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No Means No...Sometimes Developments in Postpenetration Rape Law and the Need for Legislative Action

Sarah O. Parker

No Means No . . . Sometimes

DEVELOPMENTS IN POSTPENETRATION RAPE LAW AND THE NEED FOR LEGISLATIVE ACTION

INTRODUCTION

"He wouldn't listen and he didn't stop," explained the seventeen-year-old victim.[1] She knew her aggressor, Osvaldo Sombo—also seventeen. At the time of "the incident," they were in what the prosecutor called a "dating relationship."[2] According to the prosecutor,

> [she] initially wanted to limit their contact on this occasion to just kissing. Through mutual consent, their behavior proceeds to heavy petting. The victim's statements to the responding officer and the sexual assault nurse examiner indicate that at some point during this event [Osvaldo] put on a condom and penetrated her with his penis, it hurt and she told him to stop. [Osvaldo] did not acquiesce to her desire and proceeded with rough vaginal intercourse while she continued to tell him to stop.[3]

Osvaldo was arrested and charged with second-degree rape and sexual battery, yet the prosecutor dropped the charges a month later.[4] Although the victim bravely came forward and reported the rape, the prosecutor filed a dismissal, citing "insufficient evidence to warrant prosecution,"[5] because:

> *State v. Way* . . . states that if initial penetration occurs with the victim's consent, no rape has occurred though the victim later withdraws consent during the same act of intercourse. The victim's initial statements to law enforcement and medical personnel do not indicate initial penetration was without her consent, rather, the statements imply that she withdrew consent because of the pain she was suffering and that the defendant paid no heed but continued to

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[1] Cara Kulwicki, *North Carolina: Consent to Sex Cannot be Withdrawn*, CURVATURE (Sept. 23, 2010), http://thecurvature.com/2010/09/23/north-carolina-consent-to-sex-cannot-be-withdrawn.

[2] Dismissal at 2, State v. Sombo, No. 10-CR-238650 (N.C. Super. Ct. Sept. 21, 2010).

[3] *Id.*

[4] *Id.*

[5] *Id.*

> hurt her. Therefore, applying *State v[.] Way* to the facts of the case, a [r]ape has not been legally committed.[6]

Because of *Way*'s continued validity in North Carolina, this seventeen-year-old girl and other victims have no legal recourse if their partner does not discontinue sex after being told, "No."

If the prosecutor's version of the facts is true, this young woman is a victim of what is known as *postpenetration rape*,[7] a term first introduced in 1991.[8] In contrast with other varieties of rape, postpenetration rape begins with consensual intercourse.[9] But, at some point after penetration, one partner revokes consent and states her "wish[] to terminate the sexual intercourse."[10] Then, although consent is revoked, the aggressor forcibly continues the sexual intercourse.[11]

Currently, only Illinois has criminalized postpenetration rape by statutory amendment.[12] The courts in seven states have also criminalized postpenetration rape.[13] In these jurisdictions,

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[6] Dismissal, *supra* note 2, at 2; *see also* State v. Way, 254 S.E.2d 760, 761-62 (N.C. 1979). In spite of the prosecutor's statement that "initial penetration occur[ed] with consent," the victim had not only not recanted, but had stated in at least one interview that "she had never consented to have sex and, once it started, told Sombo repeatedly to stop." Eric Frazier, *Rape Charges Dropped Against Butler Player*, CHARLOTTE OBSERVER (Sept. 22, 2010), http://www.qcitymetro.com/news/articles/rape_charges_dropped_aganst_butler_player05502829.cfm.

[7] Amy McLellan, Comment, *Postpenetration Rape—Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 780 (1991).

[8] Amanda O. Davis, Comment, *Clarifying the Issue of Consent: The Evolution of Postpenetration Rape Law*, 34 STETSON L. REV. 729, 731 n.7 (2005).

[9] McLellan, *supra* note 7, at 780.

[10] *Id.* Although men are also victims of rape and sexual assault, this note will primarily discuss the rape of women. Women report rape/sexual assault more frequently than men and one could infer that this indicates women are more frequently victims of rape/sexual assault. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION STUDY: CRIMINAL VICTIMIZATION, 2010, at 12 (2011) [hereinafter CRIMINAL VICTIMIZATION, 2010]. For an in-depth treatment of men as victims of rape, see generally Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011).

[11] McLellan, *supra* note 7, at 780.

[12] 720 ILL. COMP. STAT. ANN. 5/11-1.70(c) (LexisNexis 2012).

[13] *See, e.g.*, McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001); *In re* John Z., 60 P.3d 183, 185 (Cal. 2003); State v. Siering, 644 A.2d 958, 961 (Conn. App. Ct. 1994); State v. Bunyard, 133 P.3d 14, 27 (Kan. 2006); State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985); State v. Baby, 946 A.2d 463, 486 (Md. 2008); State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995). Several other courts appear to agree with those above, without explicitly holding that rape can occur postpenetration. *See, e.g.*, Davenport v. Vaughn, No. Civ. A. 00-5316, 2005 WL 856912, at *4 (E.D. Pa. Apr. 14, 2005), *aff'd sub nom.* Davenport v. Diguglielmo, 215 Fed. Appx. 175 (2007) (applying Pennsylvania law) (noting a "reject[ion] [of] the Petitioner's assertion that only the initial act of penetration counts as penetration under the rape statute, so a withdrawal of consent after sexual intercourse has begun is not rape unless the man withdraws and then 'penetrates' again"); State v. Crain, 946 P.2d 1095, 1102 (N.M. Ct. App. 1997) (noting "that other jurisdictions have questioned the legal validity of the proposition

the elements of postpenetration rape are generally that: (1) both parties initially consent to penetration; (2) one party subsequently withdraws consent in a manner capable of being understood by a reasonable person;[14] (3) the other party fails to discontinue the act; and (4) instead continues penetration by force[15] or compulsion.[16] Only North Carolina maintains that forcibly continuing intercourse after withdrawal of consent is not rape.[17]

The remaining forty-one states either have never addressed the issue or have failed to enunciate a clear answer. This lack of attention may be because postpenetration rapes are rarely reported or prosecuted, or because juries are not properly instructed on the possibility of rape after initially "consensual" penetration. Whatever the reason, this note argues that the way to stop these rapes and spur reports, prosecutions, and convictions is through statutory amendments and clear jury instructions.

This note charts the progress of postpenetration rape law and calls for legislative amendment, aiming to reform legal and social attitudes toward rape. Part I discusses the imperative of criminalizing postpenetration rape. Part II reviews the current state of statutory and case law on postpenetration rape. Part III calls for legislative action and statutory amendment. Part IV proposes model jury instructions for postpenetration rape cases. Part V criticizes the judicial creation of a "reasonable time" allowance in postpenetration rape cases. This note concludes with a look forward at the positive sociological impact of recognizing postpenetration rape

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that there can be no rape . . . if the victim's consent is withdrawn after penetration has begun [but,] [n]oting the questionable legal validity of the withdrawal-of-consent theory in other jurisdictions and the evidence presented at trial, we do not find that Defendant's trial counsel acted unreasonably in declining to present or rely upon this novel theory." (citations omitted)); State v. Jones, 521 N.W.2d 662, 672 (S.D. 1994) (noting that "[t]his court has never held that initial consent forecloses a rape prosecution and, based on the facts of this case, we choose not to adopt [that] position" (citation omitted)).

[14] *See, e.g.*, People v. Denbo, 868 N.E.2d 347, 358 (Ill. App. Ct. 2007) ("Even though, subjectively, R.H. no longer consented, her withdrawal of consent was ineffective until she communicated it to defendant in some objective manner so that a reasonable person in defendant's circumstances would have understood that R.H. no longer consented." (citations omitted)); *see also* COMM. ON STANDARD JURY INSTRUCTIONS, CRIMINAL, CALIF. JURY INSTRUCTIONS, CRIMINAL § 1.23.1 (2011) ("The words or conduct must be sufficient to cause a reasonable person to be aware that consent has been withdrawn.").

[15] *See, e.g.*, *Baby*, 946 A.2d at 486.

[16] *Robinson*, 496 A.2d at 1070.

