COMMENTS

CLARIFYING THE ISSUE OF CONSENT: THE EVOLUTION OF POST-PENETRATION RAPE LAW

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I. INTRODUCTION

A seventeen-year-old girl attended a party with her new boyfriend. Everyone at the party drank alcohol, but she did not. Although the girl said that she was not ready for sex, she engaged in a three-way sexual encounter at the party with her boyfriend and his friend, John. During the encounter, John left the room and the girl and her boyfriend had sexual intercourse. When it was over, her boyfriend left the room and John returned. Wordlessly, John and the girl began having sex. The girl, having second thoughts, rolled on top of John and told him she had to go home. He rolled himself on top of her and responded, "Just give me a minute." The girl replied, "No. I have to go home." About one minute later, John stopped the intercourse.[1]

 Notes & Comments Editor, *Stetson Law Review*. B.S., Florida State University, 2001; J.D., Stetson University College of Law, 2005.

I would like to thank Professor Robert Batey for his invaluable advice on this topic, and the *Law Review* editors, advisors, staff, and my publication editor, Ian Peterson, for their overwhelming commitment to this organization.

This Comment is dedicated to Carolyne Davis and Ryan Singleton for listening to me discuss this topic (and every other topic) for hours, and for their love and encouragement in all my endeavors. I would also like to extend my appreciation to my father for his endless support and direction, and to my study group—especially Duke Regan—for keeping me laughing and helping me make it onto the *Law Review* in the first place. Finally, I am eternally grateful to the Red Sox, the 2004 World Series Champions.

1. This is the dissent's version of the facts of *In re John Z.*, 60 P.3d 183, 189–190 (Cal. 2003) (Brown, J., dissenting). Justice Brown concurred with the portion of the majority's opinion that held that post-penetration rape was a convictable offense, but she dissented because she did not believe that the State proved all of the elements of rape. *Id.* at 188, 190–191. For a discussion of *John Z.*, consult *infra* Part II.B.

Did John rape the girl, or did she engage in consensual sex? In 2003, the California Supreme Court held that John's actions constituted a forcible rape.[2] That holding resolved a jurisdictional split and solidified the legal possibility of post-penetration rape as a convictable offense under California's rape statute.[3] The holding proved controversial, and reactions of approval and disapproval resonated throughout the legal community, media, and general public.[4] Reasons for the controversy varied, but two main issues arose: whether courts should recognize post-penetration rape as an offense that is convictable under a rape or sexual assault statute, and if so, based on the facts of *In re John Z.*,[5] whether John actually committed a rape.[6]

Post-penetration rape may be defined as a situation in which both parties initially consent to sexual intercourse, but, at some time during the act, one party communicates to the other that he or she is revoking consent and wishes to terminate the inter-

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2. *John Z.*, 60 P.3d at 188.

3. *Id.* The cases that created the jurisdictional split were *People v. Vela*, 218 Cal. Rptr. 161 (Cal. App. 3d Dist. 1985), and *People v. Roundtree*, 91 Cal. Rptr. 2d 921 (Cal. App. 1st Dist. 2000). For a discussion of those cases, consult *infra* notes 46–60, 87–101, and accompanying text.

4. *E.g.* Family Violence Prevention Fund, *California Court Redefines Rape*, http://endabuse.org/newsflash/index.php3?Search=Article&NewsFlashID=404 (Feb. 4, 2003) (stating that although "some legal scholars and men's rights activists claim the Court's decision is unfair and unconstitutional," others "say the ruling protects a woman's right to control what happens to her body at all times"); Robert Greene, *Confusion Over Consent: When Did Laura Say No and What Did She Mean?*, http://www.laweekly.com/ink/03/53/features-greene.php (Nov. 21–27, 2003) (questioning, in light of *John Z.*, whether "wily women [would] now utter a barely audible 'no' in the middle of intercourse to trap men into becoming rapists" and describing radio talk show commentary that was unsympathetic to the victim); Kathleen Parker, *Rape California-Style Is a Woman's Prerogative*, Orlando Sentinel G3 (Jan. 12, 2003) (stating that John waited "a full minute and a half to cease and desist—an act of rare self-control among the primate known as a [seventeen]-year-old male" and concluding that "John Z. wasn't guilty of rape; he was guilty of being male"). The facts of *John Z.* were so controversial that the case became fodder for a law school exam. Harvard Law School, *Criminal Law 6: 2002–2003*, http://www.law.harvard.edu/academics/registrar/exams_02-03/htmlbagenstos.html (Jan. 10, 2003).

5. 60 P.3d 183.

6. *Id.*, *see* Greene, *supra* n. 4 (stating that the one dissenting justice in *John Z.* "said there was no rape here, or at least not enough evidence of one for a criminal conviction"). The controversy over whether John actually committed a rape is significant because it raises issues that will be relevant in future post-penetration rape cases. For a discussion of some of these issues, consult *infra* Part III. The controversy surrounding *John Z.* is not unexpected—prosecuted forcible sex cases "often provoke heated public controversy about who should be believed and who should be blamed." Samuel H. Pillsbury, *Crimes against the Heart: Recognizing the Wrongs of Forced Sex*, 35 Loy. L.A. L. Rev. 845, 855 (2002).

course.[7] After the revocation of consent, the other party forces the revoking party to continue the intercourse against his or her will.[8]

Post-penetration rape is not a convictable offense in every state.[9] The first post-penetration rape case in a United States court occurred almost three decades ago, and, since that time, post-penetration rape cases have increasingly appeared in different jurisdictions and have been subjects of varying analyses.[10] Some courts disallowed the possibility of post-penetration rape, entirely based on a reading of the state's rape or sexual assault statute or based on persuasive cases from other jurisdictions.[11] Others found that a broad reading of the state's rape or sexual assault statute would allow a post-penetration rape conviction.[12] Finally, some courts found that, in addition to following precedent or the language of a statute, common sense or compassion should prompt a court to allow a post-penetration rape claim to pass muster.[13]

The conflicting precedent from different jurisdictions continues to grow as post-penetration rape cases continue to appear in the Nation's courts. This will result in confusion within courts addressing future post-penetration rape cases, and it furthers the debate over the validity of post-penetration rape convictions. For

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7. Amy McLellan, Student Author, *Post-penetration Rape—Increasing the Penalty*, 31 Santa Clara L. Rev. 779, 780 (1991). McLellan coined the term "post-penetration rape" in her law review article, and the term has been recognized by the general public and legal community. *E.g. John Z.*, 60 P.3d at 186 (noting that *Post-penetration Rape—Increasing the Penalty* advocated statutory change to punish post-penetration rape as rape and not as a lesser offense); Greene, *supra* n. 4 (stating that there can be "in the legal terminology, 'post-penetration rape'"); *but see* Harvard Law School, *supra* n. 4 (describing the revoked-consent scenario as "what is sometimes infelicitously referred to as a 'post[-]penetration rape'").

8. McLellan, *supra* n. 7, at 780. The Author recognizes that men may be rape victims, and this Comment attempts to remain as gender-neutral as possible. However, due to the prevalence of women as rape victims, the Comment unavoidably discusses certain aspects of post-penetration rape law as unique to the female victim.

9. Many states have not had the opportunity for their courts to address the revoked-consent scenario. For a discussion of case law from varying jurisdictions, consult *infra* Parts II.A.–B.

10. *Infra* pt. II.A.–B. (discussing post-penetration rape case law).

11. *Infra* pt. II.A. (discussing cases that disallowed rape convictions for post-penetration rape).

12. *Infra* pt. II.B. (discussing cases that allowed rape convictions for post-penetration rape).

13. *Infra* pt. II.B. (discussing cases that allowed rape convictions for post-penetration rape).

those reasons, state legislatures and courts should consider how they will address the revoked-consent scenario because it is likely to arise.[14]

This Comment seeks to explore the burgeoning law of post-penetration rape and suggests guidelines for courts and legislatures to use in the revoked-consent scenario. Part II outlines the historical development of post-penetration rape law. Part III analyzes the reasons why post-penetration rape should be convictable under rape or sexual assault statutes and the factors that courts should and should not consider when addressing a post-penetration rape case. Part IV discusses the future of post-penetration rape law and proposes ways in which legislatures may formulate laws to address post-penetration rape. Part V concludes by reemphasizing the need to codify post-penetration rape as an offense.

