after the verdict in the Michael Pena case<sup>80</sup> in

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<sup>71</sup> See Kenneth Lovett, *'Rape is Rape' Law Advocate, Sexual Assault Survivor Leaves New York*, N.Y. DAILY NEWS (July 20, 2015), <http://www.nydailynews.com/new-york/nyc-crime/rape-rape-vic-leaves-n-y-article-1.2297482>.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See Kenneth Lovett, *Gov. Andrew Cuomo Will Step into the 'Rape Is Rape' Bill Fray and Push It Ahead as Legislators Grapple with Reclassification of Forced Anal and Oral Sex*, N.Y. DAILY NEWS (Feb. 18, 2013), <http://www.nydailynews.com/news/politics/cuomo-stepping-rape-rape-bill-fray-artice-1.1266672> (showing a push from the Governor of New York, as well as Assembly members, to change the law).

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See *infra* notes 78–95 and accompanying text.

<sup>78</sup> See Lovett, *supra* note 74; Press Release, N.Y. State Assemblymember Aravella Simotas, Simotas Re-Introduces Bill to Toughen Rape Law (Feb. 12, 2013), <http://assembly.state.ny.us/mem/Aravella-Simotas/story/50940/>.

<sup>79</sup> See Lovett, *supra* note 74; *Assemblymember Aravella Simotas: Biography*, N.Y. STATE ASSEMBLY, <http://assembly.state.ny.us/mem/?ad=036&sh=bio> (last visited Sept. 21, 2016).

<sup>80</sup> See Press Release, *supra* note 78.

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January 2013, as A.3339.<sup>81</sup> In the Assembly's Rape is Rape bill, oral and anal sexual conduct without consent are also considered to be rape with the use of the same word (i.e., they are not distinguished from vaginal rape, rape in the second and third degrees, etc.).<sup>82</sup> However, some were hesitant to let go of the gendered distinction and A.3339 died in the Senate in 2014.<sup>83</sup> Rather, the Senate wanted to change the current rape law by only requiring contact rather than penetration to prove rape,<sup>84</sup> the motivation of this bill being to acknowledge the harm of all forms of rape and reduce gendered notions of rape.

In early 2013, the New York State Senate proposed the "Rape Victims Equality Act," Senate Bill S.3710,<sup>85</sup> introduced by Senator Catherine Young, a republican from Cattaraugus County.<sup>86</sup> The Senate's Rape Victims Equality Act proposed a more significant impact on current law than the Assembly's Rape is Rape bill would have had.<sup>87</sup> The New York Senate Rape Victim's Equality Act's most recent incarnation, S.3710-C, redefines the term "sexual intercourse" within the Penal Law's Sex Offenses Article (Penal Law section 130) to mean "conduct between persons consisting of contact between the penis and the vagina or vulva," thus no longer requiring penetration.<sup>88</sup>

During the vote, Senator Young explained her vote to change "penetration" to "contact" but not to include oral and anal sex in New York's definition of rape, stating:

Lydia Cuomo has put forward a push to rename several of the sexual assault acts so that they reflect the word "rape" in them. This is what this bill does. And not only that, it also strengthens the rape laws in New York State. The previous standard has been for vaginal rape to be penetration. This actually loosens the definition to include contact. That would have been very significant in Lydia Cuomo's case, but also it's very significant for all of the rape cases in New York

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<sup>81</sup> Assemb. B. 3339, 2013 Reg. Sess. (N.Y. 2013).

<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See* Press Release, N.Y. State Senator Catharine Young, New York State Senate Passes Rape Victims Equality Act (Apr. 29, 2013), <https://www.nysenate.gov/newsroom/press-releases/catharine-young/new-york-state-senate-passes-rape-victims-equality-act>.

<sup>85</sup> S. B. 3710, 2013 Reg. Sess. (N.Y. 2013); *see* Press Release, *supra* note 84.

<sup>86</sup> *See* Lovett, *supra* note 74.

<sup>87</sup> *Compare* Assemb. B. 3339, *with* S. B. 3710.

<sup>88</sup> S. B. 3710-C, 2013 Reg. Sess. (N.Y. 2013).