[17] State v. Way, 254 S.E.2d 760, 761 (N.C. 1979).

as "real rape," with hope for a subsequent decrease in the incidence of rape.[18]

I. SETTING THE STAGE

Whether a woman never consents to penetration, or initially consents but later revokes, should be irrelevant. "'[L]ack of consent' is . . . indeed, the essence . . . of the crime of rape."[19] To deny that continued sex after consent is withdrawn is rape affirms the definition of women as property, denies autonomy and bodily integrity to women, and deprives victims of legal recourse in the criminal justice system.[20]

First, the refusal to recognize postpenetration rape as "real rape" stems from adherence to the understanding of women as property that underlies rape law generally. In both "ancient societies—and in the more recent American common law tradition—women were considered the legal property of their husbands and fathers"; thus, the rape of a woman was a crime against a man's property.[21] One scholar traces the understanding of women as property back to the Middle Assyrian Laws in place during the fifteenth to eleventh centuries BC,[22] where "the rape of a virgin was presumed to be an illegal trespass upon the father's property . . . because a virgin was considered a valuable asset, the value residing in men's ability to gain absolute ownership of the totality of her sexual and reproductive functions."[23] Similarly, she notes, Biblical law recognized rape as a property crime—that is, not as "an infringement upon a woman's autonomy, but rather as an infringement of the father's or husband's property interest . . . [where] rape [of a virgin] was

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[18] "Real rape" is a term borrowed from Susan Estrich's article, *Rape*, in which she investigates the ideas of "real rape" (i.e., violent rape by a stranger) and other rape, such as date rape and acquaintance rape. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986).

[19] Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Reform*, 46 CLEV. ST. L. REV. 409, 424 (1998) (citing NANCY VENABLE RAINE, AFTER SILENCE: RAPE AND MY JOURNEY BACK 202, 210 (1998)).

[20] *See infra* text accompanying notes 21-39.

[21] Erin G. Palmer, Recent Development, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Postpenetration Rape Should be a Crime in North Carolina*, 82 N.C. L. REV. 1258, 1267 (2004) (citing GERDA LERNER, THE CREATION OF PATRIARCHY 116 (1986)).

[22] Ricki Lewis Tannen, *Setting the Agenda for the 1990s: The Historical Foundations of Gender Bias in the Law: A Context for Reconstruction*, 42 FLA. L. REV. 163, 171-72 n.53 (1990).

[23] *Id.* at 172 (internal quotations omitted).

considered a declaration of ownership."[24] Because virginity was the value of a man's property and penetration was the act that would devalue it, these ancient laws "undergird[ed] the notion that the crime of rape was complete upon penetration."[25]

For example, one court justified its holding that rape could not occur after penetration by reasoning that the "presence or absence of consent at the moment of initial penetration appears to be the crucial point in the crime of rape."[26] In further support of its holding, the court explained that if the victim withdrew consent and the aggressor continued penetration, "the sense of outrage to [her] person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood."[27] By denying the possibility of postpenetration rape and continuing to hold that initial penetration is the "crucial point" at which rape can occur, courts and legislatures cling to the archaic notions of women as the property of their husbands or fathers, fetishize virginity, and justify the idea that a woman has nothing left to lose after the moment of initial penetration.[28]

Second, recognizing postpenetration rape as "real rape" acknowledges women's freedom to choose and their right to be free from unwanted invasion of their bodies.[29] Rape's chief harm lies "in forcibly depriving a person of her right of bodily integrity," and that deprivation exists whether initial penetration is accomplished with or without consent.[30] Indeed, an aggressor's disregard of withdrawn consent "is a

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[24] *Id.* at 175. One author notes, "the . . . [ancient rape laws] all incorporated the principle that the injured party is the husband or father of the raped woman." LERNER, *supra* note 21, at 116 (internal quotation marks omitted).

[25] Baby v. State, 916 A.2d 410, 426 n.6, 427 (Md. Ct. Spec. App. 2007) ("[I]t was the act of penetration that was the essence of the crime of rape; after this initial infringement upon the responsible male's interest in a woman's sexual and reproductive functions, any further injury was considered to be less consequential. The damage—viewed from the perspective of the husband's or father's interest in the reproductive functions of the victim—was done.").

[26] People v. Vela, 218 Cal. Rptr. 161, 164 (Cal. Ct. App. 1985).

[27] *Id.* at 165. As one commentator notes, "The court did not define the term 'womanhood'; its opinion reveals only that 'womanhood' is something 'violated' by initial, unconsented penetration, and that such a violation is more harmful to a woman than any actions that might follow initial penetration." Palmer, *supra* note 21, at 1265 n.52 (quoting *Vela*, 218 Cal. Rptr. at 165).

[28] *Vela*, 218 Cal. Rptr. at 164.

[29] Estrich, *supra* note 18, at 1088.

[30] Sherry F. Colb, *Withdrawing Consent During Intercourse: California's Highest Court Clarifies the Definition of Rape*, FINDLAW'S WRIT (Jan. 15, 2003), http://writ.news.findlaw.com/colb/20030115.html.

traumatizing and humiliating experience . . . because it takes a decision about the most intimate, personal, and vulnerable matter[] in . . . life out of a woman's hands."[31] Postpenetration rape, then, is as much a denial of autonomy and a violation of bodily integrity as rape that proceeds from a lack of initial consent. Criminalizing postpenetration rape acknowledges that consent can be freely given but subsequently taken away. If this were not the case, consent would operate as a transfer of dominion or irrevocable waiver;[32] women would have no control over their own bodies, and men would be free to do as they pleased with previously "consenting" women. It seems doubtful that modern society would endorse a law in these terms, but the refusal to criminalize postpenetration rape has precisely this effect. In contrast, "recognizing postpenetration rape as a crime reflects a view of women as 'responsible, autonomous beings who possess the right to personal, sexual, and bodily self-determination,'"[33] and it trusts women to make decisions regarding sex and their bodies. Furthermore, identifying postpenetration rape as a crime will help to reform attitudes about both rape and consensual sex, and will promote sexual egalitarianism by "requir[ing] men to listen to women in sexual relationships."[34]

Lastly, affirming that victims of postpenetration rape suffer the same harms as other rape victims helps ensure that they will receive equal recourse in the criminal justice system. Whether initial penetration is consensual or not, victims of forcible, nonconsensual sex suffer physical and emotional injuries.[35] Along with the bruises, abrasions, personal devaluation, and fear[36] that many rape victims experience, all rape victims experience the loss of autonomy and bodily integrity that result from nonconsensual penetration.

Legal recognition and recourse would at least provide victims a name for their experience, though it "does not

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[31] *Id.*

[32] *Id.*

[33] Palmer, *supra* note 21, at 1275 (quoting Ronald J. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC'Y REV. 329, 330 (1988)).

[34] *Id.* at 1275.

[35] Tiffany Bohn, Note, *Yes, Then No, Means No: Current Issues, Trends, and Problems in Postpenetration Rape*, 25 N. ILL. U. L. REV. 151, 169 (2004). Postpenetration rape victims also suffer physical and mental consequences of rape: anal or vaginal abrasions, emotional anguish, and Rape Trauma Syndrome (RTS). *See* State v. Bunyard, 133 P.3d 14, 19 (Kan. 2006); Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J. L. & GENDER 447, 453 (2005); McLellan, *supra* note 7, at 796-97.

[36] *See* Baker, *supra* note 35, at 453.

conform to the rape stereotype."[37] This would legitimize their experience as victims of crime and, when recognized as such, may increase reporting of these rapes.[38] Moreover, such an acknowledgement may generate enough publicity to send the public a message that postpenetration rape is a real crime, deserving of prosecution and punishment.[39]

Refusing to acknowledge continued intercourse absent continued consent as rape endangers women. Therefore, it is imperative to recognize the crime of postpenetration rape in order to combat the understanding of women as property, acknowledge women's right to be free from unwanted bodily invasion, and give victims the legal recourse they deserve.

II. DEVELOPMENT OF POSTPENETRATION RAPE LAW

Seven states have criminalized postpenetration rape through the common law process.[40] Of those seven states, five have recognized postpenetration rape since the issue was first presented, while two recently changed course by beginning to recognize postpenetration rape after years of refusing it. In Alaska, Connecticut, Kansas, Maine, and Minnesota, courts have always held that initially consensual penetration can become rape if penetration is forcibly continued after consent is withdrawn.[41] In California and Maryland, courts initially adopted the *Way* reasoning[42]—denying that rape could occur postpenetration—but later overruled those cases to recognize postpenetration rape.[43] Illinois has amended its criminal code to explicitly criminalize postpenetration rape, standing alone as the only state to have provided a legislative solution to this issue.[44] In North Carolina, however, the unambiguous law is

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[37] Dana Vetterhoffer, Comment, *No Means No: Weakening Sexism in Rape Law by Legitimizing Postpenetration Rape*, 49 ST. LOUIS U. L.J. 1229, 1247 (2005).