II. THE ERRATIC DEVELOPMENT OF POST-PENETRATION RAPE LAW

The victim's and the defendant's testimonies tend to conflict in the majority of post-penetration rape cases.[15] Often, the victim states that she never consented to intercourse.[16] The defendant then raises one of two defenses: that the victim consented or that the defendant reasonably believed that the victim consented.[17] Generally, the conflicting testimonies in post-penetration rape cases result in jury questions and judicial instructions regarding whether a rape could occur if the victim consented to intercourse and then revoked consent during the act.[18] This leads to inconsis-

14. It is difficult to predict how much time will pass before a majority of states have a chance for their courts to try a post-penetration rape claim because "[s]urveys consistently show that many girls and women are forced to have sex by boys and men with whom they have a social relationship. Most of these assaults go unreported; the vast majority of perpetrators go unpunished." Pillsbury, *supra* n. 6, at 847–848. Although post-penetration rape may be a common occurrence, post-penetration rape claims do not commonly appear in courts. This may be because women are not aware that they may bring such a claim.

15. *Infra* pt. II.A.–B. (discussing conflicting testimonies in post-penetration rape cases). Conflicting testimonies are common in all types of rape cases. Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 Yale L.J. 2687, 2693 (1991).

16. *Infra* pt. II.A.–B.

17. *Infra* pt. II.A.–B.

18. *Infra* pt. II.A.–B.

tent results across jurisdictions.[19] The following discussion of post-penetration rape cases evidences the need for states to codify whether post-penetration claims may be raised and, if such claims may be raised, to define the elements of post-penetration rape and the defenses that may be used in a revoked-consent scenario.[20]

A. Cases Rejecting the Possibility of a Post-penetration Rape Conviction

The following trio of cases represents the view that post-penetration rape is not a convictable offense. With the exception of *People v. Vela*,[21] the cases are still binding in their respective jurisdictions.

1. State v. Way*: The First Post-penetration Rape Case*

In 1979, the North Carolina Supreme Court held that, "[i]f 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."[22] The victim testified that she and the defendant were on their first date.[23] They went to his house and entered a bedroom, where the defendant threatened to kill the victim if she did not engage in sexual acts with him.[24] During the intercourse, the victim suffered extreme stomach pains, causing the defendant to cease intercourse.[25] The defendant testified that he and the victim engaged in consensual

19. *Infra* pt. II.A.–B.

20. The Author will refer to the revoked-consent scenario as "rape" throughout this Comment. In several cases discussed in this Comment, the defendant was tried under that state's sexual assault statute. *Infra* pt. II.A.–B. Legislatures may place the crime of rape under a sexual assault statute to 1) "promote the equality of all citizens" (abolishing the theory that only women can be raped); and 2) "place emphasis on the violent, rather than the sexual, nature of the crime." Julie A. Allison & Lawrence S. Wrightsman, *Rape: The Misunderstood Crime* 211–212 (Sage Publications 1993).

21. 218 Cal. Rptr. 161 (Cal. App. 3d Dist. 1985).

22. *State v. Way*, 254 S.E.2d 760, 762 (N.C. 1979). The *Way* Court did not specify for which other crimes a defendant may be held culpable if initial penetration is consensual, the victim revokes consent during the act, and the defendant forcibly continues the intercourse. One case stated that, although the post-penetration rape defendant could not be convicted of rape, the defendant could be held culpable for assault or battery. *Vela*, 218 Cal. Rptr. at 165.

23. *Way*, 254 S.E.2d at 760.

24. *Id.*

25. *Id.* at 761.

intercourse and that she yelled about stomach pains during the act.[26] The yelling caused him to stop intercourse and call the victim's friend to help the victim.[27] The trial court instructed the jury that the victim could revoke consent, and, if the other elements of rape were met after the revocation of consent, the crime of rape occurred.[28] The *State v. Way*[29] Court found that the trial court's instruction was erroneous because, although the victim may revoke consent to sexual intercourse, she may do so only when there is more than one act of intercourse.[30] The defendant and the victim engaged in sexual intercourse only once.[31] The Court reasoned that the jury instruction was incorrect because the jury could have convicted the defendant even if the jury believed that the victim consented to intercourse.[32] Without citing authority or precedent, the Court referred to that possible jury conviction for rape based on an initially consensual sexual act and stated, "This is not the law."[33]

2. Battle v. State

In *Battle v. State*,[34] the Maryland Court of Appeals held that there is no rape if a victim consents to sexual intercourse before penetration and revokes consent subsequent to penetration,[35] ruling that a person can only give or take away consent to penetration and not to continued intercourse.[36] The victim testified that she drove the defendant to his house after they met in a parking lot.[37] She accompanied the defendant inside, where he held a screwdriver to her head and forced her to have sexual inter-

26. *Id.*
27. *Id.*
28. *Id.*
29. 254 S.E.2d 760.
30. *Id.*
31. *Id.*
32. *Id.* at 761–762.
33. *Id.* at 762. The *Way* Court's holding implies that initial consent to sexual intercourse effectively waives a person's ability to revoke consent until the completion of intercourse. For a discussion of the waiver approach to consent, consult *infra* notes 170–172 and accompanying text.
34. 414 A.2d 1266 (Md. 1980).
35. *Id.* at 1270.
36. *Id.*
37. *Id.* at 1267.

course.[38] The defendant testified that the victim invited him to have sex, but no sexual contact occurred.[39] At trial, a dialogue occurred between the judge and jury over whether a rape may occur when initially consensual intercourse turns nonconsensual.[40] The judge instructed the jury that a rape conviction was a possibility, but that the jury must decide what degree of resistance would clearly evidence the absence of consent.[41] The *Battle* court held that the jury's questions and the court's instructions were confusing and warranted a new trial.[42] In so holding, the court stated two rules regarding possible rape convictions: 1) initially nonconsensual sex may become consensual after penetration, but that consent does not prevent the intercourse from being rape,[43] and 2) initially consensual sex that becomes nonconsensual after penetration prevents the intercourse from being rape.[44] According to *Battle*, if the victim gives consent at the moment of penetration, then no rape can occur even if he or she revokes that consent.[45] Similar to *Way*, the *Battle* court referenced little authority in reaching that conclusion.

3. People v. Vela

In *Vela*, a California court of appeal held that, "if consent is given at the moment of penetration, that act of intercourse will be shielded from being a rape even if consent is later withdrawn during the act."[46] The defendant's statement to the police indicated that the victim initially consented to sexual intercourse but changed her mind during the act.[47] The prosecution's evidence showed that, although the defendant was aware that the victim revoked consent, he continued the act through the use of force,

38. *Id.*
39. *Id.*
40. *Id.* at 1268.
41. *Id*.
42. *Id.* at 1270–1271. The court did not elaborate on why the instructions were confusing.
43. *Id.* at 1269.
44. *Id.* at 1270.
45. *Id*. This implication is similar to the implications stemming from *Way* and *Vela*—that penetration is the crucial moment in which a rape occurs. *Infra* nn. 29–33, 53–55, and accompanying text. Consult *infra* Part II.B. for cases disputing that implication.
46. *Vela*, 218 Cal. Rptr. at 164.
47. *Id.* at 162.

without interruption of penetration.[48] The jury asked the trial court judge whether a rape occurs when a female is forced to continue intercourse after revoking willingly given consent.[49] The trial court first answered in the affirmative and then amended its answer to state, "[W]e do not have a definitive answer to that question."[50] The jury returned a guilty verdict.[51] On appeal, the *Vela* court held that it was not rape when the defendant forcibly compelled the victim to continue initially consensual intercourse against her will.[52] The court provided several reasons for its holding. First, the court referred to the California Penal Code, which defines rape as nonconsensual sexual intercourse in which "[a]ny penetration, however slight, is sufficient to complete the crime."[53] Relying on that statutory definition and the *Way* and *Battle* holdings, the court found that initial penetration is "the crucial point" at which the crime of rape is completed.[54] Therefore, a rape did not occur if the victim revoked consent following penetration, but each subsequent act of penetration, accompanied by the other elements of rape, could complete the crime.[55] Second, the court made reference to the following language in the Penal Code: "[t]he essential guilt of rape consists in the outrage to the person and feelings of the female."[56] That language prompted the court to promulgate the theory that the essential guilt of rape—causing the female outrage—is lacking in a revoked-consent case.[57] The court set forth its theory with the following language:

> When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage be-

48. *Id.* The court did not specify how the victim communicated her revocation of consent or in what manner the defendant compelled her to continue intercourse.
49. *Id.* at 162–163.
50. *Id.* at 163.
51. *Id.*
52. *Id.* at 165.
53. *Id.* at 164 (citing Cal. Penal Code Ann. § 263 (West 1984)).
54. *Id.* at 163–164 (relying on *Battle*, 414 A.2d at 1270; *Way*, 254 S.E.2d at 762).
55. *Id.* at 165.
56. *Id.* at 164–165 (citing Cal. Penal Code Ann. § 263 (West 1970)).
57. *Id.* at 165.

