

Fall 2004

## No Means No: Withdrawal of Consent during Intercourse and the Continuing Evolution of the Definition of Rape

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### Recommended Citation

Matthew R. Lyon, No Means No: Withdrawal of Consent during Intercourse and the Continuing Evolution of the Definition of Rape, 95 *J. Crim. L. & Criminology* 277 (2004-2005)

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# COMMENTS

## NO MEANS NO?: WITHDRAWAL OF CONSENT DURING INTERCOURSE AND THE CONTINUING EVOLUTION OF THE DEFINITION OF RAPE

MATTHEW R. LYON\*

“[A] withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in what has become nonconsensual intercourse.”<sup>1</sup>

“John Z. wasn’t guilty of rape; he was guilty of being male. If I were a guy, I’d find another country.”<sup>2</sup>

### INTRODUCTION

At approximately 6:30 P.M. on March 23, 2000, 17-year-old Laura T. left her job at a Safeway supermarket in El Dorado County, California and picked up Juan G., a young man whom she had met two weeks earlier.<sup>3</sup> Laura drove Juan to a “party” at a friend’s house, where the only guests were the two of them and three of Juan’s male friends.<sup>4</sup> All of those present, except Laura, were drinking beer.<sup>5</sup> At approximately 8:10 P.M.,

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<sup>1</sup> *People v. John Z.*, 60 P.3d 183, 184 (Cal. 2003).

<sup>2</sup> Kathleen Parker, *Rape California-Style is a Woman’s Prerogative*, ORLANDO SENTINEL, Jan. 12, 2003, at G3.

<sup>3</sup> Appellant’s Brief on the Merits at 3, *John Z.* (No. S103427) [hereinafter App. Brief].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Laura was ready to leave, but she first agreed to join Juan and one of his friends, 16-year old John Z., in a bedroom of the house.<sup>6</sup>

Upon entering the unlit bedroom together, Laura, Juan, and John engaged in consensual sexual interaction, not including intercourse.<sup>7</sup> As the relations intensified, Juan put on a condom and John left the room.<sup>8</sup> At this point, Laura then began to object, but despite her physical resistance and pleas to the contrary, Juan forced Laura to have sexual intercourse.<sup>9</sup> After the rape terminated due to Laura's struggling, Juan left the room.<sup>10</sup> As Laura searched for her clothes in the dark bedroom, John entered the room with his clothes off.<sup>11</sup>

John asked Laura to lie down with him, and then began kissing her and telling her she had a "beautiful body" and that she should be his girlfriend.<sup>12</sup> Laura kissed John back, and John then climbed on top of Laura and put his penis inside of her.<sup>13</sup> The two engaged in sexual intercourse for approximately ten minutes, during which time Laura physically struggled with John.<sup>14</sup> Laura told John several minutes into the act that she "needed to go home"; John responded for Laura to "just give me a minute."<sup>15</sup> Twice more, Laura repeated: "No, I need to go home."<sup>16</sup> After Laura's objections, John continued to have sexual intercourse with her for approximately sixty

<sup>6</sup> *Id.* According to Laura's testimony, she, John and Juan had been alone in the bedroom earlier in the evening. At that time, the boys spoke to her about how she wouldn't do "stuff"; Laura replied that she wasn't ready to do anything and left the room. *John Z.*, 60 P.3d at 184; App. Brief, *supra* note 3, at 3.

<sup>7</sup> *John Z.*, 60 P.3d at 184; App. Brief, *supra* note 3, at 3. This interaction included the removal of Laura's clothes. The boys fondled Laura's breasts and digitally penetrated her. App. Brief, *supra* note 3, at 3. Juan also "asked Laura if it was her fantasy to have two guys, and Laura said it was not." *John Z.*, 60 P.3d at 184.

<sup>8</sup> *John Z.*, 60 P.3d at 184-85.

<sup>9</sup> *Id.* at 185. Juan was originally a co-defendant in this case, but at the close of the victim's testimony he reached a plea agreement with the prosecution, admitting to sexual battery and unlawful sexual intercourse, a misdemeanor. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Laura testified that after penetration, John rolled her over on top of him for about four to five minutes, during which time she tried to pull away several times, and told John that if "he really cared about her he wouldn't be doing this to her." *Id.* John then rolled Laura over onto her back. *Id.* Laura never stated to John, either prior to or during penetration, that she did not wish to have intercourse with him. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

to ninety seconds before discontinuing the act.<sup>17</sup> As Laura dressed and prepared to leave, John turned to her and said, “Well, I didn’t rape you so you cannot call the cops.”<sup>18</sup>

Rape is defined in California as “an act of sexual intercourse . . . accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.”<sup>19</sup> In the incident described above, Laura willingly entered the bedroom with Juan and John, took her clothes off and engaged in sexual foreplay with the two boys.<sup>20</sup> When John entered the room, she kissed him, lay naked on the bed with him, and expressed no objection when the two began engaging in intercourse together.<sup>21</sup> However, on January 6, 2003, the California Supreme Court held in a 6-1 opinion that John was a rapist.<sup>22</sup> In doing so, the court interpreted the state’s rape statute to include situations where the victim initially consents to intercourse, but then withdraws her consent after penetration.<sup>23</sup>

Under the traditional common law definition of rape, the prosecution and conviction of John Z. would have been unthinkable.<sup>24</sup> However, California is one of seven states in which the courts have expanded the definition of rape to include the withdrawal of consent after penetration.<sup>25</sup> Additionally, in response to the *John Z.* decision, Illinois became the first state to pass a statute redefining “nonconsent” in sexual assault cases to include situations where consent is withdrawn after penetration.<sup>26</sup> The reforms in California and Illinois, combined with the sexual assault charges levied, and then subsequently dropped, in Eagle, Colorado, against NBA superstar Kobe Bryant, have focused an unprecedented amount of media attention on the issue of sexual assault and consent of the victim.<sup>27</sup> The

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<sup>17</sup> *Id.* Laura testified that each time she repeated her assertion that she “needed to go home,” John asked for more time and continued the sexual intercourse. *Id.* John claimed that the entire act was consensual, and that he got off of Laura as soon as she told him she needed to leave. *Id.*

<sup>18</sup> App. Brief, *supra* note 3, at 4.

<sup>19</sup> CAL. PENAL CODE § 261(a)(2) (Deering 2004).

<sup>20</sup> See *supra* note 7 and accompanying text.

<sup>21</sup> *John Z.*, 60 P.3d at 185.

<sup>22</sup> *Id.* at 188.

<sup>23</sup> *Id.* at 184.

<sup>24</sup> See discussion *infra* Part II.A.

<sup>25</sup> See discussion *infra* Parts II.B, III.A.

<sup>26</sup> 720 ILL. COMP. STAT. 5/12-17(c) (2004); see discussion *infra* Part III.B.

<sup>27</sup> See, e.g., Matt Bean, *Saying Yes, Then No: Bryant Case Enters National Debate*, COURT TV, available at <http://www.cnn.com/2003/LAW/08/05/ctv.bryant.law/> (last visited Aug. 6, 2003).

reactions of feminists, scholars, and others in the legal community and media at large have ranged from highly supportive to stridently negative.<sup>28</sup>

This comment places the 2003 actions of the California Supreme Court and the Illinois legislature in context with reforms over the past thirty years that challenged the long history of rape laws written by, and designed to support, men. It argues that the California and Illinois responses, while somewhat controversial, are important steps in rape law reform in the United States that are necessary to fully protect the rights of sexual assault victims.

Section I provides a brief description of the evolution of the definition of rape over the past twenty-five years. Reform efforts have manifested themselves most significantly in two areas: the near-eradication of the marital rape exemption, and an increased emphasis on nonconsent of the victim, resulting in the removal of the force requirement as an element of sexual assault in some jurisdictions.<sup>29</sup>

Section II outlines the current state of the law in cases where consent is initially given, and then withdrawn. Some state court decisions in the 1980s reinforced the common-law rule that if consent is given initially, the act cannot be considered rape.<sup>30</sup> In contrast, several recent state court decisions have broadened the definition of rape or sexual assault to include situations where consent is initially given but later withdrawn by the victim.<sup>31</sup>

Section III compares the two methods of including post-penetration rape within the statutory definition of rape. Seven states have enacted this reform by judicial decision, while one has chosen to do so by statute.<sup>32</sup> California and Illinois, as two recent high-profile examples, provide the most guidance to other states considering the reform.<sup>33</sup>

Section IV describes some of the specific criticisms of the expansion of the rape definition in California, Illinois, and other jurisdictions. General criticisms of the policy fall into three categories: (1) it creates an unworkable rule because it is impossible to define a reasonable amount of time for the partner to stop after the women withdraws her consent; (2) it victimizes men; and (3) it trivializes the harm done to those women who are victims of "actual" rapes.<sup>34</sup> Some advocates raise an additional concern

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<sup>28</sup> See discussion *infra* Part IV.

<sup>29</sup> See discussion *infra* Part I.

<sup>30</sup> See discussion *infra* Part II.A.

<sup>31</sup> See discussion *infra* Part II.B.

<sup>32</sup> See discussion *infra* Part III.

<sup>33</sup> See discussion *infra* Part III.

<sup>34</sup> See discussion *infra* Part IV.A.

regarding reform by statute, claiming that it actually minimizes the rights of the victim by transforming them from constitutional rights to statutory rights.<sup>35</sup> However, both the overwhelming need for change and the controversial nature of this policy require that legislatures, as well as the courts, position themselves to enact these reforms.

With public attention currently focused on the issue of post-penetration rape, courts and state legislatures around the country should seek to modernize rape statutes to protect all victims of nonconsensual intercourse, regardless of when those victims manifest their lack of consent.

## BACKGROUND

### I. MODERN REFORMS IN THE DEFINITION OF SEXUAL ASSAULT

Under the English common law, rape was defined as “carnal knowledge of a woman forcibly and against her will.”<sup>36</sup> This definition included three elements: intercourse, force, and lack of consent.<sup>37</sup> American jurisdictions almost universally adopted the three common law elements and maintain them even today.<sup>38</sup> However, the late twentieth century was marked by a series of reforms of rape laws, beginning with the proposed definition of rape in the Model Penal Code.<sup>39</sup> This new wave of reforms arose from the feminist movement of the 1970s, and has continued to the present day.<sup>40</sup> Feminists, progressive legal scholars, and victims’ advocates have sought to “transform the aim of rape law as well as to expand society’s understanding of what constitutes rape.”<sup>41</sup>

The efforts to reform rape law in the United States over the past thirty years are far too significant to be comprehensively covered in this space. However, two types of reforms provide context for the recent decisions in

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<sup>35</sup> See discussion *infra* Part IV.B.

<sup>36</sup> CATHARINE A. MACKINNON, *SEX EQUALITY: RAPE LAW 801 (2001)* (quoting WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 210 (1765)).

<sup>37</sup> SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 318 (7th ed. 2001).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* The Model Penal Code definition maintains the marital rape exemption and the force requirement, but includes within the definition of rape situations where the female’s power to consent is impaired, including where the female is unconscious or under the influence of drugs or intoxicants administered by the male without her knowledge. The definition also includes degrees of rape. MODEL PENAL CODE AND COMMENTARIES § 213.1(1) (Proposed Official Draft 1962) [hereinafter MODEL CODE].

<sup>40</sup> KADISH & SCHULHOFER, *supra* note 37, at 318.

<sup>41</sup> JUDITH G. GREENBERG, MARTHA L. MINOW, AND DOROTHY E. ROBERTS, *WOMEN AND THE LAW* 776 (3d ed. 2004) [hereinafter *WOMEN AND THE LAW*].

some states to include post-penetration withdrawal of consent within the state's definition of rape. These reforms are: (1) the partial abolition of the marital rape exemption; and (2) the increased emphasis on the nonconsent of the victim, rather than the use of force by the attacker, in defining rape.