[38] *Id.* at 1246-47.

[39] *See* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320 (2000); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996); *see also infra* Section III.A.

[40] *See* McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001); *In re* John Z., 60 P.3d 183, 185 (Cal. 2003); State v. Siering, 644 A.2d 958, 961 (Conn. App. Ct. 1994); State v. Bunyard, 133 P.3d 14, 27 (Kan. 2006); State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985); State v. Baby, 946 A.2d 463, 486 (Md. 2008); State v. Crims, 540 N.W.2d 860, 865 (Min. Ct. App. 1996).

[41] *See McGill*, 18 P.3d at 84; *Siering*, 644 A.2d at 961; *Bunyard*, 133 P.3d at 27; *Robinson*, 496 A.2d at 1070; *Crims*, 540 N.W.2d at 865.

[42] State v. Way, 254 S.E.2d 760, 761 (N.C. 1979).

[43] *In re John Z.*, 60 P.3d at 185; *Baby*, 946 A.2d at 486.

[44] *See* 720 ILL. COMP. STAT. ANN. 5/11-1.70(c) (LexisNexis 2012).

that postpenetration rape is legally impossible.[45] In the remaining forty-one states, neither the legislatures nor the courts have clearly articulated whether sex that is forcibly continued after consent is withdrawn constitutes a crime. This section will explore the various state approaches to postpenetration rape: criminalization by case law, criminalization by statute, and North Carolina's refusal to criminalize.

A. Criminalization by Case Law: The Maine Approach

Beginning with Maine in 1985, courts in seven states have unequivocally held that when all the elements of rape are established, the time of nonconsent (whether before or after initial penetration) is immaterial.[46] These courts have reasoned that state rape statutes do not preclude a holding that rape has occurred, even though initial penetration may have been consensual.[47]

1. Maine

In *State v. Robinson*, the earliest of these cases, the Supreme Judicial Court of Maine upheld the trial court's ruling that the timing of consent is immaterial and therefore affirmed the defendant's conviction.[48] At trial, the prosecuting witness and the defendant "gave sharply divergent testimony" about the incident.[49] She said that the intercourse was entirely nonconsensual. He said that the intercourse was consensual, but "during intercourse . . . she suddenly declared 'I guess I don't want to do this anymore,'" at which time he stopped and left.[50] During deliberations, the jury asked the judge, "if two people began consenting to an act, then one person says no and the other continues—is that rape?"[51] The judge answered affirmatively and emphasized that the key element "is the continuation under compulsion."[52] The jury convicted the defendant of rape.[53]

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[45] *See Way*, 254 S.E.2d at 762 ("If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape . . . .").

[46] *See McGill*, 18 P.3d at 84; *In re John Z.*, 60 P.3d at 185; *Siering*, 644 A.2d at 961; *Bunyard*, 133 P.3d at 27; *Robinson*, 496 A.2d at 1070; State v. Baby, 946 A.2d 463, 486 (Md. 2008); *Crims*, 540 N.W.2d at 865.

[47] *See McGill*, 18 P.3d at 84; *In re John Z.*, 60 P.3d at 185; *Siering*, 644 A.2d at 961; *Bunyard*, 133 P.3d at 27; *Robinson*, 496 A.2d at 1070; *Baby*, 946 A.2d at 486; *Crims*, 540 N.W.2d at 865.

[48] *Robinson*, 496 A.2d at 1069.

[49] *Id.* at 1068.

[50] *Id.* at 1069.

[51] *Id.*

[52] *Id.* at 1070.

Subsequently, the trial court held that where intercourse is initially consensual, but then one partner reconsiders, "communicates the revocation . . . , and the other party continues the sexual intercourse by compulsion," both the Maine Criminal Code and common sense permit a finding of rape.[54]

On appeal, the Supreme Judicial Court affirmed, reasoning that initially consensual sex could become rape within the meaning of the Maine Criminal Code.[55] The Code emphasized three elements of rape: (1) "'sexual intercourse' by the defendant," (2) "with a person not the defendant's spouse," and (3) "in circumstances by which that other person submits to sexual intercourse as a result of compulsion applied by the defendant."[56] Chief Justice McKusick stated that "[i]n anybody's everyday lexicon, the continued penetration of the female sex organ by the male sex organ, after the time either party has withdrawn consent, is factually 'sexual intercourse,'"[57] and where the other elements of the statute are met, this act is rape.[58] In sum, the Supreme Judicial Court looked to the rape statute, the legislature's intent, and common sense to hold that initially consensual penetration does prevent a conviction for rape if a defendant continued penetration under compulsion after consent was withdrawn.[59]

2. Connecticut

The Appellate Court of Connecticut followed suit in 1994, also citing common sense as the basis for its holding.[60] In *State v. Siering*, the Appellate Court held that initially consensual sex could become sexual assault if continued by force after the revocation of consent; accordingly, the court affirmed the defendant's conviction of sexual assault in the first degree.[61] As in *Robinson*, the trial testimony of the victim and the defendant were "sharply divergent."[62] The victim

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[53] *Id.* at 1068.

[54] *Id.* at 1069 (stating "then it would be rape").

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1070. The court further clarified, "We of course agree with the North Carolina court that a mere change of the woman's mind in the midst of sexual intercourse does not turn the man's subsequent penetration into rape." *Id.*

[59] *Id.* at 1069.

[60] State v. Siering, 644 A.2d 958, 963 (Conn. App. Ct. 1994), *appeal denied*, 648 A.2d 158 (Conn. 1994).

[61] *Id.* at 961.

[62] *Id.*

testified that "the defendant pulled off [her] clothes and had sexual intercourse with her by force" as she continued "yelling, screaming and fighting."[63] The defendant testified that they were "engaged in mutually consensual sex when the victim suddenly 'snapped and yelled rape.'"[64] Also like *Robinson*, the jury asked the trial judge, "if a person agrees to sexual intercourse then changes her mind, withdraws her consent, but is compelled to continue intercourse by use of force, does this constitute sexual assault?"[65] The Appellate Court agreed with the trial judge's affirmative answer that "if there exists consensual intercourse and the alleged victim changes her mind[,] communicates the revocation . . . of consent[,] and the other person continues the sexual intercourse by compelling the victim through the use of force[,] then it would be sexual assault in the first degree."[66]

Courts in Alaska, California, Kansas, Maryland, and Minnesota have cited these decisions with approval and explained that the law in their own states could be applied similarly.[67] Nevertheless, California and Maryland did not show their approval immediately. Indeed, following *Way*,[68] both states initially held that rape after consensual penetration was legally impossible.[69]

3. California

In 2003, the Supreme Court of California recognized the validity of postpenetration rape, holding that rape occurs when, during intercourse, one partner withdraws consent while the other continues the intercourse by force.[70] This decision settled a split between two California Courts of Appeal—one agreeing with *Way*,[71] the other finding postpenetration rape possible because the California rape statute did not specify the time for

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[63] *Id.* at 959.

[64] *Id.*

[65] *Id.* at 961 (internal quotation marks omitted).

[66] *Id.* (internal quotation marks and footnote omitted).

[67] McGill v. State, 18 P.3d 77, 84 & nn.40-41 (Alaska Ct. App. 2001); *In re* John Z., 60 P.3d 183, 185 (Cal. 2003); State v. Bunyard, 133 P.3d 14, 27-28 (Kan. 2006); State v. Baby, 946 A.2d 463, 486 (Md. 2008); State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1996).

[68] *See* State v. Way, 254 S.E.2d 760, 762 (N.C. 1979).

[69] *See* People v. Vela, 218 Cal. Rptr. 161, 164 (Cal. Ct. App. 1985); Battle v. State, 414 A.2d 1266, 1270 (Md. 1980).

[70] *John Z.*, 60 P.3d at 185.