> cause of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood.[58]

For those reasons, the court reversed the defendant's rape conviction.[59] Although the court found that post-penetration rape was a legal impossibility, it stated that defendants in revoked-consent cases may be found guilty of a lesser crime, such as assault or battery.[60]

Subsequent cases departed from the view that post-penetration rape may not be convicted as rape, generally by finding this trio of cases unpersuasive.[61] Regardless, *Way* and *Battle* remain binding within their jurisdictions, and *Vela* remained binding until 2003.[62]

B. Cases Allowing Post-penetration Rape Convictions

Although the number of cases in which a court is willing to convict a defendant for post-penetration rape as rape is increasing,[63] some courts are still hesitant to address the revoked-consent scenario.[64] This section describes the varying ways courts have reached the conclusion that a person initially may consent to sex and still be raped. These conflicting analyses will create problems for a court looking to outside authority when addressing the

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58. *Id.*

59. *Id.*

60. *Id.*

61. Consult *infra* Part II.B. for cases that allow post-penetration rape convictions.

62. *John Z.*, 60 P.3d at 186, 188 (disapproving of the "unsound" reasoning in *Vela*).

63. The first court to address the issue of post-penetration rape refused to allow a post-penetration rape conviction. *Way*, 254 S.E.2d at 762. Since that decision, the clear trend in the law has been toward allowing post-penetration rape convictions. *See infra* n. 125 (listing state courts that have addressed the issue of post-penetration rape, the majority of which have allowed convictions for post-penetration rape).

64. *E.g. State v. Crain*, 946 P.2d 1095, 1102 (N.M. App. 1997) (stating that, even though "we do not rule on the merits of the issue of withdrawal of consent under New Mexico law, we note that other jurisdictions have questioned the legal validity of the proposition that there can be no rape . . . if the victim's consent is withdrawn after penetration has begun") (citing *State v. Siering*, 644 A.2d 958, 961–963 (Conn. App. 1994); *State v. Robinson*, 496 A.2d 1067, 1069–1071 (Me. 1985); *State v. Crims*, 540 N.W.2d 860, 865 (Minn. App. 1995)). However, the *Crain* court continued to state that the concept of "withdrawal-of-consent" (post-penetration rape) has questionable legal validity and is a "novel theory." *Id.*

revoked-consent scenario for the first time,[65] and evidence the need for state legislatures to codify their states' stance on post-penetration rape.

1. State v. Robinson

In 1985, the year that the *Vela* court decided that post-penetration rape was not a legal possibility,[66] the Supreme Judicial Court of Maine came to the opposite conclusion in *State v. Robinson*.[67] The victim testified that the defendant showed up at her door, claiming that he had run out of gasoline and asking to use her telephone.[68] He entered the victim's house and engaged in a struggle during which he forced the victim to have sexual intercourse.[69] The defendant testified that the victim and he engaged in consensual sexual intercourse and that, during the act, the victim stated, "I guess I don't want to do this anymore."[70] The defendant stopped, put on his clothes, and left.[71] At trial, the jury asked the judge, "[I]f two people began consenting to an act, then one person says no and the other continues—is that rape?"[72] The judge answered in the affirmative, adding that the critical element of post-penetration rape is "*continuation under compulsion*."[73]

The *Robinson* Court found that the trial court's instruction was correct, based on the legislative intent expressed in the Maine Criminal Code[74] and on common-sense principles.[75] The

65. *E.g. Robinson*, 496 A.2d at 1070 (stating that a review of precedent with "dubious pertinence" left the court to resolve the revoked-consent issue based on its own best judgment).

66. 218 Cal. Rptr. at 165.

67. 496 A.2d 1067, 1071 (Me. 1985). The *Robinson* and *Vela* decisions came out at the same time; therefore, neither court had the opportunity to examine the other's analysis. In 1985, the only revoked-consent rape cases were *Way* and *Battle*. Due to the minimal authority available at the time, it is likely that the *Robinson* Court would have taken *Vela* into account in its analysis, and vice versa. *See* McLellan, *supra* n. 7, at 792 n. 74 (mentioning the likelihood that *Vela* and *Robinson* would reciprocally consider the other if they had not been decided at the same time).

68. *Robinson*, 496 A.2d at 1069.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (emphasis in original).

74. *Id.*

relevant Criminal Code rape elements in that case included "'sexual intercourse' by the defendant . . . in circumstances by which that other person submits to the sexual intercourse as a result of compulsion applied by the defendant."[76] *Robinson* noted that the majority of rape cases focused on the initial penetration of the female's body and found that the rape is complete upon initial penetration, "however slight."[77] The *Robinson* Court declined to focus on the moment of initial penetration, instead finding that continued penetration after initial penetration was still factually sexual intercourse.[78] For that reason, the Court found that continued sexual intercourse fell within the statutory language, which stated only that intercourse was required.[79] The Court then turned to "[p]ractical, common sense considerations" in rejecting the defendant's contention that initial penetration without consent is the only way rape may occur.[80] The defendant's argument implied that a post-penetration rape claim would be contingent on whether the victim, after revoking consent, could succeed "at least momentarily in displacing the male sex organ."[81] If the victim could accomplish that displacement, any subsequent penetration without her consent could be rape.[82] The Court rejected the defendant's argument as counterintuitive because, "it hardly makes sense to protect from a rape prosecution the party whose compulsion through physical force or threat of serious bodily harm is so overwhelming that there is no possible withdrawal, however brief."[83] However, the Court emphasized that the mere revocation

75. *Id.* at 1070–1071.

76. *Id.* at 1069. The element that did not apply to *Robinson* was the marital rape exemption. *Id.* For a discussion of the marital rape exemption as an eliminated part of rape law, consult *infra* notes 138–140 and accompanying text.

77. 496 A.2d at 1069–1070 n. 2 (citing *State v. Croteau*, 184 A.2d 683, 684 (Me. 1962) (quoting *King v. Commw.*, 183 S.E. 187, 189 (Va. 1936))); *e.g. Vela*, 218 Cal. Rptr at 164 (stating that initial penetration is "the crucial point" to complete the crime of rape).

78. 496 A.2d at 1069–1070. The *Robinson* Court also declined to find *Way* persuasive, noting that the *Way* Court cited no authority in its holding and failed to examine whether the facts of the case met the rape element of "force or threat of force." *Id.* at 1070 (quoting jury instructions).

79. *Id.* at 1069 (reviewing 17-A Me. Rev. Stat. Ann. § 252(1)(B) (1983)).

80. *Id.* at 1070.

81. *Id.* at 1071.