#### A. PARTIAL ABOLITION OF THE MARITAL RAPE EXEMPTION

Historically, rape law was designed to regulate "competing male interests in controlling sexual access to females, rather than protecting women's interest in controlling their own bodies and sexuality."<sup>42</sup> No vestige of the common law of rape represents this more than the marital rape exemption. Until reform efforts began to take hold in the late 1970s, the definition of rape in nearly every American jurisdiction explicitly stated that husbands could not be prosecuted for raping their wives.<sup>43</sup> The origin of the marital rape exemption is widely attributed to the eighteenth-century English jurist Sir Matthew Hale, who wrote: "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract."<sup>44</sup>

The drafters of the Model Penal Code, who to some degree sought to revise the common law definition of rape, chose to maintain an absolute marital rape exemption.<sup>45</sup> The commentary to the Model Penal Code, which defends the marital rape exemption as avoiding an "unwanted intrusion of the penal law into the life of the family," constitutes a modern defense to Hale's eighteenth-century position.<sup>46</sup> Some defend the marital rape exemption on the grounds that it represents the merger of a man and a

<sup>42</sup> *Id.*

<sup>43</sup> Jill Elaine Hasday, *Content and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1376 (2000).

<sup>44</sup> DIANA E. H. RUSSELL, RAPE IN MARRIAGE 17 (2d ed. 1990) (quoting MATTHEW HALE, HISTORIES OF THE PLEAS OF THE CROWN (1736)). This reasoning as to generalized consent—that a woman cannot retract her consent to sexual intercourse once she enters into marriage—is the same used to argue that, if a woman initially consents to an individual sexual act, she then is proscribed from withdrawing that consent during the act.

<sup>45</sup> Hasday, *supra* note 43, at 1487. The Code mirrors the language of many state statutes in stating that "a male who has sexual intercourse with a female not his wife is guilty of sexual rape if . . ." MODEL CODE, *supra* note 39, § 213.1(1). It also recommends extending the immunity to couples who are living together "as man and wife" but are not formally married. *Id.* § 213.6(2).

<sup>46</sup> MODEL CODE, *supra* note 39, § 213.1(1) cmt. at 345 (1980). The commentary also states that "marriage or equivalent relationship, while not amounting to a legal waiver of the woman's right to say 'no,' does imply a kind of generalized consent that distinguishes some versions of the crime of rape from parallel behavior by a husband." MODEL CODE, *supra* note 39, § 213.1(1) cmt. at 344.

woman into a single legal entity upon their marriage.<sup>47</sup> The defense of the exemption also stems from a “cultural need” to understand the relationship between a husband and wife as “consensual and harmonious.”<sup>48</sup>

When feminist legal scholars began to attack existing rape provisions with vigor in the early 1970s, the marital rape exemption was one of the first targets.<sup>49</sup> Most of the progress in removing the exemption was made during the 1980s, when the number of states in which husbands could be prosecuted for raping their wives increased from nine to forty-two, plus the District of Columbia.<sup>50</sup> Some states chose to abolish the exemption through statutory means; on at least one occasion, this resulted in publicity that gave life to both the reform movement and its critics.<sup>51</sup> Other states required intervention through the courts to abolish or reform their marital rape statutes.<sup>52</sup> Today, roughly half of the states have struck the general marital immunity clause out of their rape statutes entirely, while only two states still preserve a broad marital rape exemption.<sup>53</sup> The remaining states allow prosecution for rape of a wife by her husband, but with some qualifications

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<sup>47</sup> WOMEN AND THE LAW, *supra* note 41, at 862.

<sup>48</sup> Hasday, *supra* note 43, at 1381 (“Never do we hear more about the joys of marital love, trust, and intimacy in a contemporary legal context than when courts, lawmakers, and commentators justify the preservation of a husband’s legal right to rape his wife.”); *see also* WOMEN AND THE LAW, *supra* note 41, at 863.

<sup>49</sup> In her seminal work *Against Our Will*, Susan Brownmiller writes: “A sexual assault is an invasion of bodily integrity and a violation of freedom and self-determination wherever it happens to take place, in or out of the marriage bed.” SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 381 (1975).

<sup>50</sup> RUSSELL, *supra* note 44, at 21.

<sup>51</sup> Oregon deleted the marital rape exemption from its rape statute in 1977. *Id.* at 18. A year later, it became the first state to prosecute a husband for the rape of his wife while he was still living with her. Lalenya Wientraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 364-65 (1995) (citing *State v. Rideout*, No. 108,866 (Marion County Cir. Ct., Or. Dec. 17, 1978) (unreported)). When the defendant, John Rideout, was acquitted, the trial raised national attention regarding the issue of marital rape. Supporters of the reform welcomed the attention to the issue; critics argued that the couple’s subsequent reconciliation proved that the statute was an unwarranted intrusion into private relationships. RUSSELL, *supra* note 44, at 20-21.

<sup>52</sup> The Court of Appeals of New York struck down the marital rape exemption in 1984, finding that “a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity.” *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984).

<sup>53</sup> KADISH & SCHULHOFER, *supra* note 37, at 370. The only two states that retain the marital rape exemption in its traditional common law form are Kentucky and Oklahoma. *See* KY. REV. STAT. ANN. § 510.035 (Michie 2004); OKLA. STAT. ANN. tit. 21, § 1111 (West 2004).



attached (i.e., requiring a lesser punishment than nonmarital rape, or only allowing prosecution if a certain level of force is used).<sup>54</sup>

Complete immunity for spousal rape was a common law standard that existed for hundreds of years. Its near-eradication in a generation provides a model for those who seek further reform of the rape laws in this country.

## B. INCREASED EMPHASIS ON THE VICTIM'S NONCONSENT

Under the common law, the crime of rape must include both the element of force by the attacker and the element of nonconsent of the victim.<sup>55</sup> In response to the proposed definition of rape under the Model Penal Code, many states revised their statutes to increase the emphasis on the use of force during the sexual act.<sup>56</sup> Reacting to critics of this trend, however, many jurisdictions subsequently deemphasized the importance of force in defining rape by loosening the requirement of physical resistance by the victim.<sup>57</sup> A few states have gone even further and turned to the nonconsent of the victim as the ultimate factor in determining if a rape has occurred.<sup>58</sup> Although an absolute reliance on nonconsent is not required to accept the idea of post-penetration withdrawal of consent as rape, it still represents a crucial step in the modernization of rape laws.

### 1. *The Model Penal Code's Emphasis on Force*

As the authors of the Model Penal Code considered a reformed rape statute, they noted that the consent element was more ambiguous than the force element.<sup>59</sup> In fact, the commentators found it necessary for the Code to "draw a line between forcible rape on the one hand and reluctant

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<sup>54</sup> KADISH & SCHULHOFER, *supra* note 37, at 370; see also RUSSELL, *supra* note 44, at 21-23 (discussing the variations among state laws as of January 1990). Skeptics of the impact of the reform of marital rape laws note the limited changes in many states, as well as the fact that marital rapes are not prosecuted any more frequently than before the reforms took hold. Telephone Interview with Wendy Murphy, Director, Victim Advocacy & Research Group (Mar. 2, 2004) [hereinafter Interview with Wendy Murphy, Victim Advocacy & Research Group].

<sup>55</sup> MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 57-59 (1989). Traditionally, this puts the burden of proof on the prosecutor to show both that the defendant forced himself on the victim, and also that the victim asserted her nonconsent to her assailant's actions. *Id.* at 58.

<sup>56</sup> See discussion *infra* Part I.B.1.

<sup>57</sup> See discussion *infra* Part I.B.2.

<sup>58</sup> See discussion *infra* Parts I.B.3.

<sup>59</sup> STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 23* (1998).

submission on the other.”<sup>60</sup> They therefore proposed a rule that would define rape as sexual intercourse only where the man compels the woman “to submit by force or threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone.”<sup>61</sup>

The proposed reform of the Model Code placed the emphasis not on the woman’s consent to the act, or lack of it, but solely on the defendant’s misconduct.<sup>62</sup> The authors of the code had purportedly sought to produce a modern rape statute that would more adequately protect rape victims.<sup>63</sup> Instead, the modification they proposed rendered moot the victim’s subjective (or even objective) manifestation of her lack of consent to her attacker.<sup>64</sup>

During the 1960s, a number of states followed the lead of the Model Penal Code and revised their rape statutes to place a much greater emphasis on force, at the expense of using the victim’s nonconsent as an indicator of guilt.<sup>65</sup> The revised statutes reinforced an emphasis on physical violence, rather than minimizing it.<sup>66</sup> As courts looked to force as the predominantly defining feature of rape, they began to apply a resistance standard rather than a consent standard.<sup>67</sup> A consent standard, advocated by many reformers, “would be one in which rape is proved where the fact-finders are satisfied that the female’s mental condition was such as to withhold her

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<sup>60</sup> *Id.* at 22-23. The commentary reveals a not-so-subtle critique of women’s ability to know whether or not they have “consented” to a sexual act: “Women were thought to be unable to express their sexual desires directly; beset by ‘conflicting emotions,’ women, in this view, might not know what they themselves actually wanted.” *Id.* at 23 (criticizing the decision of the authors of the Code to avoid the consent issue).

<sup>61</sup> MODEL CODE, *supra* note 39, § 213.1(1)(a); SCHULHOFER, *supra* note 59, at 22-23; *see also* SUSAN ESTRICH, REAL RAPE 58-60 (1987).

<sup>62</sup> ESTRICH, *supra* note 61, at 59.

<sup>63</sup> SCHULHOFER, *supra* note 59, at 22 (noting that the move away from consent was, at least in part, “progressive and well-intended”). “The reformers saw the concept of consent as an invitation to put the victim on trial and to divert attention from the defendant’s misconduct.” *Id.*

<sup>64</sup> *Id.*; *see also* Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 210 (2003) (suggesting significant reforms to the Code and specifically noting that the Code’s emphasis on objective measures “have backfired in light of today’s attitudes towards sexual force”).

<sup>65</sup> SCHULHOFER, *supra* note 59, at 23-24; ESTRICH, *supra* note 61, at 59. New York, which previously had defined force in terms of the victim’s “earnest resistance,” revised its rape statute to require “forcible compulsion.” N.Y. PENAL LAW § 130.35 (McKinney 2004). “Lack of consent by the victim, in turn, can result only from forcible compulsion or by an incapacity to consent.” SCHULHOFER, *supra*, at 24.

<sup>66</sup> SCHULHOFER, *supra* note 59, at 24.

<sup>67</sup> KADISH & SCHULHOFER, *supra* note 37, at 329; *see also* SUE BESSMER, THE LAWS OF RAPE 178-90 (1984) (discussing the use of resistance as an indicator of nonconsent).

consent.”<sup>68</sup> However, the Model Penal Code had the opposite effect of defining nonconsent solely in terms of physical evidence of resistance to the attacker.<sup>69</sup> As a result, some defendants who clearly forced intercourse onto women without their consent had their convictions overturned because their victims were not able to show beyond a reasonable doubt the requisite amount of physical resistance.<sup>70</sup>

In response to the trend towards using physical force to define, rather than supplement, a victim's nonconsent, feminist legal reformers argued that the revised laws were working to victims' detriment, rather than helping them.<sup>71</sup> In addition, the revitalized resistance standard represented yet another unwanted imposition of a male standard on the crime of rape, the vast majority of victims of which are women.<sup>72</sup> Reformers began to promote legal definitions of rape that marginalized the use of force, or at the very least broadened its definition beyond physical violence, and placed more of an emphasis on the victim's testimony regarding consent.<sup>73</sup>

States responded to this push for reform both by legislative statute and in the courts.<sup>74</sup> Some states have loosened the rigid resistance requirement and relied more on the victim's reported state of mind at the time of the act.<sup>75</sup> More significantly, a minority of states shifted towards removing

<sup>68</sup> BESSMER, *supra* note 67, at 178.

<sup>69</sup> KADISH & SCHULHOFER, *supra* note 37, at 329; BESSMER, *supra* note 67, at 178-90.

<sup>70</sup> See *State v. Alston*, 312 S.E.2d 470 (N.C. 1984) (holding that lack of physical resistance meant abusive ex-boyfriend's intercourse with victim without her consent was not rape); ESTRICH, *supra* note 61, at 60-63 (describing *Alston* and criticizing the definition of "force" adopted by the North Carolina court); see also *State v. Thompson*, 792 P.2d 1103 (Mont. 1990) (holding that high school principal's threats that student would not graduate if she did not submit to intercourse could not be considered force, as the definition of force does not include intimidation, fear, or apprehension).