[71] *Way*, 254 S.E.2d at 762 (holding that postpenetration rape is legally impossible); *see also Vela*, 218 Cal. Rptr. at 164.

consent or refusal.[72] The California Court of Appeal for the Fifth District, in *People v. Vela*,[73] followed *Way*,[74] emphasizing that the moment of penetration is the essential focus in the crime of rape, rather than the presence or absence of consent throughout the entire sex act.[75] Yet *Vela* went further in its reasoning for this rule, explaining that

> the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. . . . If she withdraws consent . . . and the male forcibly continues the act without interruption, the female may certainly feel outrage . . . but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood.[76]

While the court gave no support for this proposition, its reasoning reflects the same archaic notions about virginity and women as property that formed the basis of rape definitions in the early English common law.[77]

The California Court of Appeal for the Fourth District came to the opposite conclusion in *People v. Roundtree*,[78] finding *Vela*'s conclusion "unsound."[79] Instead, the court found that *Robinson*[80] articulated the appropriate standard and that, under the California rape statute, "a rape is necessarily committed if a victim is forced to continue with sexual intercourse against her will."[81] The California Supreme Court

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[72] *See* People v. Roundtree, 91 Cal. Rptr. 2d 921, 924 (Cal. Ct. App. 2000) ("The crime of rape therefore is necessarily committed when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act. The statutory requirements of the offense are met as the act of sexual intercourse is forcibly accomplished against the victim's will. . . . That the victim initially consented to the act is not determinative.").

[73] *Vela*, 218 Cal. Rptr. at 164.

[74] *Way*, 254 S.E.2d at 761.

[75] *Vela*, 218 Cal. Rptr. at 164; *see also Way*, 254 S.E.2d at 761.

[76] *Vela*, 218 Cal. Rptr. at 165.

[77] State v. Baby, 946 A.2d 463, 480 (Md. 2008) (reviewing the English common law regarding rape and the increased punishment for raping virgins). *See* Tannen, *supra* note 22, at 172. ("[A] virgin was considered a valuable asset, the value residing in men's ability to gain absolute ownership of the totality of her sexual and reproductive functions. Any infringement upon this totality through premarital sexual relations rendered the asset less valuable and might even turn it into a liability."); *supra* notes 19-28 and accompanying text.

[78] People v. Roundtree, 91 Cal. Rptr. 2d 921, 923 (Cal. Ct. App. 2000) (holding that "[i]f all the elements of rape are present, the fact that there was a prior penetration with the consent of the female does not negate rape").

[79] *Id.* at 924.

[80] State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985).

[81] *Roundtree*, 91 Cal. Rptr. 2d at 925.

soon resolved the split, approving the *Roundtree*[82] court's holding in a well-publicized and oft-cited case, *In re John Z.*[83] The *John Z.* court held that "the offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection."[84] The court reasoned that "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."[85]

4. Maryland

In Maryland, it was not until 2008 that the highest court in the state, the Court of Appeals, first recognized postpenetration rape.[86] In *State v. Baby*,[87] the court declined to follow a 1980 decision that stated that withdrawing consent after penetration would not constitute rape.[88] Instead, the *Baby* court explicitly held that "a woman may withdraw consent for vaginal intercourse after penetration has occurred" and that, "after consent has been withdrawn, the continuation of vaginal intercourse by force or the threat of force may constitute rape."[89] At trial, the complaining witness testified that she submitted to penetration because she felt she did not have a choice.[90] She stated that "he got on top of me and he tried to put it in and it hurt[,] . . . [s]o I said stop and that's when he kept pushing it in and I was pushing his knees to get off me."[91] On the other hand, the defendant testified that the sex was consensual. As in *Robinson*[92] and *Siering*,[93] the jury sent two questions to the judge during deliberations regarding whether rape can occur after consensual penetration.[94] The trial judge referred the jury to his prior instructions and the statutory definition of rape and consent, but he otherwise failed to

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[82] *Id.*

[83] 60 P.3d 183, 184 (Cal. 2003).

[84] *Id.* at 185.

[85] *Id.* at 184 (citing *Roundtree*, 91 Cal. Rptr. 2d 921).

[86] State v. Baby, 946 A.2d 463, 475 (Md. 2008).

[87] *Id.*

[88] Battle v. State, 414 A.2d 1266, 1270 (Md. 1980); *but see Baby*, 946 A.2d at 475 (stating that the "pronouncement in *Battle* was dicta").

[89] *Baby*, 946 A.2d at 486.

[90] *Id.* at 467.

[91] *Id.*

[92] State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985).

[93] State v. Siering, 644 A.2d 958, 961 (Conn. App. Ct. 1994).

[94] *Baby*, 946 A.2d at 471-72.

answer the question.[95] The Court of Appeals reversed because the lower court's failure to instruct the jury on postpenetration rape was not harmless error.[96] Thus, the crime of first degree rape in Maryland today "includes postpenetration vaginal intercourse accomplished through force or threat of force and without the consent of the victim, even if the victim consented to the initial penetration."[97]

B. Criminalization by Statute: The Illinois Approach

In Illinois, "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."[98] This explanatory amendment to the statute frees both the court and the jury from dwelling on questions of timing, while maintaining the essential elements of the crime of sexual assault.[99] As always, the jury must find the elements of sexual assault, regardless of when consent was withdrawn (that is, pre- or postpenetration).[100]

Though the amended statute marks an admirable step in the right direction, it is not perfect. For example, it lacks a clear standard for determining whether consent has been withdrawn, so the challenges of interpreting the statute and charging the jury remain obstacles. In the only reported case that applies Illinois's postpenetration rape statute, *People v.*

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[95] *Id.*

[96] *Id.* at 489.

[97] *Id.* at 465.

[98] 720 ILL. COMP. STAT. ANN. 5/11-1.70(c) (LexisNexis 2012).

[99] *See id.* 5/11-1.20, 1.30.

> Some states now characterize the crime of rape as "sexual assault," . . . or "criminal sexual conduct[.]" The reason[] for the change in nomenclature is that: *[s]exual assault* puts the concept of violence into the word *rape*. It reflects a historically recent clinical, political, and social analysis of the phenomenon of rape that attempts to drain off the toxins of blame-the-victim, and to shift the criterion of rape from the behavior of the victim to that of the criminal. It is an attempt to take any ambiguity out of the word *rape*.

Dressler, *supra* note 19, at 410 n.2 (quoting RAINE, *supra* note 19, at 208).

[100] *See* Joel Emlen, Note, *A Critical Exercise in Effectuating "No Means No" Rape Law*, 29 VT. L. REV. 215, 229 (2004) ("This law does nothing to change . . . the facts that need to be clarified in a court of law. . . . This does nothing whatsoever to the laws of Illinois . . . the presentation must be made before a judge and jury and those facts of the case must be determined.") (citing Ill. SB 406, 93d Gen. Assemb., Reg. Sess., at 3 (Ill. 2003) (statement of Sen. Rutherford)); *see also* State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985) (explaining that withdrawal of consent cases still require proving all elements of rape).

Denbo, the Appellate Court of Illinois reversed the defendant's conviction, finding that the victim failed to effectively communicate her withdrawal "in some objective manner so that a reasonable person in defendant's circumstances would have understood that [she] no longer consented."[101] Although this reasonableness-under-the-circumstances standard may be favorable, it remains unclear whether the Illinois Supreme Court will approve it, how future cases will be resolved, or how juries will be instructed on withdrawn consent. So, although the Illinois statute allows for postpenetration rape convictions, it fails to articulate the kind of clear and unambiguous standard that would be desirable in postpenetration rape statutes.[102]

C. A Legal Impossibility: The North Carolina Approach

In North Carolina, "If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape."[103] Interestingly, in *Way*, the Supreme Court of North Carolina reversed the trial court despite the jury's vote to convict after the trial judge's instruction that "consent initially given could be withdrawn" and that rape would occur "if the intercourse continued through use of force or threat of force . . . ."[104] The Supreme Court granted a new trial, finding the trial judge's instructions "erroneous"[105] because consent can only be withdrawn *between* distinct acts of penetration and not during a single sex act.[106] This means that in North Carolina, intercourse that is forcibly continued after withdrawal of consent constitutes rape only if, to borrow language from the Maine Supreme Court, "the prosecutrix . . . succeeds at least momentarily in displacing the male sex organ," thereby creating a series of distinct sex acts.[107] This absurd rule

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[101] 868 N.E.2d 347, 358 (Ill. App. Ct. 2007) (internal citations omitted), *appeal denied* 875 N.E.2d 1116 (Ill. 2007).

[102] *See infra* Section III.B.

[103] State v. Way, 254 S.E.2d 760, 762 (N.C. 1979).

