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

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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."¹

"John Z. wasn’t guilty of rape; he was guilty of being male. If I were a guy, I’d find another country."²

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.³ 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.⁴ All of those present, except Laura, were drinking beer.⁵ At approximately 8:10 P.M.,

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¹ People v. John Z., 60 P.3d 183, 184 (Cal. 2003).
² Kathleen Parker, Rape California-Style is a Woman’s Prerogative, ORLANDO SENTINEL, Jan. 12, 2003, at G3.
³ Appellant’s Brief on the Merits at 3, John Z. (No. S103427) [hereinafter App. Brief].
⁴ Id.
⁵ 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.\textsuperscript{6}

Upon entering the unlit bedroom together, Laura, Juan, and John engaged in consensual sexual interaction, not including intercourse.\textsuperscript{7} As the relations intensified, Juan put on a condom and John left the room.\textsuperscript{8} 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.\textsuperscript{9} After the rape terminated due to Laura’s struggling, Juan left the room.\textsuperscript{10} As Laura searched for her clothes in the dark bedroom, John entered the room with his clothes off.\textsuperscript{11}

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.\textsuperscript{12} Laura kissed John back, and John then climbed on top of Laura and put his penis inside of her.\textsuperscript{13} The two engaged in sexual intercourse for approximately ten minutes, during which time Laura physically struggled with John.\textsuperscript{14} Laura told John several minutes into the act that she “needed to go home”; John responded for Laura to “just give me a minute.”\textsuperscript{15} Twice more, Laura repeated: “No, I need to go home.”\textsuperscript{16} After Laura’s objections, John continued to have sexual intercourse with her for approximately sixty

\textsuperscript{6} \textit{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. \textit{John Z.}, 60 P.3d at 184; App. Brief, \textit{supra} note 3, at 3.

\textsuperscript{7} \textit{John Z.}, 60 P.3d at 184; App. Brief, \textit{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, \textit{supra} note 3, at 3. Juan also “asked Laura if it was her fantasy to have two guys, and Laura said it was not.” \textit{John Z.}, 60 P.3d at 184.

\textsuperscript{8} \textit{Id.} at 184-85.

\textsuperscript{9} \textit{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. \textit{Id.}

\textsuperscript{10} \textit{Id.}

\textsuperscript{11} \textit{Id.}

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Id.}

\textsuperscript{14} \textit{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.” \textit{Id.} John then rolled Laura over onto her back. \textit{Id.} Laura never stated to John, either prior to or during penetration, that she did not wish to have intercourse with him. \textit{Id.}

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.}
to ninety seconds before discontinuing the act. 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."  

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." 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. 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. However, on January 6, 2003, the California Supreme Court held in a 6-1 opinion that John was a rapist. 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.

Under the traditional common law definition of rape, the prosecution and conviction of John Z. would have been unthinkable. 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. 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. 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.  

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17 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.


19 CAL. PENAL CODE § 261(a)(2) (Deering 2004).

20 See supra note 7 and accompanying text.

21 John Z., 60 P.3d at 185.

22 Id. at 188.

23 Id. at 184.

24 See discussion infra Part II.A.

25 See discussion infra Parts II.B, III.A.

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

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

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.

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. 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.

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. California and Illinois, as two recent high-profile examples, provide the most guidance to other states considering the reform.

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. Some advocates raise an additional concern

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28 See discussion infra Part IV.
29 See discussion infra Part I.
30 See discussion infra Part II.A.
31 See discussion infra Part II.B.
32 See discussion infra Part III.
33 See discussion infra Part III.
34 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.\textsuperscript{35} 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.”\textsuperscript{36} This definition
included three elements: intercourse, force, and lack of consent.\textsuperscript{37}
American jurisdictions almost universally adopted the three common law
elements and maintain them even today.\textsuperscript{38} 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.\textsuperscript{39} This new wave of
reforms arose from the feminist movement of the 1970s, and has continued
to the present day.\textsuperscript{40} 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.”\textsuperscript{41}