82. *Id.*

83. *Id.* Some rape victims "'freeze' and 'become helpless from panic and numbing fear,'" while others "do what they were taught to do as girls—to remain passive in the face of a rapist . . . ." Joshua Dressler, *Understanding Criminal Law* §33.04[B][2][a], 580–581

of consent during intercourse does not automatically convert consensual sex to rape.[84] The *Robinson* holding provided that a post-penetration rape is committed when, after the revocation of consent, the victim submits to the defendant's continuation of the sex act under compulsion.[85]

Later revoked-consent cases tended to examine all of the existing precedent, and courts generally reached the conclusion, for a variety of reasons, that post-penetration rape may be a convictable offense.[86]

2. People v. Roundtree

In 2000, *People v. Roundtree*[87] created a split within the California courts of appeal by holding that, under the California Penal Code,[88] "a rape is necessarily committed if a victim is forced to continue with sexual intercourse against her will."[89] The victim, a runaway girl, testified that she accepted shelter from the defendant and that he raped her in a car.[90] The defendant testified that the victim consented to sexual intercourse and then told him to stop because she heard a person approaching the vehicle.[91] The jury questioned, "If, after penetration, the female changes her mind and says 'stop' and the male continues, is this still rape[?]"[92]

(3d ed., LEXIS 2001) (quoting *People v. Barnes*, 721 P.2d 110, 119 (Cal. 1986); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 958 (1998)). The frozen or passive rape victim would be incapable of displacing the sex organ.

84. *Robinson*, 496 A.2d at 1070.

85. *Id.* at 1070–1071.

86. *E.g. Siering*, 644 A.2d at 963 (declining to follow *Way*, *Battle*, *Vela*, and *Robinson*, and finding that, based on a common sense reading of Connecticut's statute, post-penetration rape was a legal possibility). The *Siering* court noted that Connecticut's rape statute provided that "'[p]enetration, however slight, is sufficient to complete vaginal intercourse . . . .'" *Id*. at 962 (quoting Conn. Gen. Stat. Ann. § 53a–65(2) (West 1994)). The court rejected the defendant's argument that intercourse is complete upon penetration and found that continued penetration also constitutes intercourse for the purpose of meeting the elements of sexual assault. *Id*. at 962–963; *see also Crims*, 540 N.W.2d at 865 (rejecting *Way*, *Battle*, and *Vela* because the Minnesota statute was broader than those states' statutes). The Minnesota statute defined penetration as "both the initial intrusion into the body of another *and* as the act of sexual intercourse." *Id*. (citing Minn. Stat. Ann. § 609.341 (West 1992)) (emphasis added).

87. 91 Cal. Rptr. 2d 921 (Cal. App. 1st Dist. 2000).

88. Cal. Penal Code Ann. § 261 (West 1999).

89. *Roundtree*, 91 Cal. Rptr. 2d at 925.

90. *Id.* at 922.

91. *Id.* at 923.

92. *Id.*

The court responded, "[I]f all of the elements of rape are present, the fact that there was a prior penetration with the consent of the female does not negate rape."[93] The *Roundtree* court examined the jury instructions given by the trial court in *Vela* and the *Vela* appeals court's analysis of that instruction.[94] The *Roundtree* court found *Vela*'s analysis unsound and *Robinson*'s analysis persuasive.[95] *Roundtree* declined to follow *Vela*'s conclusion that penetration is the crucial moment at which a rape is completed.[96] Instead, *Roundtree* decided that rape is completed when sexual intercourse is accomplished against a person's will.[97] The court quoted *Robinson* as stating that "[t]he 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."[98] Finally, *Roundtree* criticized *Vela*'s "outrage" theory.[99] Whereas *Vela* stated that the outrage of a victim who revokes consent after penetration is less than the outrage felt by a victim who never consented,[100] *Roundtree* stated that "the outrage to the victim is complete" when "sexual intercourse is forcibly accomplished against the victim's will."[101]

3. In re John Z.

In 2003, the California Supreme Court heard *John Z.* to resolve the jurisdictional split created by *Vela* and *Roundtree*.[102] The Court agreed with *Roundtree* and held that "a withdrawal of consent effectively nullifies any earlier consent and subjects [the defendant] to forcible rape charges if he persists in what has become nonconsensual intercourse."[103]

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93. *Id.*
94. *Id.* at 923–924.
95. *Id.* at 924.
96. *Id.* at 925.
97. *Id.*
98. *Id.* at 924 (quoting *Robinson*, 496 A.2d at 1071).
99. *Id.* (rejecting the *Vela* Court's assertion that a victim who has given consent and subsequently withdrawn it does not have the same sense of outrage as a victim who did not initially consent to intercourse).
100. *Id.*
101. *Id.*
102. *Id.* at 184.
103. *Id*.

John and the victim wordlessly began sexual intercourse.[104] The victim rolled on top of John and told him that she needed to go home.[105] He asked her to wait a minute.[106] She twice repeated her need to go home, and John stopped intercourse sixty to ninety seconds after her final request.[107] The Court noted that it was not certain whether the victim initially consented to the act but assumed that the victim implied consent when John penetrated her.[108] Further, the Court stated that "substantial evidence" showed that the victim communicated her lack of consent both physically and verbally, and that "no reasonable person in defendant's position would have believed that [the victim] continued to consent to the act."[109] The Court rejected *Vela*, *Battle*, and *Way* because they used unsound reasoning.[110] Specifically, the Court disavowed *Vela*'s outrage theory, stating that there is no way to measure the outrage any forcible intercourse victim may feel, but it should be presumed to be substantial.[111] Also, the Court rejected *Vela* because the victim's feelings are not a required element to convict for forcible rape.[112]

Next, the Court addressed John's argument that, when a female consents to intercourse and then revokes consent during the act, the male should be "permitted a 'reasonable amount of time' . . . to withdraw."[113] John argued,

> By essence of the act of sexual intercourse, a male's primal urge to reproduce is aroused. It is therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge . . . .[114]

104. *Id.* at 184–185.
105. *Id*. at 185.
106. *Id*.
107. *Id.*
108. *Id.*
109. *Id.* at 186–187.
110. *Id.* at 186.
111. *Id.*
112. *Id.*
113. *Id.* at 187 (quoting Appellant's Br. on the Merits, 11, *In re John Z.*, 60 P.3d 183 (Cal. 2003) (available at 2002 WL 1925874)).
114. *Id.*

The Court disagreed with this "primal urge" argument, noting the lack of legal authority for it and that California law does not allow a defendant, once the victim expresses lack of consent, to "persist in intercourse" for any reason.[115] Further, the Court stated that the sixty to ninety seconds after the victim revoked consent was sufficient for John to discontinue intercourse.[116]

Justice Brown concurred with the majority's holding that post-penetration rape may be convicted as rape and not as a lesser crime, but she dissented from the majority's opinion because the majority neglected to answer several "critical questions" that arise in a post-penetration rape case. [117] The dissent characterized *John Z.* as a "sordid, distressing, sad little case," in which the victim's revocation of consent could have been easily misinterpreted.[118] First, the dissent questioned whether the victim clearly communicated her revocation of consent.[119] The dissent noted that, while the victim's "silent and ineffectual movements" coupled with ambiguous statements may have been clear to her, John could have interpreted her behavior as "requests for reassurance or demands for speed."[120] Second, Justice Brown stated that it was unclear whether the elements of rape were met—particularly, whether John "forcibly compelled [the victim] to continue."[121] Next, the dissent questioned the majority's finding that John was acting through compulsion when he failed to immediately discontinue intercourse after the victim's revocation of consent.[122] Justice Brown questioned whether a defendant's "persistence" should be viewed as force or compulsion and criticized the majority for failing to define what constituted force in the post-penetration rape context.[123] Finally, Justice Brown criticized the majority for not analyzing whether John had the wrongful intent to commit a rape.[124]

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115. *Id.*
116. *Id.*
117. *Id.* at 188 (Brown, J., dissenting).
118. *Id.* at 189–190.
119. *Id.* at 190.
120. *Id*.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* The defendant's *mens rea* is an often-ignored element in rape case opinions and trials. Lani Anne Remick, Student Author, *Read Her Lips: An Argument for a Verbal Con-*

III. WHY AND HOW COURTS MAY ALLOW POST-PENETRATION RAPE CONVICTIONS

The majority of states have not had one of their courts hear a post-penetration rape case.[125] When a revoked-consent scenario arises, the trial court invariably will examine precedent from other jurisdictions for guidance.[126] At this time, there is precedent that supports diametrically opposed views—first, that initial consent forecloses a rape prosecution, and second, that initially consensual intercourse that turns nonconsensual may become rape.[127] The reasons for disallowing a post-penetration rape conviction are generally flawed. This Part addresses those barriers to post-penetration rape convictions and suggests ways in which courts may avoid the flawed reasoning adopted in past post-penetration rape cases.