[104] *Id.* at 761 (internal quotation marks omitted). Had this decision been affirmed, North Carolina would have been one of the first states to recognize postpenetration rape, formulating the definition in much the same terms as other states' courts subsequently have. *See, e.g.*, *In re* John Z., 60 P.3d 183, 185 (Cal. 2003); State v. Siering, 644 A.2d 958, 961 (Conn. App. Ct. 1994); *Robinson*, 496 A.2d at 1070; State v. Baby, 946 A.2d 463, 486 (Md. 2008).

[105] *Way*, 254 S.E.2d at 762.

[106] *Id.* at 761 (noting that "consent can be withdrawn," but "[t]his concept ordinarily applies . . . to those situations in which there is evidence of more than one act of intercourse between the prosecutrix and the accused").

[107] *Robinson*, 496 A.2d at 1071.

"protect[s] from a rape prosecution the party whose compulsion through physical force or threat of serious bodily harm is so overwhelming there is no possible withdrawal, however brief."[108] So, for now, sexual partners in North Carolina have only until the moment of penetration to refuse or consent to sex.

III. THE NEED FOR LEGISLATIVE ACTION

In order to cure the absurdity that exists in North Carolina—that is, the fact that if a woman does not say "no" before penetration, it is irrelevant whether she says "no" after penetration—legislation is needed. Legislation is the ideal route to criminalizing postpenetration rape because of the legislature's special ability to act prescriptively, enacting forward-looking laws rather than adjudicating past controversies.[109] Lawmakers must recognize postpenetration rape as "real rape" by amending rape statutes to explicitly permit withdrawal of consent after penetration.[110] The model statute would go beyond the Illinois statute by clarifying: (1) the irrelevance of the timing of when consent is withdrawn, (2) the continued validity of the other statutory elements of rape, (3) the equivalence of postpenetration rape to other rape crimes, and (4) the standard for assessing withdrawn consent. This part first addresses the importance of criminalizing postpenetration rape by statute and then recommends the form and substance of such a statute.

A. The Importance of a Statute

There is an expressive function to law, which is largely visible through its impact on society's current norms.[111] Indeed, empirical evidence suggests that the increases in rape reporting and convictions that follow rape law reforms are mainly a consequence of "evolving public attitudes . . . rather than specific legal changes, except insofar as national publicity accompanying the changes may have affected attitudes everywhere."[112] Regardless of the specific reason for the rise in reporting and convictions, clearly worded statutes will

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[108] *Id.*
[109] *See* Bohn, *supra* note 35, at 164.
[110] *See* Estrich, *supra* note 18, at 1088.
[111] *See* Sunstein, *supra* note 39, at 2051.
[112] Bryden, *supra* note 39, at 320 (footnote omitted).

hopefully encourage the trend.[113] Likewise, effective statutes could eliminate the need to wait for perfect facts, a credible complaining witness, a creative prosecutor, and an open-minded judge and jury.[114] Finally, statutory amendments would set clear guidelines for juries and avoid the confusion that arises in rape trials from facts that indicate the presence of initial consent to penetration.[115]

As an initial matter, statutory law can both reflect and alter public perceptions and ideas,[116] and in doing so, can lead to increased reporting of postpenetration rape.

> Traditionally, the law has done more than reflect the restrictive and sexist views of our society; it has legitimized and contributed to them. . . . [A] law that rejected those views and respected female autonomy might do more than reflect the changes in our society; it might even push them forward a bit.[117]

Statutes that explicitly criminalize postpenetration rape could convince people that it is "real rape" and should be recognized as such.[118] This would likely lead to increased reporting because "women are far more likely to report rapes . . . [that are] perceived to be real rapes."[119] Moreover, a statute criminalizing postpenetration rape might boost reporting by generating publicity and fostering greater awareness of postpenetration rape. For example, a 1992 study of the effect of rape law reforms in six U.S. cities concluded that the rise in rape reporting following reform efforts probably "resulted from publicity surrounding the reforms."[120] Indeed, the passage of the

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[113] Vetterhoffer, *supra* note 37, at 1243-59; *see also* David Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1286 (1997).

[114] *See* Davis, *supra* note 8, at 763 (explaining that one reason for passing the Illinois statue was to avoid a lengthy court battle).

[115] *See infra* text accompanying notes 132-36.

[116] *See* Estrich, *supra* note 18, at 1093-94; *see also* Sunstein, *supra* note 39, at 2051 (on the expressive function of the law).

[117] Estrich, *supra* note 18, at 1093-94.

[118] *See id.*

[119] Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1388 n.263 (2010). "Because the credibility of rape victims is often put in question, rape victims are more likely to report rapes where their credibility will be least doubted. In these circumstances, women report rapes that society will accept as real rapes, i.e. rapes involving strangers or black men." *Id.* Postpenetration rape, like other rapes that do not "fit the paradigm of the stranger in the bushes," is less likely to be perceived as "real rape." Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 293 (1993).

[120] Bryden & Lengnick, *supra* note 113, at 1227 (citing CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 18 (1992)).

Illinois statute was reported in national papers.[121] Therefore, the passage of clear and explicit postpenetration rape statutes—and the publicity that entails—will broadcast to the public that postpenetration rape is "real rape," which may encourage increased reporting.

A clear statute could also increase prosecution rates. Although prosecutors are generally "reluctant to prosecute cases in which the odds are long against a conviction," a statute could increase the odds of conviction and thus the odds of prosecution in postpenetration rape cases.[122] Perhaps this is especially true in North Carolina, where case law has foreclosed the possibility of postpenetration rape; there, prosecutors might not pursue cases that look like postpenetration rape because of the low odds of success. The dismissal of charges against Osvaldo Sombo[123] provides just one example of the types of cases that will never go to trial because of *Way*'s holding.[124] If it is possible that both partners have consented before penetration, the continued validity of *Way*[125] could render prosecution futile.[126] Furthermore, prosecutors may be similarly reluctant to prosecute what appears to be initially consensual sex in states where courts have never considered the question of postpenetration rape.[127] In these states, statutory recognition of postpenetration rape could facilitate the prosecution of claims like the one against Osvaldo, instead of leaving his victim—and victims in the majority of states—without legal recourse.[128]

In addition to encouraging reporting and prosecution, a statute would ensure immediate reform, eliminating the need to wait for state courts to take the lead in recognizing postpenetration rape as a crime.[129] In fact, the Illinois

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[121] The signing of the Illinois statutory amendment which criminalized postpenetration rape was covered by the *N.Y. Times*, Jo Napolitano, *National Briefing Midwest: Illinois: Exactly When No Means No*, N.Y. TIMES, Aug. 1, 2003, at A14, *available at* http://www.nytimes.com/2003/08/01/us/national-briefing-midwest-illinois-exactly-when-no-means-no.html, and the *Chicago Tribune*, Christi Parsons, *"No" Really Means "No" in Sex Law Clarification*, CHI. TRIB., July 29, 2003, at 1, *available at* http://articles.chicagotribune.com/2003-07-29/news/0307290136_1_sexual-assault-sexual-activity-law.

[122] Bryden & Lengnick, *supra* note 113, at 1379.

[123] Dismissal, *supra* note 2, at 2; *see also supra* notes 2-6 and accompanying text.

[124] 254 S.E.2d 760, 761 (N.C. 1979).

[125] *Id.*

[126] *See, e.g.*, Dismissal, *supra* note 2, at 2.

[127] *See* Bryden & Lengnick, *supra* note 113, at 1379.

[128] *See id.* at 1225-29; Vetterhoffer, *supra* note 37, at 1246.

[129] *See* Davis, *supra* note 8, at 762-63.

postpenetration statute was added to the criminal code specifically in response to a lengthy court battle over postpenetration rape in California.[130] In light of the similarity between California and Illinois's rape statutes, the bill's sponsors sought to "avoid lengthy litigation in the Illinois courts" by clearly identifying postpenetration rape as rape.[131] If legislatures in other states prospectively passed postpenetration rape statutes, lengthy and uncertain litigation like *In re John Z.* could be avoided.

Finally, a postpenetration rape statute would help to eliminate confusion among judges and jurors in cases where the facts indicate that sex may have been initially consensual. Often, trial courts are deferential to the statute when instructing the jury[132] and answering jurors' questions about the possibility of postpenetration rape.[133] For example, after beginning deliberations in *State v. Bunyard*, the jury asked the trial judge, "If someone allows penetration, but then says no and [the defendant] does not stop, does that fit the legal definition of rape?"[134] The judge pointed to the instructions and responded, "I cannot elaborate any further. Please reread the instructions."[135] Likewise, the trial judge in *Robinson* answered a similar question by referring to the statute and "repeat[ing] his careful description of what constitutes the compulsion necessary for a conviction for rape under the [Maine] Criminal Code."[136] Postpenetration rape statutes could eliminate this confusion among jurors and provide judges with clear guidance.