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

\textsuperscript{35} See discussion infra Part IV.B.
\textsuperscript{36} CATHERINE A. MACKINNON, SEX EQUALITY: RAPE LAW 801 (2001) (quoting WILLIAM
BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (1765)).
\textsuperscript{37} SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES
318 (7th ed. 2001).
\textsuperscript{38} Id.
\textsuperscript{39} 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 §
\textsuperscript{40} KADISH & SCHULHOFER, supra note 37, at 318.
\textsuperscript{41} JUDITH G. GREENBERG, MARTHA L. MINOW, AND DOROTHY E. ROBERTS, WOMEN AND
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."42 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.43 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."44

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.45 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.46 Some defend the marital rape exemption on the grounds that it represents the merger of a man and a

42 Id.
44 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.
45 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).
46 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.\textsuperscript{47} The defense of the exemption also stems from a "cultural need" to understand the relationship between a husband and wife as "consensual and harmonious."\textsuperscript{48}

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.\textsuperscript{49} 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.\textsuperscript{50} 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.\textsuperscript{51} Other states required intervention through the courts to abolish or reform their marital rape statutes.\textsuperscript{52} 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.\textsuperscript{53} The remaining states allow prosecution for rape of a wife by her husband, but with some qualifications

\textsuperscript{47} WOMEN AND THE LAW, supra note 41, at 862.

\textsuperscript{48} 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.

\textsuperscript{49} 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).

\textsuperscript{50} RUSSELL, supra note 44, at 21.

\textsuperscript{51} 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.

\textsuperscript{52} 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).

\textsuperscript{53} 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). \(^{54}\)

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. \(^{55}\) 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. \(^{56}\) 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. \(^{57}\) 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. \(^{58}\) 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. \(^{59}\) In fact, the commentators found it necessary for the Code to “draw a line between forcible rape on the one hand and reluctant

54 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].

55 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.

56 See discussion infra Part I.B.1.

57 See discussion infra Part I.B.2.

58 See discussion infra Parts I.B.3.

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." 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. The authors of the code had purportedly sought to produce a modern rape statute that would more adequately protect rape victims. Instead, the modification they proposed rendered moot the victim’s subjective (or even objective) manifestation of her lack of consent to her attacker.

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. The revised statutes reinforced an emphasis on physical violence, rather than minimizing it. As courts looked to force as the predominantly defining feature of rape, they began to apply a resistance standard rather than a consent standard. 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 consent to the sexual act."
However, the Model Penal Code had the opposite effect of defining nonconsent solely in terms of physical evidence of resistance to the attacker. 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.

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. 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. 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.

States responded to this push for reform both by legislative statute and in the courts. 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. More significantly, a minority of states shifted towards removing

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68 BESSMER, supra note 67, at 178.
69 KADISH & SCHULHOFER, supra note 37, at 329; BESSMER, supra note 67, at 178-90.
70 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).
71 BESSMER, supra note 67, at 180 (arguing that where the resistance standard is applied rigorously, it places "stringent demands" on the victim).
72 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").
73 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.").
74 KADISH & SCHULHOFER, supra note 37, at 329.
75 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.  

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. 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. The Commentaries to the Model Penal Code actually seemed to recommend that states abolish the resistance requirement. However, the vast majority of states ignored this directive, instead choosing to follow the Code's (seemingly contradictory) emphasis on force. Thus, prior to reforms that began in the 1970s, the resistance requirement was still explicitly included in many state rape statutes.

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

76 See discussion infra Part I.B.3.
77 BESSMER, supra note 67, at 177.
78 GORDON & RIGER, supra note 55, at 59.
79 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").
80 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).
81 SCHULHOFER, supra note 59, at 24; KADISH & SCHULHOFER, supra note 37, at 329.
82 GORDON & RIGER, supra note 55, at 59.
83 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.
84 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).
85 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. 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. 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.

Evidence of the practical impact of removing the resistance standard is mixed. 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.” Prosecutors still rate the use of physical force as the most important single factor in securing convictions of rape defendants. 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.

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. Under this approach, all incidents of nonconsensual

86 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).


88 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 Dressier, 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).

89 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).

90 KADISH & SCHULHOFER, supra note 37, at 329.

91 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.

92 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).