State, because it will make it easier to obtain a conviction.<sup>89</sup>

Furthermore, the Senate Rape Victim's Equality Act changes the crimes within criminal sexual act to exclude any mention of "oral sexual conduct" and instead to exclusively apply to "anal sexual conduct," renamed "Anal Rape."<sup>90</sup> In order to deal with acts of "oral sexual conduct," the bill also proposed the creation of three new penal codes—sections 130.37, 130.38, and 130.39—named "Oral Rape."<sup>91</sup>

The bill was passed by the New York State Senate on April 29, 2013, but died in the New York State Assembly and was referred back to the Senate's Codes Committee.<sup>92</sup> The Senate Rape Victims Equality Act was supported by the District Attorneys Association as well as the Downstate Coalition for Crime Victims.<sup>93</sup>

Concern about the Rape is Rape bill (which removes the penetration criteria and includes oral and anal forcible nonconsensual sexual conduct in the definition of "rape") included worries that charging rape for all three acts during the same incident could result in concurrent sentences for each of the rapes rather than consecutive terms and thus perpetrators would serve less jail time.<sup>94</sup> Some of the preference for the Senate bill was because the distinctions between "types of rape" would make it easier to impose consecutive terms on rapists.<sup>95</sup> Because the Senate bill does not classify oral or anal sexual conduct specifically as "rape," and thus differentiates it with rape involving vaginal penetration, it may be thought that in order to have clarity in the language that each of the rapes should be separate acts.

#### VIII. CONCERNS REGARDING CONCURRENT SENTENCING

As state, it appears that the Senate has been particularly unwilling to call all of the offenses "rape" because of concerns that difficulties may occur for prosecutors to request consecutive sentences where the oral, anal, and vaginal rapes are considered

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<sup>89</sup> NEW YORK STATE SENATE: THE STENOGRAPHIC RECORD, Reg. Sess., at 2041–42 (N.Y. 2013), <http://legislation.nysenate.gov/pdf/transcripts/042913.v1.txt/> (Apr. 29, 2013).

<sup>90</sup> See S. B. 3710-C.

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> See STENOGRAPHIC RECORD, *supra* note 89, at 2045–46.

<sup>94</sup> See Kenneth Lovett, *Bronx Teacher Raped by City Cop Continues Fight to Get 'Rape is Rape' Bill through Albany*, N.Y. Daily News (July 7, 2013), <http://www.nydailynews.com/news/politics/bronx-teacher-raped-fights-rape-rape-bill-albany-article-1.1392563>.

<sup>95</sup> See *id.*

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part of the same incident (if they have the same name).<sup>96</sup>

However, assertions that state that calling vaginal, oral, and anal penetration “rape” would cause all to be concurrent sentences rather than consecutive are largely unfounded. Concerns about consecutive and concurrent terms may be satisfied by several provisions of New York law causing one to wonder why the Senate is holding onto the traditional definition of “rape.” First, all of the distinct offenses of rape would have separate intents and are separate acts. Moreover, the issue of different acts during an incident mandating concurrent sentences has been established through New York case law. To determine what constitutes a single transaction, the Court of Appeals in *People v. Laureano*<sup>97</sup> stated:

Because both prongs of Penal Law §70.25 (2) refer to the “act or omission,” that is, the “*actus reus*” that constitutes the offense[,] . . . the court must determine whether the *actus reus* element is, by definition, the same for both offenses (under the first prong of the statute), or if the *actus reus* for one offense is, by definition, a material element of the second offense (under the second prong). If it is neither, then the People have satisfied their obligation of showing that concurrent sentences are not required . . . . If the statutory elements do overlap under either prong of the statute, the People may yet establish the legality of consecutive sentencing by showing that the “acts or omissions” committed by defendant were separate and distinct acts . . . .<sup>98</sup>

Generally, where an act involves a lesser-included offense with many of the same material elements, the acts will not be considered separately.<sup>99</sup> An example of the same intent and act as underlying elements is possession of a knife with intent to kill the victim is not separate and distinct from the killing of the victim, Penal Law section 70.25(2) prohibited the trial courts from ordering consecutive sentences.<sup>100</sup> Another example would be if a burglary

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<sup>96</sup> See Press Release, *supra* note 84; *supra* notes 94–95 and accompanying text.