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[130] Bohn, *supra* note 35, at 165; *see also In re* John Z., 60 P.3d 183, 184 (Cal. 2003) (holding that "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"); People v. Roundtree, 91 Cal. Rptr. 2d 921, 923 (Cal. Ct. App. 2000) (holding that "[i]f all of the elements of rape are present, the fact that there was a prior penetration with the consent of the female does not negate rape"); People v. Vela, 218 Cal. Rptr. 161, 164 (Cal. Ct. App. 1985) (holding that consent withdrawn after penetration is irrelevant because "the presence or absence of consent at the moment of initial penetration appears to be the crucial point in the crime of rape").

[131] Bohn, *supra* note 35, at 165; *see also* Vetterhoffer, *supra* note 37, at 1243 (2005).

[132] *See infra* Part IV (discussing jury instructions in detail).

[133] Bohn, *supra* note 35, at 162.

[134] State v. Bunyard, 133 P.3d 14, 26 (Kan. 2006) (internal quotation marks omitted).

[135] *Id.* (internal quotation marks omitted) (jury instructions contained the statutory elements of rape under Kansas law).

[136] State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985).

B. Recommended Form and Substance

In order to accomplish these goals, postpenetration rape statutes should clarify four separate elements: the irrelevance of the timing of withdrawn consent, the continued validity of the other statutory elements of rape, the equivalence of postpenetration rape to other rape crimes, and the standard for assessing withdrawn consent. This section will examine the elements of the Illinois postpenetration rape statute as well a bill pending in the North Carolina General Assembly, and it will then propose a model statute that borrows elements from each.

The Illinois postpenetration rape statute contains the first three elements recommended for an effective statute above, but it fails to provide the fourth element: a clear standard for assessing withdrawn consent. Under the first element, the statutory language unequivocally makes timing of withdrawn consent irrelevant by providing that "[a] person who initially consents . . . is not deemed to have consented to any sexual penetration . . . that occurs after he or she withdraws consent."[137] Under the second element, the statute does not change the elements of the crime of sexual assault;[138] instead, it merely clarifies that timing is irrelevant, while all other elements of rape must still be proved.[139] In fact, advocates for the Illinois statute stressed that the statute does not "change the legal standard in Illinois, but rather spells out exactly what lawmakers have intended all along."[140] Under the third element, the Illinois statute does not add postpenetration rape as a separate or lesser offense. On the contrary, the Illinois statute resides in a section entitled, "Defenses with Respect to Offenses Described in Sections 11-1.20 through 11-1.60."[141] Thus, the statute clarifies that postpenetration rape is rape, not a separate or less serious crime. The Illinois statute's real drawback is that it lacks a clear standard for when consent is effectively withdrawn, the fourth recommended element.[142] Indeed, no standard at all is provided in text of the statute.

In addition to the Illinois statute, the North Carolina General Assembly introduced a bill in 2011 that would, if

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[137] 720 ILL. COMP. STAT. ANN. 5/11-1.70(c) (LexisNexis 2012); *see also supra* notes 98-100 and accompanying text.

[138] *See* 720 ILL. COMP. STAT. ANN. 5/11-1.20, 1.30.

[139] Parsons, *supra* note 121.

[140] *Id.*

[141] 720 ILL. COMP. STAT. ANN. 5/11-1.70.

[142] *See supra* text accompanying notes 98-102.

passed, criminalize postpenetration rape and invalidate *Way*.[143] The North Carolina bill (HB 849) also includes three of the four elements listed above, failing instead on the third element. HB 849 would accomplish the first goal by making timing irrelevant. Indeed, the language is very clear: "A person who initially consents . . . is not deemed to have consented to any penetration that occurs after the person withdraws consent."[144] The bill also accomplishes the second goal by leaving the elements of other types of rape unchanged.[145] In addition, HB 849 meets the fourth goal by including a helpful standard for when consent has been withdrawn. The bill states that "[t]he withdrawal of consent must be *clearly communicated* in a way that a *reasonable person* would understand to constitute withdrawal of consent."[146]

Unfortunately, the bill fails the third goal: it does not treat postpenetration rape symmetrically with other rape.[147] The bill would make postpenetration rape only a Class E felony, whereas first and second degree rape in North Carolina are Class B1 and Class C felonies, respectively.[148] Depending on prior felony convictions and aggravating or mitigating factors, the North Carolina structured sentencing chart prescribes a penalty of 12 years to life without parole for a Class B1 felony.[149] For a Class C felony, the sentence could be 44 to 182 months.[150] In contrast, the sentence range for a Class E felony is just 15 to 63 months.[151] Accordingly, although HB 849 recognizes postpenetration rape as a crime, its categorization of postpenetration rape as a less serious offense, deserving less punishment, only partially solves the problems of refusing to recognize postpenetration rape as "real rape."[152]

A model statute might help to resolve the deficiencies of each approach. Such a statute, a hybrid of the Illinois statute

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[143] *See* H.B. 849, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

[144] *Id.* (adding N.C. GEN. STAT. § 14-27.3A(b)).

[145] *See generally id.*

[146] *Id.* (emphasis added).

[147] *Id.*

[148] *Id.* (adding N.C. GEN. STAT. § 14-27.3A(c)); *see also* N.C. GEN. STAT. ANN. §§ 14-27.2; 14-27.3 (West 2010).

[149] N.C. SENTENCING AND POLICY ADVISORY COMM'N, STRUCTURED SENTENCING TRAINING AND REFERENCE MANUAL 4 (2009), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/sstrainingmanual_09.pdf.

[150] *Id.*

[151] *Id.*

[152] *See supra* Part I.

and the standard for withdrawn consent from the North Carolina bill, could be written as follows:

> 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.[153] The withdrawal of consent must be clearly communicated in a way that a reasonable person [under the circumstances] would understand to constitute withdrawal of consent.[154]

This model statute combines the best elements of the Illinois statute and HB 849. From the Illinois statute, it borrows the first three elements: that the timing of withdrawn consent is irrelevant, that all statutory elements of rape are unchanged, and that postpenetration rape is not a lesser or different crime from other rape. From HB 849, this model statute borrows HB 849's strongest point: the clear standard for assessing withdrawn consent. Thus, the model postpenetration statute would include all four recommended elements, sending a message that postpenetration rape is "real rape" and punishing its commission accordingly.

IV. JURY INSTRUCTIONS IN POSTPENETRATION RAPE TRIALS

Of course, an effective statute is only the beginning. There must also be clear, concise jury instructions for postpenetration rape. These instructions are especially important in postpenetration rape prosecutions because this form of rape may not fall within the public's contemplation of rape. Such instruction would therefore combat juror confusion when jurors are faced with facts that indicate initially consensual penetration. Indeed, in the majority of the cases examined in Part II, the jury, rather than the judge or the parties, inquired about the significance of consent withdrawn after penetration and whether this could constitute rape.[155]

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[153] 720 ILL. COMP. STAT. ANN. 5/11-1.70(c) (LexisNexis 2012).

[154] H.B. 849, adding N.C. GEN. STAT. § 14-27.3A(b), 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

[155] In *McGill v. State*, for example, after being charged the jury returned a question to the judge, asking, "if one or another of the parties involved says 'stop,' does consent for sex terminate at this point?" 18 P.3d 77, 82 (Alaska Ct. App. 2001). In *State v. Baby*, the jury sent two questions to the judge. The first asked, "If a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the man continues until climax, does the result constitute rape?" 946 A.2d 463, 471 (Md. 2008) The second question asked, "If at any time the woman says stop is that rape?" *Id.* at 471. The judge answered, "This is a

Instead of waiting for a jury to ask, jurors should be instructed, in sex-neutral phrasing, on the possibility of postpenetration rape, its elements, the standard to be applied, and the circumstances to take into account.

The persistence of sex-specific language, in both rape statutes and jury instructions, reinforces the idea that only women are raped and only men are rapists.[156] However, men can be victims of rape, and women can be rapists.[157] Utilizing sex-neutral language will begin the process of recognizing that not all rape is perpetrated on women by men.