<sup>71</sup> BESSMER, *supra* note 67, at 180 (arguing that where the resistance standard is applied rigorously, it places "stringent demands" on the victim).

<sup>72</sup> See ESTRICH, *supra* note 61, at 60. "In rape the male standard defines a crime that, traditionally by law and still predominantly in practice, is committed only by men against women." *Id.*; see also BROWNMILLER, *supra* note 49, at 369 (arguing that the resistance standard placates men's concerns "that beyond the female's oath, her word, her testimony, there was not mutual intercourse and subsequent vindictiveness and wrath, but an objective, tangible crime").

<sup>73</sup> See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1182 (1986) ("[A]t the very least the criminal law ought to say clearly that women who actually say no must be respected as meaning it; that nonconsent means saying no; that men who proceed nonetheless, claiming that they thought no meant yes, have acted unreasonably and unlawfully.").

<sup>74</sup> KADISH & SCHULHOFER, *supra* note 37, at 329.

<sup>75</sup> *Id.*; see discussion *infra* Part I.B.2.

force entirely as an element of the crime of rape, concentrating solely on the consensual nature of the act.<sup>76</sup>

## 2. Loosening of the Resistance Requirement

The extent to which a victim resists her attacker with physical force has long been considered a necessary indicator of the female's nonconsent to the sexual act.<sup>77</sup> The purpose of a resistance requirement is both to show a physical manifestation of the victim's nonconsent and to provide a (purportedly objective) standard by which prosecutors and factfinders can determine if there was nonconsent.<sup>78</sup> The Commentaries to the Model Penal Code actually seemed to recommend that states abolish the resistance requirement.<sup>79</sup> However, the vast majority of states ignored this directive, instead choosing to follow the Code's (seemingly contradictory) emphasis on force.<sup>80</sup> Thus, prior to reforms that began in the 1970s, the resistance requirement was still explicitly included in many state rape statutes.<sup>81</sup>

States varied as to the amount of resistance required to show that an act was against the victim's will.<sup>82</sup> The most rigid standards, applied in most states up until the 1970s, required the victim to show the "utmost resistance."<sup>83</sup> Today, only one state still requires that a victim resist to the "utmost."<sup>84</sup> Nearly all states have liberalized the rule, with about half requiring the victim only to meet a reasonableness standard of resistance.<sup>85</sup>

<sup>76</sup> See discussion *infra* Part I.B.3.

<sup>77</sup> BESSMER, *supra* note 67, at 177.

<sup>78</sup> GORDON & RIGER, *supra* note 55, at 59.

<sup>79</sup> SCHULHOFER, *supra* note 59, at 21. The commentators, seeking to modernize rape statutes, found that the common law resistance requirement was antiquated and harmful to victims. See, e.g., *id.* at 19 (citing *Whittaker v. State*, 50 Wis. 519, 522 (1880) (overturning conviction of defendant who raped a victim at gunpoint because "submission . . . no matter how reluctantly yielded, removes from the act an essential element of the crime of rape")).

<sup>80</sup> *Id.* at 24; see also Denno, *supra* note 64, at 211-17 (contrasting the "progressive" nature of the Commentaries with the now-outdated language of the Code itself).

<sup>81</sup> SCHULHOFER, *supra* note 59, at 24; KADISH & SCHULHOFER, *supra* note 37, at 329.

<sup>82</sup> GORDON & RIGER, *supra* note 55, at 59.

<sup>83</sup> *Id.* "Utmost resistance" means in general terms "that the victim did everything possible, exercised every physical means within her power, to prevent the assailant from completing the assault." *Id.* The standard as applied in many states also included a requirement that the victim's resistance not subside until after penetration. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 963.

<sup>84</sup> Louisiana retains the "utmost resistance" standard for the crime of aggravated rape, but requires a lesser standard for crimes of forcible and simple rape. LA. REV. STAT. ANN. §§ 14:42(A)(1), 14:42.1, 14:43 (West 2004).

<sup>85</sup> KADISH & SCHULHOFER, *supra* note 37, at 329. The reasonableness standard judges resistance relative to circumstances surrounding the alleged assault and the victim's physical and mental state. GORDON & RIGER, *supra* note 55, at 59.

Several additional states actually eliminated the resistance standard entirely.<sup>86</sup> Though many states rejected the resistance requirement via legislative action, the most widely cited rejection of the resistance requirement occurred in a decision by the Maryland Court of Appeals.<sup>87</sup> There, the court upheld a defendant's rape conviction where the victim acquiesced to intercourse, without physical resistance, out of fear for her own safety.<sup>88</sup>

Evidence of the practical impact of removing the resistance standard is mixed.<sup>89</sup> Within states that have removed the formal resistance requirement entirely, courts "continue to consider resistance (or its absence) as highly probative on the question of whether the victim consented."<sup>90</sup> Prosecutors still rate the use of physical force as the most important single factor in securing convictions of rape defendants.<sup>91</sup> Generally, however, the liberalization and partial elimination of the formal resistance requirement is viewed as a positive development for victims because it broadens the ways in which they may manifest their nonconsent.<sup>92</sup>

### 3. *Removal of Force as an Element of Rape*

Another reform in this area, albeit one that has received much less acceptance among the states, is the removal of force entirely as an element of the crime of rape.<sup>93</sup> Under this approach, all incidents of nonconsensual

<sup>86</sup> SCHULHOFER, *supra* note 59, at 30; KADISH & SCHULHOFER, *supra* note 37, at 329. States that have completely eliminated the resistance requirement by statute include Michigan, Ohio, Pennsylvania, and New Jersey. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520(a) (West 2004); N.J. STAT. ANN. § 2C:14-2C(1) (West 2004); OHIO REV. CODE ANN. § 2907.02 (West 2004); PA. CONS. STAT. ANN. § 18-3121 (West 2004).

<sup>87</sup> *State v. Rusk*, 424 A.2d 720 (Md. 1981).

<sup>88</sup> *Id.* at 737 ("[T]he old rule of 'resistance to the utmost' is obsolete. The law does not require that the woman shall do more than . . . all attending circumstances make reasonable for her to do in order to manifest her opposition."). *Rusk* is emblematic of a trend among courts of applying a less strict (and arguably more realistic) view of force. Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 419-20 (1998).

<sup>89</sup> SCHULHOFER, *supra* note 59, at 31 (noting that the prevailing view is that most courts still require evidence of physical resistance and consider verbal protests alone to be insufficient, regardless of the statutory language in their state).

<sup>90</sup> KADISH & SCHULHOFER, *supra* note 37, at 329.

<sup>91</sup> ESTRICH, *supra* note 61, at 18-19. Resistance by the victim is especially influential on the outcome of cases of acquaintance rape, where the victim's initial meeting with her attacker was voluntary. *Id.* at 19.

<sup>92</sup> *See* Dressler, *supra* note 88, at 420-21. *But see generally* Anderson, *supra* note 83 (arguing that the resistance requirement be revived, but that verbal resistance be given the legal equivalence of physical resistance).

<sup>93</sup> KADISH & SCHULHOFER, *supra* note 37, at 329.

intercourse would be treated as a crime, regardless of whether physical force occurred.<sup>94</sup> Some feminist scholars have long hailed such a reform as necessary to protect the rights of victims, particularly those who know their attacker and fear physical retaliation if they go beyond a mere verbal assertion of nonconsent.<sup>95</sup>

The most-cited case involving the removal of force as an element of rape is the New Jersey Supreme Court's 1992 decision in *State in the Interest of M.T.S.*<sup>96</sup> In this case, seventeen-year-old M.T.S. was staying in the home of fifteen-year-old C.G. and her mother.<sup>97</sup> The nature of the relationship between the two teenagers was in great dispute at trial, but C.G. claimed that M.T.S. came to her bedroom very early on the morning of May 22, 1990.<sup>98</sup> C.G. allegedly awoke from a deep sleep to find M.T.S. on top of her, with his penis inside of her.<sup>99</sup> She immediately slapped M.T.S. in the face and "told him to get off [her] and get out"; M.T.S. complied less than a minute later.<sup>100</sup> M.T.S., in contrast, testified that C.G. had invited him to her room and that the sex between them was consensual.<sup>101</sup> However, during the act, C.G. changed her mind and pushed M.T.S. off, at which time he immediately complied with her wishes.<sup>102</sup>

The trial court found that C.G. was not sleeping at the time of the act, and that she and M.T.S. were engaged in consensual kissing and heavy petting; however, C.G. had not consented to intercourse.<sup>103</sup> M.T.S. was convicted of second-degree sexual assault, but the appellate division overturned, citing a lack of the element of force required to establish rape.<sup>104</sup>

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<sup>94</sup> *Id.* Under this regime, nonconsensual intercourse in the absence of force might be treated either as rape or as a lesser degree of sexual assault.

<sup>95</sup> See generally Lucy Reed Harris, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976). "[T]he reasonable man . . . should be one who understands that a woman's word is deserving of respect, whether she is a perfect stranger or his own wife." ESTRICH, *supra* note 61, at 97.

<sup>96</sup> 609 A.2d 1266 (N.J. 1992).

<sup>97</sup> *Id.* at 1267.

<sup>98</sup> *Id.* at 1267-68.

<sup>99</sup> *Id.* at 1268.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1269.

<sup>104</sup> *In re M.T.S.*, 588 A.2d 1282, 1284 (N.J. Super. Ct. App. Div. 1991) (noting that "there is no crime involving the penetration of a victim who does not give consent, [unless] there is physical force or coercion . . . or other statutorily-added conditions present").

In a unanimous decision, the New Jersey Supreme Court reversed and reinstated *M.T.S.*'s rape conviction.<sup>105</sup> The court reasoned that, even though New Jersey's recently reformed rape statute included a requirement of physical force, "physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful."<sup>106</sup> With the force requirement met by penetration, courts could focus on whether the defendant reasonably believed that "the alleged victim had freely given affirmative permission to the specific act of sexual penetration."<sup>107</sup> By holding that force was intrinsic to the sexual act, and making the victim's manifestation of nonconsent the focus of its analysis, New Jersey became the first state to effectively eliminate force as an element of rape.<sup>108</sup>

The *M.T.S.* decision met with a predictably mixed reaction. Rape reform advocates praised the court's opinion, claiming that it "provide[d] a historic statement of the relevance of the law of sexual assault for protecting personal autonomy."<sup>109</sup> However, the opinion also attracted its fair share of critics.<sup>110</sup> Many focused on the dangers of mistake-of-fact regarding consent, and argued that *M.T.S.*, and laws similar to it, unjustly punish men for misunderstanding communications from women regarding sex—a problem that has existed as long as there have been relationships between the genders.<sup>111</sup>

After the New Jersey decision, a few states adopted similar provisions that allow prosecution for lesser sexual assault offenses where force is not present.<sup>112</sup> This innovative approach remains the minority view, though, as

<sup>105</sup> *M.T.S.*, 609 A.2d at 1279-80.

<sup>106</sup> *Id.* at 1277. The Court went on to state that "a person's failure to protest or resist cannot be considered or used as justification for bodily invasion." *Id.* at 1279.

<sup>107</sup> *Id.* at 1278.

<sup>108</sup> *Id.*

<sup>109</sup> PEGGY REEVES SANDAY, *A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL* 281 (1996); see also Mustafa K. Kasubhai, Note, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN'S L.J. 37, 66 (1996) ("In raising the significance of freely-given permission, the court appropriately legitimized the significance of consent over the confusing doctrine of force.").

<sup>110</sup> See Dressler, *supra* note 88, at 421-45. Dressler argues that the New Jersey Supreme Court "acted as a super-legislature," redrafting the state's rape statute and inviting disproportional punishment by treating intercourse as force. *Id.* at 423. "[U]nder *M.T.S.* . . . we have gone beyond the no-means-rape proposition to absence-of-yes means forcible rape." *Id.* at 425.

<sup>111</sup> WOMEN AND THE LAW, *supra* note 41, at 830 (citing Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 L. & PHIL. 95 (1992)).