93 KADISH & SCHULHOFER, supra note 37, at 329.
intercourse would be treated as a crime, regardless of whether physical force occurred. 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.

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.* In this case, seventeen-year-old M.T.S. was staying in the home of fifteen-year-old C.G. and her mother. 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. C.G. allegedly awoke from a deep sleep to find M.T.S. on top of her, with his penis inside of her. 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. M.T.S., in contrast, testified that C.G. had invited him to her room and that the sex between them was consensual. However, during the act, C.G. changed her mind and pushed M.T.S. off, at which time he immediately complied with her wishes.

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. 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.

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94 *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.

95 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.


97 *Id.* at 1267.

98 *Id.* at 1267-68.

99 *Id.* at 1268.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 1269.

104 *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. 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." 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." 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.

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." However, the opinion also attracted its fair share of critics. 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.

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

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105 M.T.S., 609 A.2d at 1279-80.
106 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.
107 Id. at 1278.
108 Id.
109 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.").
110 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.
111 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)).
112 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. 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." 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. The common law rule that a woman cannot withdraw her consent after penetration remains the majority rule. 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.

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. 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. 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

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).

113 SCHULHOFER, supra note 59, at 44.
114 SANDAY, supra note 109, at 278.
115 See discussion infra Parts II-III.A.
116 See discussion infra Part II.A.
117 See discussion infra Parts II.B.
118 See discussion infra Parts II.B., III (describing the only eight states that have deviated from the common-law standard).
119 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. It did so in the context of a jury instruction in a rape trial
regarding withdrawn consent. In that case the defendant, Donnie Way,
and victim, Beverly Hester, were on their first date together. During
the date, they went with another couple to the apartment of the defendant’s
friend. The victim accompanied the defendant to a bedroom, at which
time she testified that Way hit her, and she undressed “because she was
scared.” 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.” During the act, Beverly complained of severe stomach pains,
and Way got off her and called her friend from downstairs. They then
took Beverly to the hospital, where she reported she had been raped.
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.

During deliberations at trial, the jury asked the judge “whether consent
can be withdrawn” and the judge responded affirmatively. Way was
convicted of second-degree rape, and appealed on the grounds that the
court’s instruction on withdrawal of consent was in error. The North

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120 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
at length and criticizing it in light of recent actions by other states, including John Z. and the
Illinois statute).
121 Way, 254 S.E.2d at 761.
122 Id. at 760.
123 Id.
124 Id.
125 Id. at 760-61.
126 Id. at 761.
127 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.
128 Id.
129 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.
130 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.\textsuperscript{131} 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.\textsuperscript{132}

\textbf{2. Maryland}

Two years after \textit{Way}, the Maryland Court of Appeals heard a case involving a similar instruction to a jury.\textsuperscript{133} 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.\textsuperscript{134} 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.\textsuperscript{135} Battle then brandished a screwdriver and held it to the victim's head, demanding that she disrobe and join him in bed.\textsuperscript{136} The victim complied, and the defendant raped her.\textsuperscript{137} 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.\textsuperscript{138}

As in \textit{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?"\textsuperscript{139} After clarifying the jury's question, the judge responded, in part: "it is possible for a situation to start out as consensual

\begin{footnotes}
\item[\textsuperscript{131}] Id. (citing R. ANDERSON, 1 WHARTON'S CRIM. L. & PROC. § 302 (1957)).
\item[\textsuperscript{132}] Id. at 761-62. \textit{But see} Palmer, \textit{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).
\item[\textsuperscript{133}] Battle v. State, 414 A.2d 1266 (Md. 1980).
\item[\textsuperscript{134}] Id. at 1267.
\item[\textsuperscript{135}] Id.
\item[\textsuperscript{136}] Id.
\item[\textsuperscript{137}] Id.
\item[\textsuperscript{138}] Id.
\item[\textsuperscript{139}] Id. at 1268.
\end{footnotes}
and then become a non-consensual one in the course of the event."

The jury then convicted Battle of assault with intent to rape. In doing so, the court considered the history of Maryland's rape statute, which arose from the English common law. 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. For example, when the victim originally does not consent to intercourse, but then gives her consent after penetration, the act is still considered rape. Thus, the court concluded that if a woman consents to intercourse prior to penetration, and then withdraws her consent, no rape has occurred. 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."