A. Statutory Barriers

Statutory language should not be construed to prevent post-penetration rape claims when the prosecution has established that the case fits the statutory definition of rape. The *Way*, *Battle*,

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sent Standard in Rape, 141 U. Pa. L. Rev. 1103, 1108, 1130 (1993).

125. As of the date of publication, courts in eight states have expressly addressed the issue of post-penetration rape. *McGill v. State*, 18 P.3d 77 (Alaska App. 2001) (allowing a post-penetration rape conviction in Alaska); *John Z.*, 60 P.3d 183 (allowing a post-penetration rape conviction in California); *Siering*, 644 A.2d 958 (allowing a post-penetration rape conviction in Connecticut); *State v. Bunyard*, 75 P.3d 750 (Kan. App. 2003) (allowing a post-penetration rape conviction in Kansas); *Robinson*, 496 A.2d 1067 (allowing a post-penetration rape conviction in Maine); *Battle*, 414 A.2d 1266 (refusing to allow a post-penetration rape conviction in Maryland); *Way*, 254 S.E.2d 760 (refusing to allow a post-penetration rape conviction in North Carolina); *State v. Jones*, 521 N.W.2d 662 (S.D. 1994) (allowing a post-penetration rape conviction in South Dakota). Courts in two additional states upheld rape convictions notwithstanding appellants' assertions that procedural error occurred when the trial court refused to instruct the jury on post-penetration rape. *Crims*, 540 N.W.2d 860 (Minn. App. 1995) (upholding a rape conviction in Minnesota because the court's failure to instruct the jury that continued intercourse after withdrawal of consent is not rape does not amount to plain error); *Crain*, 946 P.2d 1095 (N.M. App. 1997) (refusing to overturn a rape conviction in New Mexico because the court's failure to respond to a question from the jury about consent withdrawn during intercourse did not amount to fundamental error).

126. Although courts are not bound by cases from other jurisdictions, because of the novel nature of the post-penetration rape scenario, courts that have addressed the issue usually have looked to other jurisdictions' analyses. *See supra* pt. II.A.–B. (discussing several post-penetration rape cases, many of which looked to outside authority).

127. *Supra* pt. II.A.–B.

and *Vela* holdings indicated that, under the applicable state statutes, the crime of rape is complete at penetration, and a rape cannot occur if consent exists at that moment unless there is a displacement of the sex organ and another penetration without consent.[128] *Vela* used the statutory language "any sexual penetration, however slight, is sufficient to complete the crime" to hold that the initial moment of penetration is the crucial time at which a rape is committed.[129] Although *Vela* is no longer good law in California, there are courts in states with statutes similar or identical to the one considered in *Vela* that could potentially use the *Vela* analysis to foreclose the opportunity for post-penetration rape convictions.[130] This analysis should not prompt courts in these states to reach a *Vela*-type conclusion.

Additionally, several states' rape statutes provide that the defendant is guilty of rape if he or she "accomplishes" penetration without consent.[131] A strict reading of those statutes could prevent a post-penetration rape conviction because, in a revoked-consent scenario, initial penetration is accomplished with the victim's consent.[132] Courts in those states will have great latitude in deciding whether to allow a post-penetration rape conviction.

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128. *Supra* pt. II.A.

129. 218 Cal. Rptr. at 164–165.

130. *E.g.* Colo. Rev. Stat. Ann. § 18-3-401(6) (West 2003) (providing "[a]ny penetration, however slight, is sufficient to complete the crime"); Conn. Gen. Stat. Ann. § 53a-65(2) (West 2004) (providing "[p]enetration, however slight, is sufficient to complete [intercourse]"). Colorado's Criminal Code uses language identical to the statute on which *Vela* relied. Colo. Rev. Stat. Ann. § 18-3-401(6). In 2004, there was a high-profile case in Colorado that involved a post-penetration rape claim. *Infra* n. 220. Although the case did not go to trial, that court likely would have examined the statutory construction used in *Way*, *Battle*, and *Vela*. Those cases have been criticized for unsound reasoning and should be rejected by any court that examines them. *E.g. John Z.*, 60 P.3d at 186 (declining to follow other post-penetration rape cases because other cases employed unsound reasoning).

131. *E.g.* Miss. Code Ann. § 97-3-95(1) (2003) (providing that "[a] person is guilty of sexual battery if he or she *engages in sexual penetration* with . . . [a]nother person without his or her consent") (emphasis added); Neb. Rev. Stat. § 28-319 (2004) (providing that "[a]ny person who *subjects another person to sexual penetration* without consent of the victim . . . is guilty of sexual assault in the first degree") (emphasis added); Utah Code Ann. § 76-5-402.2 (2003) (providing that "[a] person who, without the victim's consent, *causes the penetration* . . . commits an offense") (emphasis added).

132. *See Battle*, 414 A.2d at 1270 ("stating that "ordinarily if [the victim] consents prior to penetration and withdraws the consent following penetration, there is no rape"); *Way*, 254 S.E.2d at 762 (stating that "[i]f 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").

The preferable approach would be a broad interpretation of the statute, perhaps by finding *Robinson*'s statutory interpretation persuasive.[133] *Robinson* stated that continued penetration satisfied the accomplished-penetration element of the rape statute.[134] Courts should adhere to that reasoning to find that continued penetration is equivalent to penetration when deciding a post-penetration rape case and not allow strict statutory interpretation to hinder a post-penetration rape conviction.

B. Unstoppable Men, Promiscuous Women, and Other Social Barriers

Myths and conventions about the social harm of rape and "biological imperatives of men who are engaged in sexual intercourse" should not be considered in a post-penetration rape claim as they have been considered in the past.[135] In the last century, drastic rape law reforms occurred, in part, because of the efforts of feminists and scholars.[136] The reform obliterated the social conventions that allowed rapists to go unpunished.[137] The marital

133. For a discussion of *Robinson*, review *supra* notes 66–85 and accompanying text.

134. 496 A.2d at 1069; *see also Siering*, 644 A.2d at 962 (referring to the Connecticut statute's legislative history to find that initial penetration does not complete intercourse but, instead, is the minimum amount of contact required to prove intercourse).

135. Sherry F. Colb, *Withdrawing Consent during Intercourse: California's Highest Court Clarifies the Definition of Rape*, http://writ.news.findlaw.com/colb/20030115.html (Jan. 15, 2003).

136. Carol Bohmer, *Acquaintance Rape and the Law*, in *Acquaintance Rape: The Hidden Crime* 323–326 (Andrea Parrot & Laurie Bechhofer eds., John Wiley & Sons, Inc. 1991); Pillsbury, *supra* n. 6, at 853 (stating that "[i]n the last thirty years, few crimes have been as written about, and no serious crime has received as much attention from legal reformers, as rape"). Although the most drastic changes in rape law occurred in the last twenty years, it is a constantly modified body of law. An extreme example of how attitudes and law regarding sex crimes evolve is the way in which sexual abuses of children are regarded. One federal judge has commented that "[t]he idea that children should be sexually innocent is not universal; in fact, it is relatively modern." Richard A. Posner, *Sex and Reason* 396 (Harvard U. Press 1992) (noting that the age of consent in English rape law was ten years old until 1885, and that "consensual intercourse with a [child under ten years old] was a misdemeanor"). In the United States, children were not the potential legal victims of any sex crime except rape until 100 years ago. Pillsbury, *supra* n. 6, at 901.