Moreover, the standard for culpability must be one of reasonableness under the circumstances; the victim's withdrawal of consent, whether by words or actions, must be capable of being understood by a reasonable person in the defendant's circumstances. This standard requires one party to manifest withdrawal of consent in a manner capable of being understood by a reasonable person, and it requires the other party to understand and react to that withdrawal as a reasonable person. This standard anticipates the gender bias that "objective" or "subjective" language are likely to provoke.

> Objective standards in general have been criticized by feminist legal theorists who have argued that these standards inherently embody male values. Our understanding of what is "objective" has been based largely on male experience, and stereotypes of men as objective and analytical have been contrasted with stereotypes of women as subjective and emotional.[158]

On the other hand, a concern with "the subjective standard in postpenetration rape prosecution is that it may require juries to perceive the withdrawal of consent from a masculine perspective."[159] Women are statistically more likely to be victims of rape and sexual assault, so a man would usually be in the

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question that you as a jury must decide. I have given the legal definition of rape which includes the definition of consent." *Id.* at 471-72. And in *State v. Robinson*, the jury sent the judge a question that asked, "if two people began consenting to an act, then one person says no and the other continues—is that rape?" 496 A.2d 1067, 1069 (Me. 1985).

[156] "[E]ven though most rape statutes have been amended so that their language is gender neutral, our prosecutions continue to be over-determined by gender." Capers, *supra* note 11, at 1299.

[157] *See generally* Capers, *supra* note 11 (calling attention to the existence of male rape victimization). The particular sex of the victim and the defendant can be taken into account by considering "all the circumstances" of the particular crime, without casting women in the perpetual role of victim.

[158] ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 139 (2000).

[159] Emlen, *supra* note 100, at 234-35.

position of interpreting words or conduct intended to withdraw consent.[160] An objective standard may therefore "diminish the possibility that juries will interpret the victim's actions only from a masculine standard of communication."[161]

In reality, however, "subjective and objective are poles on a continuum, because under either approach the jury must find that the actor acted reasonably."[162] Therefore, rather than characterizing the standard as "objective" or "subjective," the jury should be instructed to determine whether the defendant understood the complainant's manifestation as a withdrawal of consent (through words or conduct) or whether a reasonable person in the defendant's situation would have understood the manifestation as a withdrawal of consent for penetration. One example of such an instruction is the paragraph that was added to the California Jury Instructions[163] after *In re John Z.*[164] The California instructions defining *consent* in rape prosecutions now explain:

> A person who initially consents and participates in the act . . . has the right to withdraw that consent. To be effective as a withdrawal of consent, the person must inform the other person by words or conduct that consent no longer exists, and the other person must stop. The words or conduct must be sufficient to cause a reasonable person to be aware that consent has been withdrawn. If the other person knows or reasonably should know that consent has been withdrawn[,] . . . continuing the act . . . despite the objection, is against the will and without the consent of the person.[165]

Thus, both parties are responsible for unambiguous, two-way communication, and both are required to act reasonably.

Lastly, jury instructions must take into account the circumstances of the particular case. The relevant circumstances, among others, may include the events preceding intercourse, the mental states of the parties at the time of intercourse, the sexes of the parties, the relative sizes or strengths of the parties, and the methods of communication normally used by the parties. Taking into account all relevant facts ensures some measure of individualization and specificity

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[160] *Id.*

[161] *Id.*

[162] SCHNEIDER, *supra* note 158, at 139.

[163] COMM. ON STANDARD JURY INSTRUCTIONS, CRIMINAL, CALIF. JURY INSTRUCTIONS, CRIMINAL § 1.23.1 (2004).

[164] 60 P.3d 183 (Cal. 2003).

[165] COMM. ON STANDARD JURY INSTRUCTIONS, CRIMINAL, CALIF. JURY INSTRUCTIONS, CRIMINAL § 1.23.1 (2004).

in assessing the manner of withdrawn consent. Considering all relevant circumstances also points jurors toward the particular facts of the case and away from conscious or unconscious stereotypes and myths about rape.

An instruction that accomplishes all of this may look very similar to California's instruction on consent,[166] but it would differ by explicitly requiring consideration of the circumstances. For example, a model jury instruction might be written as follows:

> The words or conduct must be sufficient to cause a reasonable person [in the defendant's circumstances] to be aware that consent has been withdrawn. If the other person knows or reasonably should know [under the circumstances] that consent has been withdrawn, forcibly continuing the act of despite the objection[] is against the will and without the consent of the person.[167]

An instruction of this kind would allow jurors to account for the particular facts of the case, without either sex-specific language or vague terms like "objective" or "subjective."

Explicit, uniform, and sex-neutral instructions charging jurors with applying a reasonableness standard and taking into account all the circumstances will enable jurors to properly understand and assess the crime of postpenetration rape. As a result, the conviction rate in postpenetration rape prosecutions should increase, and victims may begin to believe that their cases will be taken seriously and assessed fairly. This could contribute to higher reporting rates and lower attrition rates in rape prosecutions, and ultimately, it could reduce the incidence of postpenetration rape.

V. REASONABLE TIME ALLOWANCE

A postpenetration rape statute or pattern jury instruction should not include an allowance for a "reasonable time," like that created by the Supreme Court of Kansas in *Bunyard*.[168] There, the court explained, "In the case of consensual intercourse and withdrawn consent, . . . the defendant should be entitled to a reasonable time in which to act after consent is withdrawn and communicated to the defendant . . . ."[169] Dissenting judges, in both *Bunyard* and a

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[166] *Id.*
[167] *Id.*
[168] 133 P.3d 14, 30 (Kan. 2006).
[169] *Id.*

more recent case, *State v. Flynn*, sharply disagreed.[170] In *Bunyard*, Judge Luckert dissented in part, stating that the majority had taken it upon themselves to create a "reasonable time" defense for Bunyard and future defendants.[171] In *Flynn*, Judge Malone dissented, stating that "the Kansas Supreme Court should reevaluate its holding in *Bunyard* on this point."[172] He declared that the reasonable time instruction "went beyond the statutory language," reiterating Judge Luckert's concern that "Kansas appellate courts should not add a judicially created defense allowing a reasonable time in which to commit rape."[173]

In contrast to the approach of the Kansas courts, neither the Illinois statute[174] nor the North Carolina House Bill[175] includes a "reasonable time" allowance. Likewise, the Supreme Court of California rejected a "reasonable time" allowance in *In re John Z.*[176] Nevertheless, the court in *In re John Z.* did not go far enough; it should have explicitly held that there is no "reasonable time" in which to continue sex after one partner has withdrawn consent.[177] In the case of consent withdrawn during sexual penetration, communicated by words or acts capable of being understood by a reasonable person under the circumstances, the only "reasonable time" to respond is immediately. Explicit approval of continued penetration for any amount of time under these circumstances

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[170] *Id.* at 35 (Luckert, J., dissenting in part and concurring in part); State v. Flynn, 257 P.3d 1259, 1265 (Kan. Ct. App. 2011) (Malone, J., dissenting).

[171] *Bunyard*, 133 P.3d at 35 (Luckert, J., dissenting in part and concurring in part).

[172] *Flynn*, 257 P.3d at 1265 (Malone, J., dissenting). Petition for review was granted on January 20, 2012, *see* Kansas Judicial Branch, *Petitions for Review—Calendar Year 2012: History of Previous Actions*, KAN. SUP. CT., http://www.kscourts.org/Cases-and-Opinions/Petitions-for-Review/Previous-Actions-2012.asp (Case # 103,566) (last visited June 4, 2013), and as of June 9, 2013, briefs have been submitted and hearing scheduled for September 11, 2013. *See Case Search Result*, KAN. APPELLATE CTS., http://intranet.kscourts.org:7780/pls/ar/CLERKS_OFFICE.list_case_detail?i_case_number=103566&i_case_name= (last visited June 9, 2013).

[173] *Id.* at 1264-65 (Malone, J., dissenting); *see also Bunyard*, 133 P.3d at 35 (Luckert, J., dissenting in part and concurring in part).

[174] 720 ILL. COMP. STAT. ANN. 5/11-1.70(c) (LexisNexis 2012).

[175] H.B. 849, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

[176] *In re* John Z., 60 P.3d 183, 187-88 (Cal. 2003) (noting a "lack of supporting authority for defendant's 'primal urge' theory" and that "[n]othing in the language of section 261 [the California rape statute] or the case law suggests that the defendant is entitled to persist in intercourse once his victim withdraws her consent").