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. The case following the traditional common-law rule, like Way and Battle, dealt with the appeal of a jury instruction
regarding withdrawal of consent during intercourse. The court relied heavily on the Way and Battle decisions in reaching its opinion. The defendant claimed that the victim initially consented to intercourse, but changed her mind during the act and withdrew her consent. He then continued the act of intercourse by force and against the victim's will.

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?" The judge responded in the affirmative, and the jury returned a guilty verdict. 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. 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." 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.

The exclusion of post-penetration withdrawal of consent was, in the view of the court, consistent with the rape statute in California. 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." Such outrage cannot be present where a female has willingly consented to the act of intercourse, even if she

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150 Id. at 162.
151 Id.
152 Id.
153 Id. at 162-63.
154 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.
155 Id. at 163, 165.
156 Id. at 164.
157 Id. The court noted that acts of force or violence during the act, while not considered rape, could by punishable under other crimes (i.e., assault or battery). Id. at 165.
158 Id. at 164-65 (citing CAL. PENAL CODE §§ 261, 263 (West 1985)).
159 Id. at 165.
withdraws her consent during the act.\textsuperscript{160} The \textit{Vela} court's reasoning received some criticism at the time, and was later overruled in \textit{John Z}.\textsuperscript{161} 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.

\textit{1. Maine}

Maine was the first state to classify intercourse that continues after consent is withdrawn as rape.\textsuperscript{162} In 1984, the Maine Supreme Court heard the appeal of Gordon Robinson III from his rape conviction.\textsuperscript{163} 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.\textsuperscript{164} 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."\textsuperscript{165} Robinson claimed that after the alleged victim made this statement, he got dressed and left her home immediately.\textsuperscript{166}

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

\begin{footnotesize}
\begin{itemize}
\item[160] 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." \textit{Id}.
\item[161] See \textit{generally} McLellan, \textit{supra} note 144 (criticizing \textit{Vela} and proposing a statute that would ensure that rape encompasses the withdrawal of consent post-penetration).
\item[162] State v. Robinson, 496 A.2d 1067 (Me. 1984).
\item[163] \textit{Id}.
\item[164] \textit{Id.} at 1069.
\item[165] \textit{Id}.
\item[166] \textit{Id}.
\item[167] \textit{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?" \textit{Id}.
\item[168] \textit{Id}.
\item[169] \textit{Id}.
\end{itemize}
\end{footnotesize}
cannot transform initially consensual intercourse into rape.\textsuperscript{170} The court reasoned that a definition of rape that includes withdrawn consent was consistent with the legislative intent of the Maine rape statute.\textsuperscript{171} 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.\textsuperscript{172}

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.\textsuperscript{173} The court emphasized that the ongoing intercourse, initiated with the alleged victim’s consent, “did not become rape merely because she revoked her consent.”\textsuperscript{174} 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.\textsuperscript{175} 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.\textsuperscript{176} More recent state court decisions have relied less on force, and more on consent, in protecting victims of nonconsensual sex.

\subsection*{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.\textsuperscript{177} The trial judge carefully instructed the

\textsuperscript{170} 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.

\textsuperscript{171} 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)).

\textsuperscript{172} 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.

\textsuperscript{173} Id. at 1069-70.

\textsuperscript{174} Id. at 1070.

\textsuperscript{175} Id.

\textsuperscript{176} 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.

jury that continued intercourse after consent is withdrawn is only rape if it is accompanied by force.\footnote{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. \textit{Id.} While the inclusion of a force requirement implies that the court may have been closely following the \textit{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." \textit{Id.} at 963 (citing \textit{Robinson}, 496 A.2d at 1070).} 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.\footnote{\textit{Id.} at 962 (citing \textit{Conn. Gen. Stat.} § 53a-65(2) (1984)).} Thus, it rejected the notion, espoused by the Maryland court in \textit{Battle}, that consent at penetration is equivalent to consent for the entire act.\footnote{See \textit{Battle v. State}, 414 A.2d, 1266, 1269-70 (Md. 1980).} 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."\footnote{\textit{Id.} at 963 (citing \textit{Robinson}, 496 A.2d at 1070).}