<sup>97</sup> *People v. Laureano*, 664 N.E.2d 1212 (N.Y. 1996).

<sup>98</sup> *Id.* at 1214 (citations omitted).

<sup>99</sup> See *Carter v. United States*, 530 U.S. 255, 260 (2000) (quoting *Schmuck v. United States*, 489 U.S. 705, 716 (1989)).

<sup>100</sup> See, e.g., *People v. Hernandez*, 846 N.Y.S.2d 371, 373 (App. Div. 2007) (first citing *People v. Hamilton*, 830 N.E.2d 306, 308 (N.Y. 2005); then citing *People v. Jenkins*, 824 N.Y.S.2d 676, 678 (App. Div. 2006); then citing *People v. Boyer*, 817 N.Y.S.2d 813, 815 (App. Div. 2006); then citing *People v. Ivory*, 813 N.Y.S.2d 149, 150 (App. Div. 2006); and then citing *People v. Rosario*, 810 N.Y.S.2d 55, 56 (App. Div. 2006)).

charge required trespass as a material element of the burglary and a concurrent sentence may be justified because the burglary may not have been possible without the trespass.<sup>101</sup>

Continuous acts can have different actus reuses or mens reas.<sup>102</sup> For example, a court found that “manipulation of the victim’s penis and the placing of his penis in defendant’s mouth as one continuous act.”<sup>103</sup> Sentences imposed on a “defendant’s convictions of rape in the first degree and incest” should run concurrently where they arose from his “commission of a single act of intercourse . . . .”<sup>104</sup> These cases can be differentiated from acts of rape involving oral or anal contact, though.

However, where there are different acts or counts during the same incident, the defendant’s conviction sentences may run consecutively, for example, in a case where the defendant put his penis in the vagina and mouth “at different times” even if the sequence is not clear.<sup>105</sup> Rape and sodomy during the same incident have also been found to be separate acts in New York.<sup>106</sup> In addition, where a “defendant shot the victim after the robbery already had been completed[,] . . . although the convictions arose out of a single transaction, the robbery and assault were separate and distinct acts . . . .”<sup>107</sup> On conviction of first degree rape, robbery, and burglary, consecutive sentences for rape and robbery were properly imposed, even though both crimes occurred in the course of a “single extended transaction” in the victim’s apartment, since they clearly resulted from separate acts on defendant’s part.<sup>108</sup>

Procedural methods also exist where a defendant committing more than one count of rape can be sentenced to consecutive terms of imprisonment. For example, the prosecution may request a jury

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<sup>101</sup> See, e.g., *Carter*, 530 U.S. at 281 (Ginsburg, J., dissenting).

<sup>102</sup> See *Laureano*, 664 N.E.2d at 1214.

<sup>103</sup> *People v. Lussier*, 613 N.Y.S.2d 466, 468 (App. Div. 1994).

<sup>104</sup> *People v. Respass*, 623 N.Y.S.2d 337, 338 (App. Div. 1995) (citing *People v. Davis*, 582 N.Y.S.2d 791, 792 (App. Div. 1992)).

<sup>105</sup> See *People v. White*, 690 N.Y.S.2d 300, 304 (App. Div. 1999) (first citing *People v. Radage*, 681 N.Y.S.2d 772, 772 (App. Div. 1998); then citing *People v. Willard*, 641 N.Y.S.2d 896, 902 (App. Div. 1996); and then citing *People v. King*, 618 N.Y.S.2d 598, 599 (App. Div. 1994)).

<sup>106</sup> See *People v. Cropper*, 609 N.Y.S.2d 288, 290 (App. Div. 1994) (first citing *People v. Patterson*, 165 N.Y.S.2d 357, 358 (App. Div. 1990); and then citing *People v. Scattareggia*, 543 N.Y.S.2d 742, 744 (App. Div. 1989)).

<sup>107</sup> *People v. Marte*, 860 N.Y.S.2d 191, 192 (App. Div. 2008) (first citing *Laureano*, 664 N.E.2d at 1215; then citing *People v. Bryant*, 834 N.Y.S.2d 305, 307 (App. Div. 2007); and then citing *People v. Murray*, 749 N.Y.S.2d 411, 412 (App. Div. 2002)).