<sup>112</sup> Under Wisconsin law, first- and second-degree sexual assault requires intercourse without the consent of the victim by use or threat of force or violence. WIS. STAT. ANN. §§

the physical force requirement remains the law in nearly every American jurisdiction.<sup>113</sup> These efforts at reform may be isolated or may in fact represent “the threshold of a new era in the long and painful evolution of women’s sexual autonomy.”<sup>114</sup> Either way, they have helped to set the stage for the next step in rape reform laws—the inclusion of post-penetration withdrawal of consent within the definition of rape.

## II. STATE OF THE LAW REGARDING WITHDRAWAL OF CONSENT

A discussion of the most recent changes regarding post-penetration rape must first be placed in a historical context. The majority of states that have heard cases on post-penetration rape have done so while reviewing the appropriateness of jury instructions.<sup>115</sup> The common law rule that a woman cannot withdraw her consent after penetration remains the majority rule.<sup>116</sup> However, consistent with the more general liberalization of rape laws, an increasing number of states are revising statutes to include situations where the woman withdraws her consent after the act of intercourse has begun.<sup>117</sup>

### A. MAJORITY RULE

The vast majority of states still adhere to the common law principle that once consensual intercourse begins, a man cannot be prosecuted for rape even if the woman withdraws her consent during the act.<sup>118</sup> Though a handful of state supreme courts have recognized the defendant’s disregard of withdrawal of consent as a form of sexual assault, one should not construe these examples to mean that the majority of states accept this change.<sup>119</sup> Until it is overturned, by either court decision or statute, the majority common-law rule remains in the forty-two states that have not yet addressed the issue. In addition, a few state courts have heard the issue of

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940.225(1)-(2) (2004). However, the crime of third-degree sexual assault, a Class G felony, does not require the use of force. § 940.225(3). Florida has enacted a similar statute, making nonconsensual intercourse without the use of force a second-degree felony. FLA. STAT. ANN. § 794.011(5) (2004).

<sup>113</sup> SCHULHOFER, *supra* note 59, at 44.

<sup>114</sup> SANDAY, *supra* note 109, at 278.

<sup>115</sup> See discussion *infra* Parts II-III.A.

<sup>116</sup> See discussion *infra* Part II.A.

<sup>117</sup> See discussion *infra* Parts II.B.

<sup>118</sup> See discussion *infra* Parts II.B., III (describing the only eight states that have deviated from the common-law standard).

<sup>119</sup> See discussion *infra* Parts II.B., III. The eight states that have abolished the common law standard and expanded their definitions of rape to include post-penetration withdrawal of consent are Alaska, California, Connecticut, Illinois, Kansas, Maine, Minnesota, and South Dakota. See discussion *infra* Parts II.B., III.



withdrawal of consent and reaffirmed the doctrine that a man cannot be guilty of sexual assault once a woman gives her initial consent.

### *1. North Carolina*

The North Carolina Supreme Court was the first in modern times to consider the case of continued forced intercourse in the face of withdrawn consent.<sup>120</sup> It did so in the context of a jury instruction in a rape trial regarding withdrawn consent.<sup>121</sup> In that case the defendant, Donnie Way, and victim, Beverly Hester, were on their first date together.<sup>122</sup> During the date, they went with another couple to the apartment of the defendant's friend.<sup>123</sup> The victim accompanied the defendant to a bedroom, at which time she testified that Way hit her, and she undressed "because she was scared."<sup>124</sup> Beverly further testified the defendant then forced her to "have intercourse with him even though she begged him not to because she was a virgin."<sup>125</sup> During the act, Beverly complained of severe stomach pains, and Way got off her and called her friend from downstairs.<sup>126</sup> They then took Beverly to the hospital, where she reported she had been raped.<sup>127</sup> Way denied slapping Beverly and said that the couple sat in the bedroom and talked for over thirty minutes before undressing and engaging in consensual intercourse.<sup>128</sup>

During deliberations at trial, the jury asked the judge "whether consent can be withdrawn" and the judge responded affirmatively.<sup>129</sup> Way was convicted of second-degree rape, and appealed on the grounds that the court's instruction on withdrawal of consent was in error.<sup>130</sup> The North

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<sup>120</sup> State v. Way, 254 S.E.2d 760 (N.C. 1979); see also Erin G. Palmer, Note, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should be a Crime in North Carolina*, 82 N.C. L. REV. 1258 (2004) (describing the Way case at length and criticizing it in light of recent actions by other states, including John Z. and the Illinois statute).

<sup>121</sup> Way, 254 S.E.2d at 761.

<sup>122</sup> *Id.* at 760.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 760-61.

<sup>126</sup> *Id.* at 761.

<sup>127</sup> *Id.* The doctor who examined Beverly at the hospital on the night of the incident testified that there were bruises and some swelling on her face, and that her vagina "showed evidence of recent trauma." *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* The court's instruction stated: "[C]onsent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this would constitute the crime of rape." *Id.*

<sup>130</sup> *Id.*

Carolina Supreme Court agreed with the defendant and granted him a new trial, stating that consent may only be withdrawn between acts of intercourse, rather than during a single act.<sup>131</sup> The court went on to hold that:

Under the court's instruction, the jury could have found the defendant guilty of rape if they believed Beverly had consented to intercourse with the defendant and in the middle of *that* act, she changed her mind. This is not the law. If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions.<sup>132</sup>

## 2. Maryland

Two years after *Way*, the Maryland Court of Appeals heard a case involving a similar instruction to a jury.<sup>133</sup> In this case, the victim, a forty-four year old grandmother, drove the defendant, John Battle, to his apartment, purportedly to examine a radio that Battle had offered to sell her.<sup>134</sup> When the two arrived at Battle's home, she accompanied him to his room voluntarily, at which time the victim testified that Battle grew violent, striking her.<sup>135</sup> Battle then brandished a screwdriver and held it to the victim's head, demanding that she disrobe and join him in bed.<sup>136</sup> The victim complied, and the defendant raped her.<sup>137</sup> The defendant told a very different story, testifying that he found the victim naked in his bedroom and inviting him to engage in intercourse, which he declined.<sup>138</sup>

As in *Way*, the jury submitted a question to the judge during deliberations: "When a possible consensual sexual relationship becomes non-consensual for some reason, during the course of the action can the act then be considered rape?"<sup>139</sup> After clarifying the jury's question, the judge responded, in part: "it is possible for a situation to start out as consensual

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<sup>131</sup> *Id.* (citing R. ANDERSON, 1 WHARTON'S CRIM. L. & PROC. § 302 (1957)).

<sup>132</sup> *Id.* at 761-62. *But see* Palmer, *supra* note 120, at 1269-71 (arguing that an "accurate reading" of the North Carolina rape statute indicates that *Way*, or anyone who "refuses to cease intercourse immediately after a woman withdraws consent" has committed second-degree rape).

<sup>133</sup> Battle v. State, 414 A.2d 1266 (Md. 1980).

<sup>134</sup> *Id.* at 1267.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1268.

and then become a non-consensual one in the course of the event.”<sup>140</sup> The jury then convicted Battle of assault with intent to rape.<sup>141</sup>

The Court of Appeals considered whether the judge’s instruction confused the jury to the point that a new trial was warranted.<sup>142</sup> In doing so, the court considered the history of Maryland’s rape statute, which arose from the English common law.<sup>143</sup> Noting the dearth of cases similar to the situation described in the jury instruction, the court cited precedent to show that the victim’s consent (or lack of it) at the time of initial penetration is the determining factor when analyzing if a rape has occurred.<sup>144</sup> For example, when the victim originally does not consent to intercourse, but then gives her consent after penetration, the act is still considered rape.<sup>145</sup> Thus, the court concluded that if a woman consents to intercourse prior to penetration, and then withdraws her consent, no rape has occurred.<sup>146</sup> As such, it held that the jury’s question and judge’s subsequent answer “create[d] sufficient confusion . . . to warrant reversal and remand for a new trial.”<sup>147</sup>

### 3. California Appellate Court: Vela

Prior to the 2003 California Supreme Court decision in *People v. John Z.*, the California appellate courts were split regarding whether or not consent could be withdrawn.<sup>148</sup> The case following the traditional common-law rule, like *Way* and *Battle*, dealt with the appeal of a jury instruction

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1267.

<sup>142</sup> *Id.* at 1268. While defense counsel did not specifically object on the grounds that the judge’s instruction was ambiguous, he did speculate that “what the jury thought in their minds, I thought it was wrong . . . I would say during the course of the action . . . the person cannot claim and start screaming rape.” *Id.* The Court of Appeals found that while counsel’s response to the judge was “not as specific an objection as one might prefer . . . the sum total of his statement was to specify that the question and answer were unclear.” *Id.*

<sup>143</sup> *Id.* at 1269.

<sup>144</sup> *Id.* at 1269-70. The court cited a number of legal treatises to support its proposition, as well as cases in Kansas, *State v. Allen*, 183 P.2d 458 (Kan. 1947); New Jersey, *State v. Auld*, 67 A.2d 175 (N.J. 1949); and Tennessee, *Wright v. State*, 23 Tenn. 194 (1843); see also Amy McLellan, Comment, *Post-Penetration Rape—Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 789 (1991).

<sup>145</sup> *Battle*, 414 A.2d at 1269-70. “[W]hen the offense has been made complete by penetration, no remission by the woman or consent from her, however quickly following, can avail the man.” *Id.* at 1269 (quoting J. BISHOP, CRIMINAL LAW § 1122 (8th ed. 1892)).

<sup>146</sup> *Id.* at 1270 (“[O]rdinarily if [the woman] consents prior to penetration and withdraws the consent following penetration, there is no rape.”).

<sup>147</sup> *Id.* at 1271.

<sup>148</sup> *People v. John Z.*, 60 P.3d 183, 185-86 (Cal. 2003).

regarding withdrawal of consent during intercourse.<sup>149</sup> The court relied heavily on the *Way* and *Battle* decisions in reaching its opinion.<sup>150</sup> The defendant claimed that the victim initially consented to intercourse, but changed her mind during the act and withdrew her consent.<sup>151</sup> He then continued the act of intercourse by force and against the victim's will.<sup>152</sup>

The jury submitted a note during deliberations asking: "Once penetration has occurred with the female's consent, if the female changes her mind does force from that point (where she changes her mind) constitute rape?"<sup>153</sup> The judge responded in the affirmative, and the jury returned a guilty verdict.<sup>154</sup> The Appellate Court, Fifth District conceded that the question of post-penetration rape was one of first impression in California, but held that the trial court's instruction to the jury was incorrect and ordered a new trial for the defendant.<sup>155</sup> Citing *Way* and *Battle*, the court opined that "the presence or absence of consent at the moment of initial penetration appears to be the crucial point in the crime of rape."<sup>156</sup> Therefore, if consent is given at the time the act begins, the act of intercourse is "shielded from being a rape" even if the woman withdraws her consent while the act is taking place.<sup>157</sup>

The exclusion of post-penetration withdrawal of consent was, in the view of the court, consistent with the rape statute in California.<sup>158</sup> The court's reasoning was that "the essence of the crime of rape is the outrage to the person and feelings of the female resulting from nonconsensual violation of her womanhood."<sup>159</sup> Such outrage cannot be present where a female has willingly consented to the act of intercourse, even if she

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<sup>149</sup> *People v. Vela*, 218 Cal. Rptr. 161 (Cal. Ct. App. 1985), *overruled by John Z.*, 60 P.3d at 184.

<sup>150</sup> *Id.* at 162.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 162-63.

<sup>154</sup> *Id.* at 163. Prior to the return of the verdict, the court conducted additional research on the question of post-penetration withdrawal of consent, concluding that its answer to the jurors' note may have been in error. *Id.* After polling the jury to see if its verdict had been based in part on the court's answer to the note, the judge asked the jury to deliberate further as if the court had not been able to answer the question. *Id.* The jury again returned a unanimous verdict of guilty. *Id.*

<sup>155</sup> *Id.* at 163, 165.

<sup>156</sup> *Id.* at 164.

<sup>157</sup> *Id.* The court noted that acts of force or violence during the act, while not considered rape, could be punishable under other crimes (*i.e.*, assault or battery). *Id.* at 165.

<sup>158</sup> *Id.* at 164-65 (citing CAL. PENAL CODE §§ 261, 263 (West 1985)).