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.\footnote{\textit{Siering}, 644 A.2d. at 963. The court found the Maryland court's discussion in \textit{Battle} to be dicta, the North Carolina court's analysis in \textit{Way} to be "merely a bald statement that the trial court was wrong," and the \textit{Vela} court's reasoning to be "archaic and unrealistic." \textit{Id.}} 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 \textit{Vela} decision in California.\footnote{\textit{McGill v. State}, 18 P.3d 77 (Alaska Ct. App. 2001); \textit{State v. Crims}, 540 N.W.2d 860 (Minn. Ct. App. 1995), \textit{cert. denied}, No. C1-95-304, C6-95-41 (Minn. 1996); \textit{State v. Jones}, 521 N.W.2d 662, 672 (S.D. 1984).} 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.\footnote{\textit{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 \textit{Vela} case.").} 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.\footnote{\textit{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. \textit{Id.}}
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*. 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. Jennifer alleged that the defendant ripped her clothes off and, over her cries of "no," beat and raped her. She stayed with him overnight, and told her mother the next day that she had been raped. Roundtree claimed that the two had consensual sex during which Jennifer grew angry and told him to stop.

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." The First District Appellate Court upheld the instruction, explicitly rejecting *Vela*'s conclusion as "unsound" and declining to follow it. *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." Rather, under the relevant California statute, a rape occurs if the victim removes consent and is forced to continue with intercourse against her will. 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.

*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.
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. 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.

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. 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. 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.

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.” 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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197 See discussion supra Part II.B.
198 See discussion infra.
199 People v. John Z., 60 P.3d 183, 184 (Cal. 2003); see discussion of John Z. facts supra Introduction.
200 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.
201 See generally id. at 183-91.
where intercourse begins without consent. 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.

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." 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. 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. 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.

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. John argued that Roundtree implied that courts must adopt a "reasonable amount of time" measure into the analysis of the

204 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.
205 John Z., 60 P.3d at 186.
206 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).
207 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").
208 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.
209 App. Brief, supra note 3, at 12.
alleged sexual assault. 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. As this would be very difficult for a court to gauge, the rule that the State of California advocated against John was unworkable. 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.

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.

The court rejected John's "primal urge" theory, citing a complete lack of any supporting authority. 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." Even so, the record suggests that John had "ample time" to withdraw after Laura's protests, but chose not to do so. Thus, John's reasonable time, or "primal urge" argument failed.

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. This lack of

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210 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").

211 Id. at 12.

212 Id.

213 Id. at 11-12 (emphasis added).

214 Id. at 14.


216 Id. (citing CAL. PENAL CODE § 261(a)(2) (2003)).

217 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.

218 Id.

219 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. "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?" 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.

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.

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 much of the majority’s legal analysis. 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." 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. Further, even if Laura did withdraw her consent, the state did not show that John continued the act with force after that
point. As such, the state did not prove John’s guilt beyond a reasonable doubt.

The majority responded to the claims of both John and Chief Justice Brown by emphasizing the facts in the record. 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. As such, “no reasonable person in defendant’s position would have believed that Laura continued to consent in the act.” 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. 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.

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. 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. 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.”

227 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).

228 Id. (Brown, C.J., dissenting).

229 Id. at 185-87.

230 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”).

231 John Z., 60 P.3d at 187.

232 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.

233 Id.


235 Id. at 754-55.

236 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. 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." 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.

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. 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.

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." 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.

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.").

Id.

Id.

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

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].