<sup>108</sup> See, e.g., *People v. Blowe*, 515 N.Y.S.2d 812, 815–16 (App. Div. 1987) (quoting *People v. Brathwaite*, 472 N.E.2d 29, 32 (N.Y. 1984)).

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instruction that different acts formed the basis for the two offenses.<sup>109</sup> For violent felonies, the judge may impose consecutive sentences.<sup>110</sup> Rape is a violent felony offense.<sup>111</sup>

Furthermore, in 2014 the Senate was in the process of requiring two or more acts together to receive consecutive sentences if one of the acts is homicide.<sup>112</sup> Also, Senate Bill S.1459 (same as Assembly Bill A.3323) went to the Codes Committee, requiring that persons who commit first degree rape multiple times during the same incident will serve consecutive sentences.<sup>113</sup> The justification section to S.1459 expressed that a single victim may be held and raped multiple times.<sup>114</sup> Consequently, the rapes are judged to be separate acts with separate intents regardless if they occurred with the same victim or during the same incident.<sup>115</sup>

Furthermore, although Michigan has CSC statutes in varying degrees, the terms run consecutively.<sup>116</sup> “The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.”<sup>117</sup>

## IX. LACK OF FORWARD MOVEMENT

Although the New York State Senate Rape Victims Equality Act is somewhat progressive in that it no longer requires penetration, but rather, requires contact, as an essential element for rape, one can see why Lydia Cuomo and Assemblywoman Simotas support the Assembly’s Rape is Rape bill, and not the Senate’s Rape Victims Equality Act, and believe using the term “rape” to name the violation is of importance both for the victim to gain justice and to move society forward.<sup>118</sup> Not naming oral and anal rape as “rape” diminishes the implied harm. Furthermore, Nassau County District Attorney Kathleen Rice, who heads the State District Attorneys Association, has come out in favor of the Assembly Bill.<sup>119</sup>

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<sup>109</sup> See, e.g., *People v. Alford*, 927 N.E.2d 552, 552 (N.Y. 2010).

<sup>110</sup> See, e.g., N.Y. PENAL LAW § 70.25(2-b) (McKinney 2016).

<sup>111</sup> See *id.* § 70.02(1)(a).

<sup>112</sup> See S. B. 6462, 2014 Reg. Sess. (N.Y. 2014).

<sup>113</sup> See S. B. 1459, 2013 Reg. Sess. (N.Y. 2013).

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See MICH. COMP. LAWS § 750.520b(3) (2016).

<sup>117</sup> *Id.*

<sup>118</sup> See Lovett, *supra* note 74.

<sup>119</sup> See *Top New York Prosecutor to Renew Effort to get ‘Rape is Rape’ Bill Passed*, STOP ABUSE CAMPAIGN (Oct. 26, 2013), <http://stopabusecampaign.com/feature/redefinerape>.

Given that the Senate's concerns regarding concurrent sentences can be addressed by the Assembly's Rape is Rape bill, it leaves one to wonder why they do not want to name the three offenses as "rape"? Is New York not ready to give up gender notion?

#### X. CONCLUSION

Finally, a broader definition of rape more correctly reflects the needs of the people of New York. On the practical level, the legislation acknowledges the harms and health risks of all types of sexual assault for both women and men and on the theoretical level, "rape" is a potent term and labeling all types of sexual assault as "rape" may help to engender social change. Michigan and several other states have operated with gender-neutral terms for nearly forty years. It is appropriate for New York law to be correctly worded so that the Penal Code reflects the gravity of the offense of rape to give justice to all victims of all rapes.

A narrow definition of rape minimizes the harm of the acts of other types of sexual assault and promotes gender stereotypes of male assailants and female victims. Concurrent, as opposed to consecutive, sentences are not a legal problem with an expanded definition of rape, as this issue has guidance under New York law. Thus, pertinent questions include why the New York State Senate is reluctant to adopt a broader definition of rape and whether social and political influences still play a part in drafting rape legislation.