137. *Id.* at 853. Some of the work accomplished by the reform included the following:

> [E]limination of the special caution to the jury about allegations of rape; the elimination of the requirement of corroboration of a victim's account; and in recent years, broader use of past instances of sexual aggression by the defendant. Legislatures have enacted [rape] shield laws to . . . restrict inquiry into the complainant's sexual history and have changed the definition to the offense itself, particularly the requirements of *mens rea*, force, and resistance.

rape exemption is an example of how social conventions impacted rape law and how the reform movement sought to eliminate those conventions. Until recently, a man could not be convicted of raping his wife in most states because his wife was chattel—the property of the husband to do with as he pleased.[138] Further, at least three states extended the marital rape exemption to cohabitants—allowing men in monogamous relationships to rape their partners without legal culpability.[139] The marital rape exemption has slowly been eliminated in most states due to the efforts of rape law reformers, but it has not been abolished nationwide.[140]

Acquaintance-rape prosecutors endure continuing difficulty obtaining convictions because of myths and social conventions.[141] Acquaintance (or nonstranger) rape law gained acceptance only in the last twenty years and is generally more difficult to convict than "traditional" stranger rape.[142] In these cases, the preexisting relationship between the victim and the defendant makes proving lack of consent difficult.[143] The problem is exacerbated because consent and lack of consent are not well defined in statutes.[144]

Id. For a discussion of *mens rea*, force, and resistance, and how those factors should apply in a post-penetration rape case, consult *infra* Part III.C.

138. Dressler, *supra* n. 83, at 573. In 1736, Sir Matthew Hale promulgated the marital immunity rule with the following language: "[The] 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 her husband, which she cannot retract." *Id.* at 588.

139. Colb, *supra* n. 135. States that recognized the cohabitant rape exemption included Connecticut, Kentucky, and Pennsylvania. *Id.*

140. *Id.* The marital rape exemption is not a distant relic of rape law. *E.g. Robinson*, 496 A.2d at 1070 (citing Me. Rev. Stat. Ann. § 252(1)(B) (1983) and noting how the trial court removed the statute's marital rape exemption clause from the non-marital post-penetration rape analysis); Dressler, *supra* n. 83, at 590.

141. Bohmer, *supra* n. 136, at 322.

142. Pillsbury, *supra* n. 6, at 853–854. The occurrence of acquaintance rape is not new. The Bible tells of an acquaintance rape committed by Amnon against his half-sister. Allison & Wrightsman, *supra* n. 20, at 61 (citing 2 Sam. 13:1–15). By 1993, the majority of rape victims were acquainted with their attacker. *Id.* at 63. However, the general public still had difficulty recognizing forced intercourse between acquaintances as rape. *Id.* at 62.

143. Bohmer, *supra* n. 136, at 321–322; Posner, *supra* n. 136, at 388. One student author commented that "the central substantive issue in rape is consent." Remick, *supra* n. 124, at 1105 (quoting Lucy R. Harris, Student Author, *Towards a Consent Standard in the Law of Rape*, 43 U. Chi. L. Rev. 613, 620 (1976)).

144. Bohmer, *supra* n. 136, at 319–323. Examples of traditional consent definitions include "by force" or "against her will." *Id.* at 319. Language such as "against her will" has been eliminated in some states' rape or sexual assault statutes. Allison & Wrightman, *supra* n. 20, at 213.

These sparse statutory definitions often lead to social myths or attitudes influencing the outcome in individual acquaintance-rape cases.[145] Because all post-penetration rape cases will be non-stranger rapes in which consent is the central issue,[146] the post-penetration rape prosecutor will have to jump the same hurdles that any acquaintance-rape prosecutor does, and new hurdles as well.[147] A hurdle is created because the victim gave, and then revoked, his or her willingness to have sex. People are "reluctant . . . to characterize forced sex as rape" when the man and woman have been involved in a relationship before the purported rape.[148] This is troubling in a revoked-consent scenario because both parties consented to sexual intercourse, and the evidence of a preexisting sexual relationship may bias jurors.[149] Allowing a preexisting relationship or initial consent to negate the possibility that forced sex occurred denies the progress of the reform movement, which protects each person's right to say "no."[150]

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145. Bohmer, *supra* n. 136, at 322.

146. Post-penetration rapes will always be nonstranger rapes because the victim presumably will be acquainted the perpetrator for at least a brief moment before initially consenting to intercourse. The Author does not mean to imply that all post-penetration rape cases will involve individuals in a long-standing relationship.

147. *Id.* at 321–322 (stating that "[t]he defendant's assertions that he did not mean to force the woman into sexual intercourse focus attention on the woman's behavior" and describing the prosecution's task as an "uphill battle" because proving nonconsent is difficult "[i]n the absence of circumstantial evidence or of very convincing testimony on the part of the victim . . .").

148. Pillsbury, *supra* n. 6, at 876; John H. Biebel, Student Author*, I Thought She Said Yes: Sexual Assault in England and America*, 19 Suffolk Transnatl. L. Rev. 153, 163–164 (1995) (stating that "[j]uries infer consent when a relationship exists between the defendant and complainant"). Factors that can impact that characterization include whether the parties were dating, whether they had previously engaged in sexual intercourse, and what the parties' actions were at the time of the alleged rape. *Id.* Some of these factors may relate to credibility or *mens rea*.

149. Pillsbury, *supra* n. 6, at 874. An Indianapolis defense attorney stated,

> In cases where identification is not an issue, consent becomes important. These cases are reasonably easy. The parties will have known each other—will have been together, drinking, dancing. I try to point out to the jury that even if she did change her mind, it was in the middle of the act.

Id. (citing Gary LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* 100 (1989)). This quote embodies the hindrance of a preexisting relationship in a rape prosecution by relying on the likelihood that post-penetration rape will not be convicted as rape.

150. *Id.* at 876.

Aside from the post-penetration rape parties' pre-existing relationship and initial consent, other factors will burden prosecutors because

> [n]on-recognition of forced sex is common in contemporary society, not so much because our law is deficient (though in some cases it is), nor because the facts of the incidents are contested and obscure (though this is also true in many instances), but because misguided and simplistic concepts of rape and romance obscure our view of wrongdoing.[151]

Myths and concepts of rape and romance that affect the possibility of a post-penetration rape conviction include the following: 1) the myth of the "unstoppable male;" 2) the idea that promiscuous women suffer less from rape; and 3) the notion that initial consent is a waiver that prevents the victim from halting intercourse.[152]

Courts have considered the unstoppable-male theory in revoked-consent cases.[153] The unstoppable-male (or primal urge) theory implies that, once the man is engaged in sexual intercourse, it is physically impossible for him to stop.[154] John Z. argued, "[I]t is . . . unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her

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151. *Id.* at 958.

152. Colb, *supra* n. 135 (discussing the myths of the unstoppable male and promiscuous woman and the waiver approach to consent). *See also* Pillsbury, *supra* n. 6, at 875–877 (discussing the difficulty in prosecuting rape cases when the victim and defendant had a preexisting relationship).

153. *John Z.*, 60 P.3d at 187; *Vela*, 218 Cal. Rptr. at 165. The unstoppable-male theory has also been raised in acquaintance-rape cases. Colb, *supra* n. 135.

154. Colb, *supra* n. 135. *See also* Martha Burt, *Rape Myths and Acquaintance Rape* in *Acquaintance Rape: The Hidden Crime*, *supra* n. 136, at 32–33 (discussing the myth that "men's sexuality is not active but is simply a response to stimuli supplied by women," which is perpetuated by "the underlying assumption is that men are not to be held responsible for their own excitement and what they do with it" and that "women *are* to be held responsible, not only for keeping themselves chaste but also for controlling men's sexuality") (emphasis in original). Kathleen Parker made the unstoppable-male argument by criticizing the *John Z.* victim in the following way:

> Who didn't teach this girl the rules of engagement? . . . Once upon a time, fathers taught their daughters better. You don't take a boy to bed and then say 'no.' In a similar vein, as my father taught me, you don't pull a gun on someone unless you intend to kill him. There are certain things you don't kid around with, and hormonally charged teenage boys and loaded guns are among the top two.

Parker, *supra* n. 4.

withdrawal of consent."[155] That argument acts in contravention of the rape law reforms because it denies any culpability for the male's proclivities and forces the female to take impossible steps to ensure that she does not drive the man to his primal urge.[156] Further, it hinders the right to say "no." The flaws of the primal urge theory as a defense are well summarized in the following statement: "[It] puts the law to a choice: It must either punish aroused men who inflict forcible intercourse, or condone the violent punishment of fickle women who frustrate the 'primal urge.'" [157] A woman should not be estopped from bringing a rape claim because she provoked a man's sexual impulses.