<sup>159</sup> *Id.* at 165.

withdraws her consent during the act.<sup>160</sup> The *Vela* court's reasoning received some criticism at the time, and was later overruled in *John Z.*<sup>161</sup> However, it remains an important example of the view that existed at common law and that remains the law today in over eighty percent of states.

## B. MINORITY RULE

While most states have not yet addressed the issue of post-penetration rape, many that have done so have adopted the position that their state's rape statute included situations where consent was withdrawn during intercourse.

### 1. Maine

Maine was the first state to classify intercourse that continues after consent is withdrawn as rape.<sup>162</sup> In 1984, the Maine Supreme Court heard the appeal of Gordon Robinson III from his rape conviction.<sup>163</sup> The victim testified that she allowed Robinson into her home to make a phone call after he ran out of gas, and that he then raped her.<sup>164</sup> Robinson, in contrast, claimed that he and the alleged victim engaged in sexual foreplay and then consensual intercourse before she suddenly declared: "I guess I don't want to do this anymore."<sup>165</sup> Robinson claimed that after the alleged victim made this statement, he got dressed and left her home immediately.<sup>166</sup>

At trial, the jury submitted a question to the judge regarding the law governing post-penetration rape.<sup>167</sup> The judge responded that if one party continues to engage in intercourse after the other has revoked her consent, then a rape has occurred.<sup>168</sup> The judge stressed that "the critical element there is the *continuation under compulsion.*"<sup>169</sup> On appeal, the Maine Supreme Judicial Court rejected Robinson's argument that revoked consent

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<sup>160</sup> *Id.* Where consent is withdrawn after penetration, "the sense of outrage to [the woman's] person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood." *Id.*

<sup>161</sup> See generally McLellan, *supra* note 144 (criticizing *Vela* and proposing a statute that would ensure that rape encompasses the withdrawal of consent post-penetration).

<sup>162</sup> State v. Robinson, 496 A.2d 1067 (Me. 1984).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 1069.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* The jury's written question stated: "Concerning the law—if two people began consenting to an act, then one person says no and the other continues—is that rape?" *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

cannot transform initially consensual intercourse into rape.<sup>170</sup> The court reasoned that a definition of rape that includes withdrawn consent was consistent with the legislative intent of the Maine rape statute.<sup>171</sup> It also issued a harsh attack on the *Way* decision, criticizing the North Carolina court's "misparaphrase" of the jury instruction so as to exclude the element of compulsion.<sup>172</sup>

While the court's extension of the Maine rape statute to cover the trial judge's instruction was striking, its language was pointed and very clear as to how far it was willing to go.<sup>173</sup> The court emphasized that the ongoing intercourse, initiated with the alleged victim's consent, "did not become rape merely because she revoked her consent."<sup>174</sup> Rather, a rape occurred because of the defendant's use of forcible compulsion to make the victim submit to continued intercourse after she withdrew consent.<sup>175</sup> One might surmise that the court would not recognize as rape a situation where the victim withdrew consent and the attacker continued, but did not use force.<sup>176</sup> More recent state court decisions have relied less on force, and more on consent, in protecting victims of nonconsensual sex.

## 2. Other States

Since *Robinson*, courts in several other states have held that their states' rape statutes cover continued forced intercourse after consent is withdrawn. In Connecticut, the appeals court upheld a jury instruction similar to the one in *Robinson*.<sup>177</sup> The trial judge carefully instructed the

<sup>170</sup> *Id.* "The dramatic change from the role of a voluntary participant to that of a victim compelled involuntarily to submit to the sexual intercourse is a distinct one." *Id.* at 1071.

<sup>171</sup> *Id.* at 1069-70. The Maine statute included the elements of sexual intercourse and forcible compulsion, both of which were present in this situation. *Id.* at 1069. Therefore, the judge's instruction was factually correct. *Id.* at 1069-70 (citing ME. REV. STAT. ANN. tit. 17-A, § 252(1) (West 1983) (repealed 1989)).

<sup>172</sup> *Id.* at 1070. While the trial court's jury instruction in *Way* included a requirement of "force or threat of force," the North Carolina Supreme Court ignored this part of the instruction in its analysis. *Id.* (citing *State v. Way*, 254 S.E.2d 760, 761-62 (N.C. 1979)). The *Robinson* court went on to state that, in its view, the *Way* court "did not cite any authority on point, and in any event erroneously stated the issue involved both there and here." *Id.*

<sup>173</sup> *Id.* at 1069-70.

<sup>174</sup> *Id.* at 1070.

<sup>175</sup> *Id.*

<sup>176</sup> Since a reliance on force requires courts to use the resistance requirement, rather than a consent standard, a situation where the woman says "no" during intercourse but does not resist physically (out of fear, perhaps) would not be considered rape under the Maine statute as interpreted in *Robinson*.

<sup>177</sup> *State v. Siering*, 644 A.2d 958, 964 (Conn. App. Ct. 1994), *cert. denied*, 648 A.2d 158 (Conn. 1994).

jury that continued intercourse after consent is withdrawn is only rape if it is accompanied by force.<sup>178</sup> The court found that the Connecticut rape statute, which read that “penetration, however slight [is sufficient] to complete . . . intercourse” should not be construed to mean that the act of penetration concludes intercourse.<sup>179</sup> Thus, it rejected the notion, espoused by the Maryland court in *Battle*, that consent at penetration is equivalent to consent for the entire act.<sup>180</sup> Unconvinced by any of the decisions made in other states regarding the issue, the court resolved the issue “on the basis of [its] own best judgment” by stating that “if intercourse is without consent and accomplished through force, it constitutes sexual assault.”<sup>181</sup>

Prior to 2003, three other state courts issued similar decisions involving jury instructions that interpreted their states’ rape statutes to include post-penetration withdrawal of consent.<sup>182</sup> In South Dakota, the State Supreme Court upheld a trial judge’s decision to refuse a defendant’s proposed jury instruction that was based on the *Vela* decision in California.<sup>183</sup> Minnesota adopted the position that rape includes forcible continuation of sexual intercourse after consent is withdrawn when its Court of Appeals upheld a trial court judge’s jury instruction to that effect.<sup>184</sup> Finally, and more recently, the Court of Appeals of Alaska upheld a similar trial court instruction, making it the fifth state in the nation to adopt the minority view.<sup>185</sup>

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<sup>178</sup> *Id.* at 961 n.3. The trial judge’s answer to a previous question by the jury was “no,” based on the omission of any reference to force within the question. *Id.* While the inclusion of a force requirement implies that the court may have been closely following the *Robinson* decision, the court cautioned that “the reasoning of the Maine court, while appealing, reflects in part that state’s statutes, which are not identical to our own.” *Id.* at 963 (citing *Robinson*, 496 A.2d at 1070).

<sup>179</sup> *Id.* at 962 (citing CONN. GEN. STAT. § 53a-65(2) (1984)).

<sup>180</sup> See *Battle v. State*, 414 A.2d, 1266, 1269-70 (Md. 1980).

<sup>181</sup> *Siering*, 644 A.2d. at 963. The court found the Maryland court’s discussion in *Battle* to be dicta, the North Carolina court’s analysis in *Way* to be “merely a bald statement that the trial court was wrong,” and the *Vela* court’s reasoning to be “archaic and unrealistic.” *Id.*

<sup>182</sup> *McGill v. State*, 18 P.3d 77 (Alaska Ct. App. 2001); *State v. Crims*, 540 N.W.2d 860 (Minn. Ct. App. 1995), *cert. denied*, No. C1-95-304, C6-95-41 (Minn. 1996); *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1984).

<sup>183</sup> *Jones*, 521 N.W.2d at 672 (“This court has never held that initial consent forecloses a rape prosecution and, based on the facts of this case, we choose not to adopt the position of the *Vela* case.”).

<sup>184</sup> *Crims*, 540 N.W.2d at 865. The court favorably cited the Maine, Connecticut, and South Dakota decisions and held that this rule was consistent with Minnesota’s rape statutes. *Id.*

<sup>185</sup> *McGill*, 18 P.3d at 84. In rejecting McGill’s arguments, the court interpreted the state’s statutes as not limiting “sexual penetration” to the initial moment of penetration. *Id.* Additionally, the court stated that “nothing in the legislative history of our statute supports

### 3. California Appellate Court: Roundtree

When the California Supreme Court decided *John Z.* in 2003, it did so in part to resolve a split between the *Vela* court and another appellate court that found the opposite result in a similar case a full fifteen years later after *Vela*.<sup>186</sup> In the 2000 case, the defendant brought a 15-year-old runaway, Jennifer, to a carport in an apartment complex in which he claimed his sister lived.<sup>187</sup> Jennifer alleged that the defendant ripped her clothes off and, over her cries of “no,” beat and raped her.<sup>188</sup> She stayed with him overnight, and told her mother the next day that she had been raped.<sup>189</sup> Roundtree claimed that the two had consensual sex during which Jennifer grew angry and told him to stop.<sup>190</sup>

Responding to a jury question, the trial court stated that if all other elements of rape are present, “the fact that there was a prior penetration with the consent of the female does not negate rape.”<sup>191</sup> The First District Appellate Court upheld the instruction, explicitly rejecting *Vela*’s conclusion as “unsound” and declining to follow it.<sup>192</sup> *Vela*’s focus on “the moment of penetration as the crucial moment of the crime of rape” was “not the question presented in *Vela* nor is it the issue presented here.”<sup>193</sup> Rather, under the relevant California statute, a rape occurs if the victim removes consent and is forced to continue with intercourse against her will.<sup>194</sup> Roundtree also criticized the *Vela* court’s assertion that continued forcible intercourse after a woman withdraws consent is somehow less of an outrage to the woman than intercourse without consent at penetration.<sup>195</sup>

Roundtree created an appellate division split in California. The State Supreme Court addressed the split in 2003, which became a groundbreaking year of state reform of post-penetration rape policies.<sup>196</sup>

McGill’s argument that once a person is sexually penetrated with consent, that consent cannot be withdrawn.” *Id.*

<sup>186</sup> See discussion of *Vela supra* Part II.A.3; *People v. Roundtree*, 91 Cal. Rptr. 2d 921 (Cal. Ct. App. 2000).

<sup>187</sup> *Roundtree*, 91 Cal. Rptr. 2d at 922.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 923.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 924.

<sup>193</sup> *Id.* at 924-25 (quoting *People v. Vela*, 218 Cal. Rptr. 161 (Cal. Ct. App. 1985)).

<sup>194</sup> *Id.* at 925.

<sup>195</sup> *Id.* at 924 (“The statutory requirements of the offense [of rape] are met as the act of sexual intercourse is forcibly accomplished against the victim’s will. The outrage to the victim is complete. That the victim initially consented to the act is not determinative.”).

<sup>196</sup> See discussion *infra* Part III.



## DISCUSSION

## III. METHODS OF CHANGE

As with any reform in the law, there are two primary ways in which change can take place: judicial action and legislative statute. The year 2003 began with five states explicitly including, within the meaning of their rape statutes, the act of continued forced intercourse after the victim withdraws consent.<sup>197</sup> It ended with one state adopting this position by a landmark State Supreme Court decision, a second issuing a similar opinion, and a third embracing the change through legislative action.<sup>198</sup>

## A. CHANGE THROUGH THE COURTS: CALIFORNIA

The case of the minor John Z. allowed the California Supreme Court to address an inconsistency among its appellate courts in this emerging area of sexual assault policy.<sup>199</sup> The court seized the opportunity, and in its opinion went into greater depth than any other court regarding a woman's right to withdraw her consent during intercourse.<sup>200</sup> John was convicted for forcible rape in the trial court, and in his appeal made several arguments that his conviction should be overturned. These included: (1) a reliance on the *Vela* court's "outrage theory"; (2) a newly-minted "primal urge" theory; and (3) a mistake-of-fact defense based on a purported lack of evidence that Laura, the victim in the case, had manifested a lack of consent. All seven members of the court rejected the first argument, while the other two attracted the support of the lone dissenting justice in the case.<sup>201</sup>

1. *Outrage Theory*

First, John relied on the reasoning of the state appellate court in *Vela*, claiming that "a consensual beginning to sexual intercourse does in fact alter the complexion of the act, thus differentiating it from an act of sexual intercourse where the female never consented."<sup>202</sup> John adopted the *Vela* court's argument that the sense of personal outrage a woman feels when she has initially consented to the act cannot possibly match that of a victim

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<sup>197</sup> See discussion *supra* Part II.B.