[177] *See* Henry F. Fradella & Kegan Brown, *Withdrawal of Consent Postpenetration: Redefining the Law of Rape*, 41 CRIM. L. BULL. 3, 19 (2005). The *In re John Z.* dissent also takes issue with the lack of guidance provided to juries and lower courts. Specifically that the majority does not specify "how soon would have been soon enough. Ten seconds? Thirty? A minute?" *In re John Z.*, 60 P.3d at 190 (Brown, J., dissenting).

creates a safe harbor for rape, perpetuates deleterious stereotypes, and denies autonomy to sex partners.

A. "Safe Harbor" Problem

First, the "reasonable time" allowance will make conviction difficult because it creates a "safe harbor" of an unknown duration for rapists to persist in their crime.[178] The dissent in *In re John Z.* rightly criticizes the majority for leaving judges, defendants, and the people wondering how long would be an acceptably "reasonable time" to persist.[179] All we know from the *In re John Z.* majority is that four to five minutes would have been unreasonable, even if the court had accepted the defendant's "reasonable time" argument.[180] Other courts have failed to offer better guidance on "reasonable time."[181] Thus, not only is a "safe harbor" created for continued penetration, but there is no indication of how long this "safe harbor" lasts. Rather, it shouldn't exist at all, and neither state courts nor state legislatures should create or allow a defense that says "just a *little* nonconsensual sex is okay."

B. Perpetuating Stereotypes

Second, allowing for a "reasonable time" to discontinue penetration after consent is withdrawn will mean legislative or judicial approval of stereotypes about the "unstoppable male"[182] and his "primal urge."[183] For example, the defendant in *In re John Z.* argued for a "reasonable time" allowance because "[b]y essence of the act of sexual intercourse, a male's primal urge to reproduce is aroused . . . [and it is] therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her withdrawal of consent."[184]

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[178] *Bunyard*, 133 P.3d at 35 (Luckert, J., dissenting in part and concurring in part).

[179] *In re John Z.*, 60 P.3d at 190 (Brown, J., dissenting).

[180] *Id.* at 187 (stating that "even were we to accept defendant's 'reasonable time' argument, in the present case he clearly was given ample time to withdraw [at least four to five minutes] but refused to do so despite Laura's resistance and objections").

[181] *Bunyard*, 133 P.3d at 31 (holding that even where the defendant persisted for five to ten minutes after consent was withdrawn, the determination of discontinuing within a "reasonable time" must be left to the jury); State v. Flynn, 257 P.3d 1259, 1263-64 (Kan. Ct. App. 2011) (holding that persisting in intercourse for thirty seconds to two minutes after consent was withdrawn was sufficient to warrant a jury instruction on "reasonable time").

[182] Palmer, *supra* note 21, at 1276.

[183] *In re John Z.*, 60 P.3d at 187.

[184] *Id.*

John Z. wanted the court to find that his continued penetration for four or five minutes after consent was withdrawn was not rape because "[i]t is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge . . . ."[185] This is an "absurdity" without legal or factual basis,[186] which, if believed, puts the responsibility on women to "avoid awakening the man's primal urge."[187]

There is no legal basis for such an allowance. Living within society requires control of one's "primal desires."[188] Indeed, criminal statutes are not written with exceptions for those unable to exert self-control.[189] To that end, postpenetration rape statutes and case law should not acknowledge or accommodate the existence of a "primal urge."[190] Moreover, the "primal urge"[191] appears factually unfounded. The "absurdity" of the need for a "reasonable time" to desist is well illustrated by the stark example of an eighteen-year-old-male, who engages in sexual intercourse with a partner when his parents surprise them in the act.[192] "Surely, neither [the boy] nor his parents would think . . . that he needs a reasonable period of time to finish."[193]

Most dangerous, though, is that treating these unfounded stereotypes as fact places the fault of postpenetration rape on the woman who "aroused" a man's "primal urge."[194] If courts and legislatures recognize that men are subject to this "primal urge" as a matter of fact,[195] then the responsibility will shift to the victim "to prove that she took all possible steps to avoid awakening the man's primal urge."[196] This would require women to restrict their behavior to avoid being assaulted and take the blame if they are assaulted.[197]

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185 *Id.*
186 Fradella & Brown, *supra* note 177, at 18.
187 Colb, *supra* note 30.
188 Fradella & Brown, *supra* note 177, at 19.
189 *See id.*
190 *In re* John Z., 60 P.3d 183, 187 (Cal. 2003).
191 *Id.*
192 Fradella & Brown, *supra* note 177, at 19.
193 *Id.*
194 *In re John Z.*, 60 P.3d at 187.
195 *Id.*
196 Colb, *supra* note 30.
197 *Id.*

C. Violation of Autonomy and Bodily Integrity

Lastly, the reasonable time defense represents a violation of autonomy and bodily integrity that should be eliminated when recognizing postpenetration rape as a crime. Granting a "reasonable time" to persist in penetration after consent has been withdrawn sanctions ignorance and disregard for a partner's verbal or nonverbal manifestations of nonconsent. In an ideal, egalitarian, and consensual sexual relationship, each partner would freely give or withdraw his or her consent, and partners would comply immediately.[198] The "reasonable time" allowance is incompatible with this ideal. Once postpenetration rape is recognized as a criminal harm, equivalent to other sexual assaults, that recognition of autonomy and bodily integrity should not be limited by a "reasonable time" allowance.

A likely counterargument is that the "reasonable time" defense acknowledges the reality that humans are not capable of reacting to verbal commands instantaneously—that is, that all actions require some time for processing and reacting. But clear jury instructions obviate this concern. Instructions requiring a manifestation of withdrawn consent, capable of being understood by a reasonable person, ensure that the defendant reasonably should have understood the withdrawal of consent and discontinued penetration immediately. In other words, by the time the withdrawal could have been understood by a reasonable person in the defendant's circumstances, the response should be immediate. Additionally, any ambiguity in communication should be resolved in favor of ceasing sexual activity immediately, not prolonging it until the defendant can discern the withdrawal with absolute certainty.[199] Therefore, there should be no "reasonable time" allowance. Whether judicially or legislatively appended, it condones "just a little" rape, perpetuates dangerous stereotypes, and denies autonomy to sex partners.

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[198] The broader issue here, though beyond the scope of this note, is the much-needed shift to an affirmative-permission standard rather than an absence-of-objection standard for consent. *See, e.g.*, Baker, *supra* note 35, at 452 & nn.25, 34 (discussing an affirmative consent standard and recognition of preference as protecting and respecting autonomy).

[199] *See* Baker, *supra* note 35, at 451-53.

CONCLUSION

Between law and society there exists a dialectic, whereby each informs the other.[200] A change in social consciousness can lead to legal reform, just as changes in the law color public perception, morality, and ideals.[201] It is because of this dialectic that statutes criminalizing postpenetration rape are desperately needed, both to acknowledge that it is "real rape" and provide clear standards for prosecution and conviction. In addition, in order to communicate between the law and the people, jury instructions must explain, in unambiguous terms, how postpenetration rape statutes should be applied.

The ultimate impact of these reforms and the interface between law and society could be incredibly positive and far-reaching. Hopefully, three main impacts will result: (1) the number of rapes and sexual assaults committed will decrease by virtue of disseminating knowledge and raising consciousness; (2) the reporting rate of these rapes and assaults will increase as more nonconsensual sex acts are recognized as legitimate crimes deserving criminal prosecution and punishment; and (3) the rates of prosecution and conviction in postpenetration cases will increase as reporting rates and public attitudes about the legitimacy of these crimes improve. Rather than a paradigm shift that begins with a change in public sentiment and proceeds with a piecemeal transformation of the law, in the case of rape and sexual assault, a change that begins with the law and radiates outward seems the most clear, direct, and influential method for ending sexual violence.

Sarah O. Parker[†]

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[200] *See* Estrich, *supra* note 18, at 1093-94.

[201] *See* Sunstein, *supra* note 39, at 2051.

[†] J.D., Brooklyn Law School, 2013; B.A., University of California, Berkeley, 2005. A special thank you to Professor Elizabeth Schneider for her insight and encouragement in the development of this note. Thank you also to the editors and staff of the *Brooklyn Law Review* for helpful comments and suggestions throughout the writing process. Finally, an extremely grateful thank you to my parents who are both endlessly supportive and inspirational role models.