Next, consider the view that the social harm for a promiscuous rape victim is different than the harm for a virginal rape victim.[158] Because the victim in a revoked-consent case may admit that she engaged in sexual intercourse, the social convention regarding promiscuous women may attach to her when raising her claim.[159] This myth makes the rape prosecution of a defendant difficult in a case in which the victim was a sexually active woman.[160] It burdens prosecutors because the woman consented to sex in the past, which makes it difficult to prove that the woman did not consent to sexual intercourse with the defendant.[161] Rape shield statutes now exist to alleviate this burden on

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155. Appellant's Br. on the Merits, 11, *In re John Z.*, 60 P.3d 183 (Cal. 2003) (available at 2002 WL 1925874). Consider the following illustration opposing the theory that a man cannot be expected to discontinue intercourse at will:

> If you prefer to see men as human beings with the benefit of intelligence, strength and will power, rather than robots with phalluses, then you can agree that [arguments that men are unable to stop intercourse] are insulting to the male kind. How many [seventeen-year-old] boys engaging in sex, confronted with the flashlight of a police officer have pleaded that they would stop if only their animal impulses would let them. And how many police officers have said, "that's alright take your time, after all you're only a man."

Maggie Thurs, *Men Deserve Better*, http://www.vtnetwork.org/newsletter/2003_04/cal_supreme_court.html (accessed Sept. 29, 2004).

156. Colb, *supra* n. 135.

157. *Id*.

158. Dressler, *supra* n. 83, at 575; Colb, *supra* n. 135.

159. Dressler, *supra* n. 83, at 575.

160. Bohmer, *supra* n. 136, at 324.

161. *Id.* The promiscuous woman rape myth is illustrated by the following story:

> In the movie *The Accused*, Jodie Foster played a working-class woman who engaged in risky behavior that led to her being gang-raped. She went to a bar and began playing pool and flirting with a man in an area where she was the only woman. While the movie indicated that the men were at fault, and looked realistically at the

the prosecution, but society still harbors the view that the promiscuous woman will not be as harmed by rape as a virgin, and this may result in biased juries.[162] Promiscuous women do not suffer less from being raped, and women who initially consented to sexual intercourse that turned nonconsensual do not suffer less from being raped.[163] Relying on that myth is reminiscent of *Vela*'s discredited outrage theory and the diminishing theory that stranger rape is a more heinous offense than acquaintance rape.[164] Any rape is a sexual invasion of a woman's body, in which her "'private, personal inner space' [is violated] without her consent."[165] Further, studies have shown that a promiscuous woman is more likely than other women to be blamed for putting herself in a position to be raped.[166] As post-penetration rape cases proliferate, it is likely that not only the public, but juries as well, will blame the victim for putting herself in that position.[167] This blame

> downside of contemporary sexual mores, it blamed women for putting themselves in compromising positions. When I showed the movie in one of my classes, nearly all my students blamed the Foster character. . . . What should the Foster character have expected when she went into the pool area scantily clad and flirted with a man?

Robert Cherry, *Sexual Coercion and Limited Choices: Their Link to Teen Pregnancy and Welfare*, in *Sex Without Consent: Rape and Sexual Coercion in America* 265, 265 (Merril D. Smith ed., N.Y.U. Press 2001).

162. Bohmer, *supra* n. 136, at 325.

163. If rape shield statutes are to be effective, "there can be no presumption in [our] society that if the rapist's victim is sexually active, she must be promiscuous or provocative and on either ground incapable of withholding consent . . . ." Posner, *supra* n. 136, at 393. These words apply just as well to a rape victim who initially consented to sex but, after revoking consent, was forced to continue intercourse.

164. *Vela*, 218 Cal. Rptr. at 165; Dressler, *supra* n. 83, at 576. Nonstranger rape victims report the same levels of anger and depression as stranger rape victims. Allison & Wrightsman, *supra* n. 20, at 69. Contrary to the myth, acquaintance rape victims often have a more difficult recovery from rape because they are less likely to seek professional help or discuss their ordeal. *Id.* at 70.

165. Dressler, *supra* n. 83, at 573 (quoting Susan Brownmiller, *Against Our Will: Men, Women and Rape* 376 (Simon & Schuster 1975)). The true negative effect of a rape "is a wound to the victim's inner self, to her spirit, and . . . this injury occurs because the attack is sexual." Pillsbury, *supra* n. 6, at 879. This is "a powerful argument about the wrongs of *all forms of rape*." *Id.* (emphasis added).

166. Allison & Wrightsman, *supra* n. 20, at 111. Both the media and rape researchers "repeatedly . . . apply the term *blaming the victim* to the general phenomenon of reacting negatively to a victim, including a victim of rape." *Id.* However, blame may be distinguished from causality and responsibility. *Id.* Stated differently, whether a jury or society blames the victim is distinct from whether a rape victim may be viewed to have caused the rape or to have been responsible for the rape occurring. *Id.* Studies showed that the more the victim was perceived as "respectable" (respectability based on factors such as marital and virginal status), the less likely she was be "blamed" for the rape. *Id.* at 119–120.

167. *Supra* n. 149 and accompanying text.

is misplaced because it only takes a moment for a consensual experience to turn into an act of violence against a person's will.[168] It does not matter if it is marital, stranger, acquaintance, or post-penetration rape; each victim suffers from the rape endured.[169]

Finally, the waiver-of-consent theory is a myth that should not prevent a post-penetration rape conviction. Opponents of post-penetration rape convictions have argued that, once a person consents to sexual intercourse, the person has effectively signed a waiver and consented to sexual intercourse through ejaculation.[170] Denying victim status to a person who is forced to continue intercourse against his or her will is analogous to denying victim status to a married woman who is viciously raped every night by her husband without recourse because she signed a marriage license or denying victim status to a sexually active woman who, if she said "yes" once, can never again "legitimately say 'no.'"[171] If a person consents to sexual intercourse, there is not a point of no return. That person has the right to stop the activity at any time.[172]

A court should disregard those rape myths and outdated social conventions if they are raised by the defendant in a post-penetration rape case, and it should not allow them to hinder a post-penetration rape claim. First, there is no legal authority on which to base those arguments. Second, they are contrary to the reform-movement principle that every person has a right to control what happens to his or her body at all times.[173] Third, they

168. *Robinson*, 496 A.2d at 1071.

169. Many rape victims suffer from Rape Trauma Syndrome, a form of Post Traumatic Stress Disorder. McLellan, *supra* n. 7, at 796. Rape Trauma Syndrome (RTS) is evidenced by several symptoms, including "reliving of the rape, an inability to maintain previously close relationships, and a general sense of nervousness known as the startle response." *Id.* Jurisdictions that permit the introduction of RTS at trial admit it only for limited purposes and usually do not allow RTS evidence to prove that a rape occurred. *E.g. People v. Bledsoe*, 681 P.2d 291, 299–301 (Cal. 1984) (holding that expert testimony showing that a victim suffered from rape trauma syndrome was inadmissible to prove that a rape occurred, but such testimony would have been admissible to explain a delay in reporting the attack or a delay in showing signs of trauma). It has been suggested that courts should allow RTS evidence in post-penetration rape cases to help the prosecution satisfy its burden of proving lack of consent. McLellan, *supra* n. 7, at 796.

170. Parker, *supra* n. 4; Colb, *supra* n. 135.

171. Burt, *supra* n. 155, at 29.

172. Consent to sexual intercourse is not comparable with an "unrestricted train pass on Amtrak." Colb, *supra* n. 135.

173. *Supra* nn. 136–137 and accompanying text.

deny that coercive or forced sex is actually a rape.[174] Finally, studies have shown that, when people in mock-jury situations believe a rape myth, they are less likely to convict for rape, and they recommend lighter sentences for convicted rapists.[175] These unfounded biases should not affect the jury's verdict in a real case.