<sup>198</sup> See discussion *infra*.

<sup>199</sup> *People v. John Z.*, 60 P.3d 183, 184 (Cal. 2003); see discussion of *John Z.* facts *supra* Introduction.

<sup>200</sup> *John Z.*, 60 P.3d at 183. The *John Z.* case is also notable because it was the first time any court had approached the post-penetration rape issue directly from the facts of a case, rather than through the instrument of a jury instruction. *Id.*

<sup>201</sup> See generally *id.* at 183-91.

<sup>202</sup> App. Brief, *supra* note 3, at 9.

where intercourse begins without consent.<sup>203</sup> Since rape is essentially a crime of outrage, this argument reasons, continued intercourse where consent is initially given, and then taken away, can at most be considered some lesser form of sexual assault, but certainly not rape as defined under the California Penal Code.<sup>204</sup>

The court responded to the “outrage theory” argument by totally repudiating *Vela*, characterizing its reasoning (as well as that of both *Way* and *Battle*) as “unsound.”<sup>205</sup> The court noted that it is fruitless for a judicial body to assume varying levels of outrage among victims of different types of forced intercourse.<sup>206</sup> Even more significantly, no California case, either before or after *Vela*, had ever held that the level of outrage suffered by the victim was an element of rape.<sup>207</sup> By hinging their reasoning on such a tenet, both the defendant in *John Z.* and the *Vela* court on which he relied in his appeal sealed their own fates.<sup>208</sup>

## 2. “Primal Urge” Theory

Perhaps sensing the flawed reasoning of *Vela*, John next formulated an argument using the language of *Roundtree*, which, at the time, stood in direct conflict with *Vela*.<sup>209</sup> John argued that *Roundtree* implied that courts must adopt a “reasonable amount of time” measure into the analysis of the

<sup>203</sup> *Id.* (quoting *People v. Vela*, 218 Cal. Rptr. 161, 164-165 (Cal. Ct. App. 1985), *rev'd John Z.*, 60 P.3d at 183).

<sup>204</sup> App. Brief, *supra* note 3, at 9 (citing CAL. PENAL CODE § 263 (2003)). “Our conclusion that no rape occurs under these circumstances does not preclude the perpetrator from being found guilty of another crime or crimes warranted by the evidence.” *Vela*, 218 Cal. Rptr. at 165.

<sup>205</sup> *John Z.*, 60 P.3d at 186.

<sup>206</sup> *Id.* (“Contrary to *Vela*’s assumption, we have no way of accurately measuring the level of outrage the victim suffers from being subjected to continued forcible intercourse following withdrawal of her consent. We must assume the sense of outrage is substantial.”). Observers have noted that the rule advocated by both John and the *Vela* court “equates the harm of rape with penetration alone and ignores the loss of sexual freedom that occurs when a woman is forced to continue a sexual encounter against her will.” Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 816-17 (1988).

<sup>207</sup> *John Z.*, 60 P.3d at 186. Further, nothing in the California rape statute makes the degree of the victim’s outrage a condition for the crime of rape. See CAL. PENAL CODE § 261 (2003); cf. Palmer, *supra* note 120, at 169 (criticizing the *Way* court and observing that “[a]lthough outrage and suffering by victims are significant and valid reasons for punishing rapists, they are not essential elements of the crime of rape in North Carolina”).

<sup>208</sup> However, it should be noted the so-called “outrage theory” was allowed to stand for eighteen years as a basis for legitimizing forced intercourse after a victim withdraws her consent.

<sup>209</sup> App. Brief, *supra* note 3, at 12.

alleged sexual assault.<sup>210</sup> In order to convict a man of post-penetration rape, a court would determine whether he stopped intercourse within a reasonable amount of time after the woman withdrew her consent.<sup>211</sup> As this would be very difficult for a court to gauge, the rule that the State of California advocated against John was unworkable.<sup>212</sup> John argued:

Sexual intercourse . . . is not a mechanical act that can be immediately started and immediately stopped by the turning of an ignition or a switch. It is a living act. When a female initially consents to sexual intercourse and allows a male to penetrate her, she causes certain consequences to occur. . . a male's primal urge to reproduce is aroused. . . . It is only natural, fair, and just that a male be given a *reasonable amount of time in which to quell his primal urge*, which was originally consensually invoked, upon withdrawal of a female's consent.<sup>213</sup>

John further claimed that the sixty to ninety seconds it took for him to cease intercourse after Laura withdrew her consent constituted such a reasonable amount of time.<sup>214</sup>

The court rejected John's "primal urge" theory, citing a complete lack of any supporting authority.<sup>215</sup> Further, the court found the argument contrary to the state's rape statute, which contains no language that "suggests that the defendant is entitled to persist in intercourse once his victim withdraws her consent."<sup>216</sup> Even so, the record suggests that John had "ample time" to withdraw after Laura's protests, but chose not to do so.<sup>217</sup> Thus, John's reasonable time, or "primal urge" argument failed.<sup>218</sup>

The majority declined the opportunity to issue instructional language to other courts as to what might be a reasonable amount of time for a man to end intercourse after the woman withdraws consent.<sup>219</sup> This lack of

<sup>210</sup> *Id.* (citing *People v. Roundtree*, 91 Cal. Rptr. 2d 921, 924 (Cal. Ct. App. 2000)) (criticizing the lack of specificity in *Roundtree's* rule that "rape therefore is necessarily committed when a victim withdraws her consent during sexual intercourse but is forced to complete the act").

<sup>211</sup> *Id.* at 12.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 11-12 (emphasis added).

<sup>214</sup> *Id.* at 14.

<sup>215</sup> *People v. John Z.*, 60 P.3d 183, 187 (Cal. 2003).

<sup>216</sup> *Id.* (citing CAL. PENAL CODE § 261(a)(2) (2003)).

<sup>217</sup> *Id.* The court noted that Laura repeated her admonition that she "had to go home" three times, with John ignoring her pleas each time. *Id.* The court determined that John "continued the sex act for at least four or five minutes after Laura *first* told him she had to go home," and that after her third plea John continued to force sex on her "for about a 'minute, minute and [a] half.'" *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 187-88. In choosing not to issue a holding regarding a specific time period that might be "reasonable," the court cited both the nature of the case (a juvenile adjudication,

specificity met with harsh criticism from the dissent.<sup>220</sup> “The majority . . . does not tell us how soon would have been soon enough. Ten seconds? Thirty? A minute? Is persistence the same thing as force?”<sup>221</sup> The difficulty of choosing a particular amount of time between withdrawal of consent and termination of intercourse is one popular criticism of the California decision and like cases.<sup>222</sup>

### 3. Evidence of Withdrawal of Consent

John’s final argument relied on the facts of his case, rather than legal theory. Here, he made a basic mistake-of-fact argument, claiming that even if the California statute covered post-penetration rape, the state failed to provide sufficient evidence that the victim, Laura, actually withdrew her consent.<sup>223</sup>

Chief Justice Janice Rogers Brown, in dissent, focused on what she perceived to be a shaky manifestation of nonconsent by the victim. In her analysis of what she termed a “sordid, distressing, sad little case,” Chief Justice Brown agreed with the much of the majority’s legal analysis.<sup>224</sup> For example, she admitted that “after intercourse has commenced, [a woman] has the absolute right to call a halt and say ‘no more’ and if she is compelled to continue, a forcible rape is committed.”<sup>225</sup> However, she argued that in this particular case, the prosecution did not show beyond a reasonable doubt that Laura’s actions and words constituted an unequivocal withdrawal of consent.<sup>226</sup> Further, even if Laura did withdraw her consent, the state did not show that John continued the act with force after that

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rather than a jury trial) and the fact that the briefs did not address the issue of a particular time period. *Id.*

<sup>220</sup> *Id.* at 190 (Brown, C.J., dissenting).

<sup>221</sup> *Id.* (Brown, C.J., dissenting).

<sup>222</sup> Supporters of the *John Z.* decision praise this approach, arguing that this is a question of fact for a jury to determine and any attempt by a court or legislature to codify a period of time as unreasonable is “the same thing as saying a little bit of rape is okay.” Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54; *see also* discussion *supra* Part IV.A.1.

<sup>223</sup> App. Brief, *supra* note 3, at 13-14. John conceded in his brief that Laura “expressly withdrew her consent after . . . eight and a half to nine minutes.” *Id.* However, he also noted that “the evidence demonstrates that Laura is an outgoing, conversational, independent and sexually experienced person. There is no evidence that she is shy, easily dominated or unable to perceive a situation at face value.” *Id.* at 12.

<sup>224</sup> *John Z.*, 60 P.3d at 189 (Brown, C.J., dissenting).

<sup>225</sup> *Id.* at 188 (Brown, C.J., dissenting).

<sup>226</sup> *Id.* at 190 (“Laura’s silent and ineffectual movements could easily be misinterpreted. And, none of her statements are unequivocal.”) (Brown, C.J., dissenting).

point.<sup>227</sup> As such, the state did not prove John's guilt beyond a reasonable doubt.<sup>228</sup>

The majority responded to the claims of both John and Chief Justice Brown by emphasizing the facts in the record.<sup>229</sup> Laura physically struggled with John even when she was on top of him, and asserted her need to go home three separate times, yet John continued the act.<sup>230</sup> As such, "no reasonable person in defendant's position would have believed that Laura continued to consent in the act."<sup>231</sup> Further, John exerted force over Laura that was "clearly ample" to satisfy the level of force necessary for conviction under the state's rape statute.<sup>232</sup> Since John should have known that Laura withdrew her consent, but instead ignored her pleas and continued the act with force, he was guilty of the crime of rape.<sup>233</sup>

#### 4. Kansas: Another Change Through the Courts

Since the *John Z.* opinion, a seventh state, Kansas, has adopted the position that forced continuance of sexual intercourse after a victim withdraws her consent constitutes rape.<sup>234</sup> This case once again offered conflicting testimony by the two parties involved, with the woman claiming that she was the victim of acquaintance rape and the man testifying that the woman was a consensual participant until after penetration occurred.<sup>235</sup> The defendant looked to both *Battle* and the (now vacated) *Vela* decision to argue that the encounter was not rape, citing the common-law rule that "rape occurs at the time of initial penetration, or not at all."<sup>236</sup>

<sup>227</sup> *Id.* (Brown, C.J., dissenting). The Chief Justice stressed that, like in the other states that have adopted this reform, force is still a requirement of the California rape statute, regardless of when consent is withdrawn: "[S]exual intercourse is not transformed into rape merely because a woman changes her mind." *Id.* (Brown, C.J., dissenting).

<sup>228</sup> *Id.* (Brown, C.J., dissenting).

<sup>229</sup> *Id.* at 185-87.

<sup>230</sup> *Id.* The court declined to mention that Laura had just been raped by John's friend Juan mere minutes before their encounter. This may certainly have had some effect on Laura's ability to manifest her nonconsent, regardless of her "outgoing" nature. See *supra* text accompanying notes 8-11; see also Robert Greene, *Confusion Over Consent*, L.A. WEEKLY NEWS, Nov. 21-27, 2003, at <http://www.laweekly.com/ink/03/53/features-greene.php> (noting that the majority "makes a point of describing Juan's rape").

<sup>231</sup> *John Z.*, 60 P.3d at 187.

<sup>232</sup> *Id.* (citing CAL. PENAL CODE § 261(a)(2) (2003); *People v. Mom*, 96 Cal. Rptr. 2d 172 (Cal. 2000)). The level of force required is "substantially different from or substantially greater than that necessary to accomplish the rape itself." *John Z.*, 60 P.3d at 187.

<sup>233</sup> *Id.*

<sup>234</sup> *State v. Bunyard*, 75 P.3d 750 (Kan. Ct. App. 2003).

<sup>235</sup> *Id.* at 754-55.

<sup>236</sup> *Id.* at 755-56.