720 ILL. COMP. STAT. 5/12-17(c) (2004).

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, 2003.244 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.245

No state had similar legislation pending during 2003 or the early part of 2004.246 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.247 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.248 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.249

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."250 In addition, ICASA Executive Director Polly Poskin supported the passage of the SB 406 in Illinois as "an important step
in recognizing the rights of women to control their own bodies and ensure their safety."\textsuperscript{251}

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.\textsuperscript{252} Some critics target the entire policy, while others support the reforms but favor a particular method of implementation.\textsuperscript{253} 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.\textsuperscript{254}

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.\textsuperscript{255} 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.\textsuperscript{256} 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.\textsuperscript{257} In addition, since no court has adopted an explicit "reasonable"
time, men have no guidance as to the time the law will allow them after withdrawal of consent to cease the sexual act.\textsuperscript{258}

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.\textsuperscript{259} 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.\textsuperscript{260} Additionally, this function will be unaffected whether the change in the law occurs through judicial or legislative activism.\textsuperscript{261}

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.\textsuperscript{262} 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.\textsuperscript{263} However, critics are persuasive when they decry attempts by either courts or legislatures to codify a particular

\textsuperscript{258} 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 Aquaintance Rape] (“The vagueness of the persistence element of postpenetration rape illustrates the uneasiness with which it sits as a proxy for force.”).

\textsuperscript{259} 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.

\textsuperscript{260} 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.

\textsuperscript{261} See infra Part IV.B.

\textsuperscript{262} 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.

\textsuperscript{263} 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.\textsuperscript{264} Due to the complex nature of the circumstances surrounding post-penetration rape, this case-by-case analysis is clearly preferable to a \textit{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.\textsuperscript{265} 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."\textsuperscript{266} 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.\textsuperscript{267}

This rationale is fundamentally insulting to men. It smacks of the "primal urge" argument raised by the defense in \textit{John Z.} and rejected by all seven members of the California Supreme Court.\textsuperscript{268} 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.\textsuperscript{269} "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

\textsuperscript{264} Interview with Wendy Murphy, Victim Advocacy & Research Group, \textit{supra} note 54; \textit{see supra} note 222.
\textsuperscript{266} McElroy, \textit{supra} note 244.
\textsuperscript{267} Parker, \textit{supra} note 2, at G3.
\textsuperscript{268} \textit{See discussion supra} Part III.A.1.
\textsuperscript{269} \textit{See Cathy Young}, \textit{Troubling Questions About Rape and Consent}, \textit{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."); \textit{see also} Palmer, \textit{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."\(^{270}\) 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.”\(^{271}\)

**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.”\(^{272}\) 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.\(^{273}\) 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.”\(^{274}\)

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.\(^{275}\) Each state passing this reform has reiterated that the crime of rape simply involves intercourse, performed by force and without the partner’s consent.\(^{276}\) In other words, where consent is withdrawn, force remains, and intercourse continues, there is rape, regardless of when that consent is withdrawn.\(^{277}\) Additionally, there exists no empirical proof that rape by a stranger is any more harmful to women than rape at the hands of someone


\(^{272}\) McElroy, *supra* note 244.

\(^{273}\) 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.


\(^{275}\) See *supra* Parts II.A.3, III.A.1; *John Z.*, 60 P.3d at 186.

\(^{276}\) See discussion *supra* Parts II.B, III.A; see also *John Z.*, 60 P.3d at 190 (Brown, C.J., dissenting).

\(^{277}\) See discussion *supra* Parts II.B, III.A.
who was at one time a trusted partner. 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.

The most outspoken critic of the Illinois statute has been Wendy Murphy, the director of the Victim Advocacy and Research Group in Boston. 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.

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. 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.

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278 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).

279 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 Rippy, Sen. Rutherford’s Office, supra note 241 (stating that the senator’s office was “not aware of anyone lobbying against” SB 406).

280 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.

281 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.

282 Interview with Wendy Murphy, Victim Advocacy & Research Group, supra note 54. 283 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.\(^\text{284}\) 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.\(^\text{285}\) 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.\(^\text{286}\)

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."\(^\text{287}\) 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.\(^\text{288}\) 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.\(^\text{289}\) Inaction on the issue is the most dangerous course for victims of sexual


\(^{286}\) See supra Introduction and text accompanying note 244.

\(^{287}\) Interview with Wendy Murphy, Victim Advocacy & Research Group, supra note 54.

\(^{288}\) 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.

\(^{289}\) 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. 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. 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. 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. 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. 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. 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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290 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).


293 See supra Part II.B.

294 See supra Parts III.A-B.

295 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.