The Kansas Court of Appeals was unmoved, and found that such a definition would lead to a “tortuous interpretation” of the Kansas rape statute.<sup>237</sup> Further, it rejected the defendant’s “reasonable time” argument, and adopted the rule that “when consent is withdrawn, continuing sexual intercourse for five to ten minutes is not reasonable and constitutes rape.”<sup>238</sup> The Kansas court thus went a step further than any other court, including the California court in *John Z.*, by delineating a specific time period as unreasonable.<sup>239</sup>

#### B. CHANGE THROUGH STATUTE: ILLINOIS

While courts in seven states now interpret their rape laws to include consent withdrawn during intercourse, only one state has codified this change through statute. In late January 2003, soon after the *John Z.* opinion was issued, the office of State Senator Dan Rutherford (R-Pontiac) contacted the Illinois Coalition Against Sexual Assault (ICASA) to enlist their support for a bill he planned to introduce in the Illinois Senate.<sup>240</sup> Senator Rutherford’s learned of the *John Z.* case and felt that, in order to avoid split appellate courts and a prolonged legal battle in Illinois, the legislature should act to clarify the state’s law immediately.<sup>241</sup>

Sen. Rutherford introduced SB 406, the so-called “No Means No” Act, which added a new section to the Illinois rape statute that read: “A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.”<sup>242</sup> Sen. Rutherford undertook a significant public relations effort throughout the state, and found a high-ranking member of his party to introduce a companion bill in the State House of Representatives.<sup>243</sup>

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<sup>237</sup> *Id.* at 756 (“Quite simply, sexual intercourse performed when one participant is under force or fear is rape. It does not matter if the force or fear exists at the initiation of the act or whether it comes after consent is withdrawn. The act is rape under either circumstance.”).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Telephone Interview with Sean Black, Communications Director, Illinois Coalition Against Sexual Assault (Dec. 30, 2003) [hereinafter Interview with Sean Black, ICASA].

<sup>241</sup> *Id.*; Telephone Interview with Dan Rippy, Staff Member, Office of State Senator Dan Rutherford (Mar. 9, 2004) [hereinafter Interview with Dan Rippy, Sen. Rutherford’s Office].

<sup>242</sup> 720 ILL. COMP. STAT. 5/12-17(c) (2004).

<sup>243</sup> Interview with Sean Black, ICASA, *supra* note 240. The initial sponsor in the Illinois House was Rep. Rosemary Mulligan (R-Des Plaines). Senator Rutherford argued that the new bill was not so much a change in the law, but a clarification, designed to avoid a circuit

Although the bill attracted some critics, it was signed into law by Governor Rod Blagojevich with relatively little accompanying fanfare on July 24, 2003.<sup>244</sup> Thus, Illinois became the only state to pass a statute explicitly protecting the rights of women to withdraw their consent at any time during sexual intercourse.<sup>245</sup>

No state had similar legislation pending during 2003 or the early part of 2004.<sup>246</sup> However, the media attention given to the *John Z.* case, the Illinois statute, and the now-aborted Kobe Bryant trial makes it possible, if not likely, that a number of state legislatures may introduce such statutes.<sup>247</sup> Critics of the statutory approach vow to fight further efforts to reform the law through this method, and were successful in derailing legislation in California similar to that which passed in Illinois.<sup>248</sup> However, activism by state legislatures on this issue would be welcomed, because changes via the legislative process are needed to legitimize the policy and avoid delay in its implementation.<sup>249</sup>

#### IV. RESPONSE TO CRITICS OF THE REFORM

The attention showered on this issue by feminists, legal scholars, and the media at large has been both positive and negative. Many victims' advocates groups responded to the actions with praise. The National Crime Victim Law Institute hailed the *John Z.* decision as "modern and progressive," and stated that it "means that a woman has complete control over her sexual activity."<sup>250</sup> In addition, ICASA Executive Director Polly Poskin supported the passage of the SB 406 in Illinois as "an important step

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split such as the one that had occurred in California. Interview with Dan Rippey, Sen. Rutherford's Office, *supra* note 241.

<sup>244</sup> Interview with Sean Black, ICASA, *supra* note 240; see Wendy McElroy, *Law Needs New Category of Sexual Assault*, at <http://www.ifeminists.net/introduction/editorials/2003/0819.html> (Aug. 19, 2003) [hereinafter *New Category*]; see also discussion of criticism of the statutory approach, *supra* Part IV.B.

<sup>245</sup> Interview with Sean Black, ICASA, *supra* note 240. Douglas Baloof, head of the National Crime Victim Law Institute, stated that he believed the Illinois statute was "the first of its kind in the country." *New Illinois Rape Law Protects People Who Change Mind During Sex*, FOX NEWS, available at [www.foxnews.com/story/0,2933,93245,00.html](http://www.foxnews.com/story/0,2933,93245,00.html) (last accessed Sept. 27, 2003).

<sup>246</sup> Interview with Sean Black, ICASA, *supra* note 240.

<sup>247</sup> *Id.*; Alex Markels, *The Rape Disconnect*, L.A. WEEKLY NEWS, Oct. 24, 2003, available at <http://www.laweekly.com/ink/03/49/newsmarkels.php>.

<sup>248</sup> Telephone interview with Mary Beth Carter, Executive Director, California Coalition Against Sexual Assault (Feb. 27, 2004) [hereinafter Interview with Mary Beth Carter, CALCASA]; see discussion of criticism of the statutory approach, *infra* Part IV.B.

<sup>249</sup> See discussion *supra* Part IV.B.

<sup>250</sup> Maura Dolan, *Ruling Expands Scope of Rape*, L.A. TIMES, Jan. 7, 2003, at B1.

in recognizing the rights of women to control their own bodies and ensure their safety.”<sup>251</sup>

However, the verdict of public opinion regarding these changes in the law is far from unanimous, and the vitriol with which critics have responded to the California and Illinois actions identifies potential problems with the policy.<sup>252</sup> Some critics target the entire policy, while others support the reforms but favor a particular method of implementation.<sup>253</sup> However, the need for change exists, and legislatures, as well as the judiciary, should both position themselves to enact these reforms while attention is focused on them.<sup>254</sup>

#### A. GENERAL CRITICISMS OF THE REFORM

Critics of the post-penetration rape laws have three major complaints: (1) the reform creates an unworkable rule because it is impossible to define a “reasonable” time for the partner to stop after the woman withdraws her consent; (2) the reform victimizes men; and (3) the reform trivializes the harm done to those women who are victims of “actual” rapes.

##### 1. *The Reform is Ambiguous and Unworkable*

The first group of critics argues that the reform creates a vague mandate that is impossible for men, and even women, to follow.<sup>255</sup> This difficulty is twofold: it is hard for the man to know both *if* the woman has withdrawn her consent and *when* to stop if he feels the consent has been withdrawn.<sup>256</sup> Once a woman agrees to sexual intercourse and the act begins, it may become difficult for a man to determine if she withdraws her consent.<sup>257</sup> In addition, since no court has adopted an explicit “reasonable”

<sup>251</sup> Press Release, Illinois Coalition Against Sexual Assault, ICASA Supports “No Means No” Legislation (Feb. 10, 2003), available at [http://www.icasa.org/uploads/no\\_means\\_no.doc](http://www.icasa.org/uploads/no_means_no.doc).

<sup>252</sup> See discussion *infra* Part IV.

<sup>253</sup> See discussion *infra* Part IV.B.

<sup>254</sup> *Id.*

<sup>255</sup> This argument flows naturally from Chief Justice Brown’s dissent in *John Z.*, in which she speculated that John may have had a reasonable belief that Laura did not waive her consent. Specifically, John could have viewed the words “I have to go home” as “requests for reassurance or demands for speed.” *People v. John Z.*, 60 P.3d 183, 190 (Cal. 2003) (Brown, C.J., dissenting).

<sup>256</sup> *Id.*; see also Greene, *supra* note 230 (“Did Laura, having just been raped by John Z.’s friend, really consent? Did she really revoke consent later, or was she just seeking some reassurance from John? Or telling him to hurry up?”).

<sup>257</sup> See, e.g., Debra Saunders, *Not As She Does*, at <http://www.townhall.com/columnists/debrasaunders/ds20030114.shtml>. (Jan. 14, 2003) (arguing that *John Z.* and like opinions



time, men have no guidance as to the time the law will allow them after withdrawal of consent to cease the sexual act.<sup>258</sup>

Certainly, the adoption of a rule that includes withdrawal of consent during intercourse within the definition of rape adds an element to the adjudication of rape cases that did not previously exist. However, juries are fully capable of applying the facts of a case to their state's rape statute and determining whether a defendant violated the law.<sup>259</sup> The fact that consent is withdrawn before, rather than after penetration does not affect the basic fact-finding role that trial courts have played for centuries.<sup>260</sup> Additionally, this function will be unaffected whether the change in the law occurs through judicial or legislative activism.<sup>261</sup>

The question as to whether courts or legislatures should implement a "reasonable" time after which a male must withdraw is slightly more complicated. Certainly, both courts and state legislatures could adopt specific guidelines as to the time a male has to cease intercourse after the female's manifestation of nonconsent.<sup>262</sup> It would not be the first time a legislature or judicial body has set a specific time to an action to prevent violation of a constitutional right.<sup>263</sup> However, critics are persuasive when they decry attempts by either courts or legislatures to codify a particular

mean that girls will believe in a "fairytale world without consequences" that is "not realistic").

<sup>258</sup> See *John Z.*, 60 P.3d at 190 (Brown, C.J., dissenting); see also Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?*, 117 HARV. L. REV. 2341, 2363 (2004) [hereinafter *Acquaintance Rape*] ("The vagueness of the persistence element of postpenetration rape illustrates the uneasiness with which it sits as a proxy for force.").

<sup>259</sup> *John Z.*, 60 P.3d at 185. In *John Z.*, six members of the California Supreme Court upheld the trial court's decision that John's actions constituted rape. *Id.*

<sup>260</sup> The question remains as to the standard trial courts should use to determine whether the defendant's actions were "reasonable." Some would promote an objective standard that focuses on whether a reasonable defendant would find that the victim had asserted her lack of consent. See SCHULHOFER, *supra* note 59, at 22. Others would argue that a subjective test focusing on the victim's state of mind is more appropriate. Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54. Courts will still face this choice whether or not they adopt the proposed reform that includes post-penetration rape; as such, this is a debate for another forum.

<sup>261</sup> See *infra* Part IV.B.

<sup>262</sup> While no court has identified a reasonable time within which a man must end intercourse if his partner withdraws her consent, the Kansas Court of Appeals did hold that more than five minutes between manifestation of nonconsent and cessation of the act was unreasonable, and thus constituted rape. *State v. Bunyard*, 75 P.3d 750, 756 (Kan. Ct. App. 2003); see *supra* text accompanying notes 237-39.

<sup>263</sup> See, e.g., *United States v. Banks*, 540 U.S. 31 (2003) (holding unanimously that a delay of fifteen to twenty seconds between a warning knock and entrance into an apartment was a sufficient period to preserve defendant's Fourth Amendment rights).

period of time as “reasonable,” and would leave the decision to the jury in each individual case.<sup>264</sup> Due to the complex nature of the circumstances surrounding post-penetration rape, this case-by-case analysis is clearly preferable to a *per se* approach that defines an explicit unit of time as “reasonable.”

## B. THE REFORM VICTIMIZES MEN

Accompanying claims that the reform creates an ambiguous rule is a not-so-subtle allegation that this reform is a next step in an ongoing “victimization” of men in our society.<sup>265</sup> Some critics argue that this proves the prosecution of rape in this country is now “skewed against men,” and “men may well be advised to keep a stopwatch as well as contraceptives by the bedside.”<sup>266</sup> One well-known and nationally-syndicated conservative columnist described this undeserved punishment of men by the courts as follows:

I’m sorry, but when did girls get so stupid? In the old days—when girls were apparently both smarter and tougher—a girl who didn’t want to have sex didn’t have sex. She said no thanks, grabbed her purse and walked out the door. The boy may have been disappointed and frustrated, but he wasn’t confused. “No” meant “no.” And “yes” meant yes to the finish line.<sup>267</sup>

This rationale is fundamentally insulting to men. It smacks of the “primal urge” argument raised by the defense in *John Z.* and rejected by all seven members of the California Supreme Court.<sup>268</sup> Men are just as capable as women of acting rationally during sexual intercourse, and of knowing exactly when sex crosses the line from a consensual act to an act of force.<sup>269</sup> “The minute we start to believe [otherwise] is the minute we begin to deprive our sons, and our daughters, the opportunity for a healthy, safe and

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<sup>264</sup> Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54; see *supra* note 222.

<sup>265</sup> See generally Parker, *supra* note 2; Wendy McElroy, *When is it Rape?*, at [www.ifeminists.net/introduction/editorials/2003/0114.html](http://www.ifeminists.net/introduction/editorials/2003/0114.html) (Jan. 14, 2003).

<sup>266</sup> McElroy, *supra* note 244.

<sup>267</sup> Parker, *supra* note 2, at G3.

<sup>268</sup> See discussion *supra* Part III.A.1.

<sup>269</sup> See Cathy Young, *Troubling Questions About Rape and Consent*, BOSTON GLOBE, Jan. 20, 2003, at A15 (“No less disturbing is the suggestion that a healthy red-blooded male can’t control himself under the circumstances. Believe it or not, men as well as women can change their minds during sex.”); see also Palmer, *supra* note 120, at 1276-77 (describing this “myth of the unstoppable male” as “insulting to men and frightening for women who expect personal sexual autonomy and the right to bodily integrity”).

rewarding life: both as individuals and as partners.”<sup>270</sup> The act of penetration does not transform the male into an animal, incapable of self-control, any more than it changes the female’s status from an equal and willing partner to one who exists solely to “quell” the male’s “primal urge.”<sup>271</sup>

### 3. *The Reform Trivializes Victims of “Real Rape”*

A third argument, raised occasionally by feminists generally supportive of liberalizing rape laws, states that a woman who sends a man “jumbled signals” should not have the same protection of the law as a woman “who is brutally beaten into sexual submission.”<sup>272</sup> These critics suggest that forced sexual intercourse that begins as a consensual act should fall into some lesser category of sexual assault, but not rape.<sup>273</sup> Other feminists have expressed a concern that the definition of rape will continue to shift until it includes not just unwanted sex, but also so-called “bad sex.”<sup>274</sup>

These critics map out an argument that is markedly similar to the “outrage theory” put forward by the *Vela* court, briefed by John’s lawyers, and dismissed by the California court in its landmark 2003 opinion.<sup>275</sup> Each state passing this reform has reiterated that the crime of rape simply involves intercourse, performed by force and without the partner’s consent.<sup>276</sup> In other words, where consent is withdrawn, force remains, and intercourse continues, there is rape, regardless of when that consent is withdrawn.<sup>277</sup> Additionally, there exists no empirical proof that rape by a stranger is any more harmful to women than rape at the hands of someone

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<sup>270</sup> Maggie Thurs, *Men Deserve Better*, at [http://www.vtnetwork.org/newsletter/2003\\_04/cal\\_supreme\\_court.html](http://www.vtnetwork.org/newsletter/2003_04/cal_supreme_court.html) (last accessed Sept. 27, 2003).

<sup>271</sup> See App. Brief, *supra* note 3, at 11-12; *supra* Part III.A.2.

<sup>272</sup> McElroy, *supra* note 244.

<sup>273</sup> *Id.*

Rape must not be trivialized; it should remain the violent act of taking sex through force or threat of force. Sexual contact that begins with consent and ends as unwelcome is simply in a different category than rape. If a new legal category or theory is required to address the situation of withdrawn consent, then it should be created. But the brutal crime of rape should not be diluted in the process.

*Id.*

<sup>274</sup> See generally KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS* (1994).

<sup>275</sup> See *supra* Parts II.A.3, III.A.1; *John Z.*, 60 P.3d at 186.

<sup>276</sup> See discussion *supra* Parts II.B, III.A; see also *John Z.*, 60 P.3d at 190 (Brown, C.J., dissenting).

<sup>277</sup> See discussion *supra* Parts II.B, III.A.

who was at one time a trusted partner.<sup>278</sup> To suggest that post-penetration rape is any less outrageous than so-called “real rape” is an affront to the bodily integrity of women, and hearkens back to the pre-reform era in which the cries of countless victims were ignored.

#### B. REFORM BY STATUTE DIMINISHES WOMEN’S RIGHTS

Some victims’ rights advocates raise an additional concern regarding reform by statute, claiming that the laws such as the one passed in Illinois actually do more harm than good to the rights of victims. Indeed, this argument created the only political obstacle that advocates of the Illinois statute faced as they lobbied on behalf of the bill.<sup>279</sup>

The most outspoken critic of the Illinois statute has been Wendy Murphy, the director of the Victim Advocacy and Research Group in Boston.<sup>280</sup> The basic premise of Ms. Murphy’s argument is that women’s rights against post-penetration rape are grounded in the Constitution’s protections of freedom, bodily integrity, and personal autonomy.<sup>281</sup> Codifying these basic rights, under the guise of freedom, actually does women a disservice, because the rights are no longer guaranteed but are instead subject to the whims of the legislative process.<sup>282</sup> As such, it is crucial that advocates for the reform of rape laws avoid the temptation for a legislative “quick fix” and instead seek change through the courts.<sup>283</sup>

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<sup>278</sup> Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54. In fact, some scholars believe that psychological damage is even more significant where victims are raped by trusted male partners or acquaintances, rather than strangers. See JENNIFER J. FREYD, BETRAYAL TRAUMA: THE LOGIC OF FORGETTING CHILDHOOD ABUSE 190 (1996) (arguing that “the greater the intimacy . . . between the rapist and the adult victim, the more knowledge isolation and forgetting” suffered by the victim).

<sup>279</sup> Interview with Sean Black, ICASA, *supra* note 240. This argument also led to the rejection of similar legislation in California. Interview with Mary Beth Carter, CALCASA, *supra* note 248. *But see* Interview with Dan Rippey, Sen. Rutherford’s Office, *supra* note 241 (stating that the senator’s office was “not aware of anyone lobbying against” SB 406).

<sup>280</sup> Bean, *supra* note 27 (“‘You shouldn’t have to codify basic principles of human rights, which is what rape laws are all about,’ [Murphy] said. ‘You should never put it into legislation that people have a right to change their mind.’”); Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54.

<sup>281</sup> Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54. This approach has also been adopted by the California Coalition Against Sexual Assault. CALCASA’s Executive Director, Mary Beth Carter, notes that while it is positive that legislatures are recognizing the importance of the issue, it is crucial that the inclusion of withdrawal of consent in state rape statutes be effected in a way that protects women’s constitutional rights. Interview with Mary Beth Carter, CALCASA, *supra* note 248.

<sup>282</sup> Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54.

<sup>283</sup> *Id.*

The criticism of the Illinois statute by victims' advocacy groups makes sound legal sense. However, to ensure public acceptance of this potentially controversial change in rape law, it is crucial that both courts and legislatures take ownership of the reform process. First, dependence on the courts risks reversal of the growing public support for rape law reform if the public perceives that the courts have overreached.<sup>284</sup> One need only observe two of the most divisive social issues of the present day, abortion rights and homosexual marriage, for examples of a legislative backlash to judicial directives that go beyond the realm of public opinion.<sup>285</sup> It is also worth noting that, while the *John Z.* opinion created a fury of media attention, the Illinois statute was signed into law to little public response.<sup>286</sup>

Even more importantly, wholesale rejection of statutory reform would ensure that this needed change in state rape statutes would come later, rather than sooner. Even supporters of the judicial method of reform acknowledge that the reforms would be a "very long-term process."<sup>287</sup> Since current public attention to the issue might spark a series of legislative reforms, similar to those that removed or revised the marital rape exemption in nearly all states, the price of inaction could potentially be very high.<sup>288</sup> Presently, the reform has taken hold in only eight jurisdictions out of fifty-one; until the other forty-two states and the District of Columbia act to the contrary, the common law rule regarding withdrawal of consent during intercourse remains good law for a majority of American women.<sup>289</sup> Inaction on the issue is the most dangerous course for victims of sexual

<sup>284</sup> See, e.g., Charles Krauthammer, *Courts Should Stay Out of the Gay Marriage Arena*, CHI. TRIBUNE, Mar. 1, 2004, at A23.

<sup>285</sup> Even some ardent supporters of the Supreme Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973), note that it reversed a trend in the early 1970s of expansion of women's rights by state legislatures. Ruth Bader Ginsburg, *Some Thoughts on Autonomy & Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (noting that the "sweep and detail of [*Roe*] stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures"). The country may currently be witnessing a similar phenomenon with gay marriage. See Scott Lindlaw, *Bush Defends Gay Marriage Prohibition*, CHI. TRIBUNE, Feb. 27, 2004, available at <http://www.chicagotribune.com/news/nationworld/sns-ap-bush-gay-marriage,1,3213988.story> (quoting President George W. Bush: "I believed it was important to act because the institution of marriage was being changed by the courts.").

<sup>286</sup> See *supra* Introduction and text accompanying note 244.

<sup>287</sup> Interview with Wendy Murphy, Victim Advocacy & Research Group, *supra* note 54.

<sup>288</sup> Some reformers would respond that withdrawal of consent laws differ from reform of marital rape laws because the latter involves amending legislative language while the former concerns fundamental rights protected by the Constitution. *Id.* However, as both involve the reversal of hundreds of years of common-law tradition, there is a clear parallel between the two efforts.

<sup>289</sup> See *supra* Part II.A.

assault, as it would leave their freedoms in the hands of a slow-moving judiciary rather than their own elected representatives.<sup>290</sup> Both courts and legislatures have a place at the table of rape law reform, and it behooves advocates to encourage both for the benefit of the women they represent.

### CONCLUSION

The recent history of the reform of rape laws in this country shows that each incremental change has met with some resistance. Changes in the wake of the introduction of the Model Penal Code, which emphasized the use of force in definitions of rape, influenced the states to modify their statutes in a way many reformers viewed as negative.<sup>291</sup> Only in recent years, with the virtual abolition of the marital rape exemption and widespread rejection of the resistance standard in the proof of rape charges, have states moved towards a model in which all nonconsensual sexual intercourse will be outlawed.<sup>292</sup> A natural next step in this evolution is a statute in all fifty states that explicitly prohibits forced, nonconsensual intercourse at any time during the sexual act, rather than just at penetration.

Eight states have now made this reform a reality, with seven doing so by court decision and one by statute.<sup>293</sup> Two of the most recent reforms, in California and Illinois, will likely spur action in the coming months in other states that wish to clarify their rape statutes.<sup>294</sup> Additionally, the recently dismissed criminal charges against NBA superstar Kobe Bryant, as well as the pending civil suit against him, have both drawn incredible media attention.<sup>295</sup> The accompanying public scrutiny, as well as that given to *John Z.*, the young Illinois statute, and the cases predating them, can lead the way towards a regime that empowers women to withdraw their consent

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<sup>290</sup> There may be other positive impacts of the statute as well. One sexual assault counselor in Illinois expressed hope that the new law would increase the number of acquaintance rape cases that state's attorneys are willing to prosecute. "This bill would help a jury to understand, and give them permission to say that when she says no, it means no, regardless of whether there was sexual activity before." *Acquaintance Rape*, supra note 258 (quoting *Legislators: It's Still Rape, Even If She Once Said Yes*, CHI. SUN-TIMES, Feb. 12, 2003, at 10).

<sup>291</sup> See supra Part I.B.1.

<sup>292</sup> See supra Parts I.A., I.B.2-3.

<sup>293</sup> See supra Part II.B.

<sup>294</sup> See supra Parts III.A-B.

<sup>295</sup> Although the details of the incident involving Mr. Bryant and the civil plaintiff are hazy, and now, without a trial, may never become public, anecdotal evidence indicates that the facts may be similar to those in *John Z.* and like cases; a sexual act that started out as consensual, and at some point may have crossed the line to nonconsensual. See, e.g., Bean, supra note 27; *Attorneys Think Civil Case is a Strong One*, ESPN.COM, Sept. 7, 2004, at <http://sports.espn.go.com/nba/news/story?id=1876696&CMP=OTC-DT9705204233>.

at any time during the act of sexual intercourse. It is up to legal advocates and concerned members of the public around the country to ensure that this burgeoning movement takes flight in our courts and statehouses.