C. Courts May Break Down the Barriers through Analysis

Courts should reject the view that post-penetration rape may not be a convictable offense under rape statutes and embrace the view that post-penetration rapes are as heinous as any other rape and should be convicted as such.[176] Unfortunately, the precedent that exists is not instructive for future cases because courts in revoked-consent cases often disregarded several issues. While the majority of courts examined the moment of penetration to determine whether the sexual intercourse qualified under the rape statute, the moment of penetration is a minor issue in a post-penetration rape case because initial penetration has already occurred.[177] A court in a revoked-consent case should examine the following issues: 1) whether the victim clearly communicated his or her revocation of consent; 2) whether the defendant should have understood the victim's actions or words to be a revocation; and 3) whether the defendant discontinued the intercourse within a reasonable time or compelled continuation.[178] The first two issues relate to the defendant's *mens rea*, and the third relates to the defendant's *actus reus*.[179] The court must also consider any defenses the defendant may raise.

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174. Burt, *supra* n. 154, at 26–37.

175. *Id.* at 33.

176. There are varying degrees of rape and sexual assault. Dressler, *supra* n. 83, at 570. This Comment does not examine the varying degrees of rape as it relates to post-penetration rape claims because of the differences between state laws. This Comment does support the view that post-penetration rape should not be convicted as a lesser charge, such as assault or battery.

177. For a discussion of cases that examined initial penetration as the crucial issue in a post-penetration rape case, review *supra* notes 29–31, 45, 54, and accompanying text.

178. These issues were raised by the dissenting justice in *John Z.*, 60 P.3d at 188–190 (Brown, J., dissenting).

179. A criminal conviction requires the prosecution to prove the *actus reus* (that the defendant committed an unlawful act) and *mens rea* (that the defendant had the culpable mental state). Biebel, *supra* n. 148, at 164.

First, the court should consider the victim's manner of revoking consent. Rape law reform shifted the analysis away from the victim's actions to a heavier focus on the defendant's actions.[180] However, the victim's actions in a revoked-consent case are likely to be crucial—in particular, how the victim revoked consent while engaged in sexual intercourse. Although focusing on the victim's actions seems contrary to the work of rape law reformers, it will likely be a necessary inquiry in the post-penetration rape case, as it is often a necessary inquiry in nonstranger rape scenarios.[181] This is because when consent is a main issue in a rape trial—as it will be in revoked-consent cases—the victim's behavior must be examined to determine whether she consented at all or revoked consent clearly.[182] The victim's initial consent may be given expressly but also implied by actions,[183] because it is impractical to suggest a set of rules, such as the Antioch Code, in which sexual partners must gain affirmative consent in order to advance in stages of intimacy.[184] However, when a partner decides to revoke

180. Matt Bean, *Saying Yes, Then No: Bryant Case Enters National Debate*, http://www.courttv.com/trials/bryant/rapelaw_ctv.html (updated Aug. 4, 2003); Allison & Wrightsman, *supra* n. 20, at 210 (stating that, at the beginning of the rape law reform movement, "societal concern was not centered so much on the treatment of the victim, but on the criminal justice system's coddling of criminals"); Bohmer, *supra* n. 136, at 322–323 (stating that an acquaintance rape is unlikely to have the same amount of objective evidence as a stranger rape, and emphasizing the failures of rape law reforms that attempt to move attention away from the victim's behavior, which means that courts are "likely to fall back on traditional attitudes to judge the appropriateness of both the victim's and the defendant's behavior").

181. Allison & Wrightsman, *supra* n. 20, at 213. Due to the efforts of rape law reformers,

> [m]any states eventually changed their definition so as to place the emphasis on the alleged rapist's behavior as opposed to the victim's. Some jurisdictions have reflected this change by eliminating the phrases *against her will* and *without her consent* and replacing them with a standard of force used by the alleged rapist.

Id. (emphasis in original).

182. *Id.* at 125.

183. Pillsbury, *supra* n. 6, at 954–955.

184. Antioch College promulgated the Antioch Code in the 1990s and required parties engaged in sexual activity to obtain verbal consent before advancing in stages of intimacy. Biebel, *supra* n. 148, at 179; Colb, *supra* n. 135; Pillsbury, *supra* n. 6, at 957. If one party stopped consenting to the sexual activity, that party was required to communicate his or her lack of consent verbally and, if necessary, with physical resistance. *Id.* Some scholars have proposed an affirmative verbal-consent standard for couples who engage in sexual intercourse. *E.g.* Remick, *supra* n. 124, at 1141, 1147 (stating that the purpose of this standard is to ease the burden of proof on the prosecution by creating a presumption of lack of consent that is rebutted by the affirmative consent of the parties); Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 Minn. L. Rev.

consent during the act of sexual intercourse, his or her actions should be unequivocal, by words, actions, or both. Physical resistance should not be a requisite for unequivocal revocation of consent. The resistance requirement—that the victim must attempt to physically resist the unwanted sexual intercourse—was criticized by rape law reformers and has been abolished or minimized by many courts and legislatures.[185] Resistance is often not a requirement of lack of consent in ordinary rape cases.[186] Whether the victim physically resisted is relevant in a post-penetration rape case as evidence of both the victim's revocation of consent and the defendant's forcible act,[187] but it is not necessary to prove rape, so long as the victim revoked consent orally in a clear and obvious manner.[188] A firm "no" or "I want to stop having sex now" should suffice to evidence the victim's lack of consent.[189] The analysis of the victim's expression of revocation of consent should

599, 602 (1991) (suggesting changing the definition of consent to mean affirmative words or conduct "indicating a freely given agreement to have sexual contact"). Current rape law has a presumption of consent that may be rebutted by proof of the victim's lack of consent. *See John Z.*, 60 P.3d at 185 (presuming that the initial intercourse was consensual because the parties engaged in the intercourse without speaking). The flaw in arguing that partners must gain affirmative consent for each stage of sexual intimacy is that the argument disregards the fact that intercourse is often "entered into without negotiation, express articulation of desire, or even deliberate decision making." Pillsbury, *supra* n. 6, at 954 (noting this fact, but suggesting an affirmative consent standard). Proof of lack of consent is a preferable approach over proof of lacking affirmative consent. The argument for a rape conviction is stronger in a case in which the victim was raped after screaming "no" and struggling to get away than if she simply did not say "yes."

185. *E.g. Barnes*, 721 P.2d at 121 (determining that the California legislature's amendment of Cal. Penal Code Ann. § 263 eliminated the resistance requirement for rape convictions); *State v. Kulmac*, 644 A.2d 887, 903–904 (Conn. 1994) (determining that a rape victim in need not resist her attacker if she is afraid or overwhelmed). One of the main reasons for the abolishment of the resistance requirement was that each victim reacts differently to the crime of rape. Dressler, *supra* n. 83, at 580–581. Some freeze out of fear while others are physically incapable of resisting. *Id.*

186. Allison & Wrightsman, *supra* n. 20, at 213. Rape law reform narrowed the amount of resistance, if any, required. *Id.*; s*ee also* Dressler, *supra* n. 83, at 580–581 (discussing the elimination of the resistance requirement).

187. *Id.* at 581 (noting that "proof of resistance may be helpful—or even critical—to the factfinder's determination that a rape has occurred").

188. *See* Berliner, *supra* n. 15, at 2696 (stating that, "in the absence of a resistance requirement, courts have looked to objective manifestations of subjective states or applied a reasonable person standard to subjective feelings").

189. Courts have held that verbal resistance is sufficient to prove lack of consent. *E.g. Tobias v. State*, 666 N.E.2d 68, 72 (Ind. 1996) (upholding rape conviction even though juvenile victim only verbally resisted by telling her attacker to stop). *See also* Remick, *supra* n. 124, at 1113 (identifying the trend toward eliminating the physical resistance requirement and arguing for a verbal consent standard).

be based on an objective, rather than a subjective, standard. Contrary to *Vela*'s logic, how the victim felt when he or she revoked consent is not as essential to the prosecution's attempt to prove rape as how the victim stated his or her revocation.[190]

Second, the court should determine whether the defendant understood the victim's conduct because there is a possibility that the defendant will not understand the victim's actions or words to be a revocation of consent.[191] The defendant's reaction to the victim's conduct is one reason why *John Z.* was so controversial.[192] The victim said "no"; but was it, "No, I don't want to have sex anymore," or, "No, hurry up?"[193] Although the admissibility of a post-penetration rape claim empowers prosecutors, victims, and courts to punish those who commit a rape, the burden likely will be high to prove the defendant's *mens rea*.[194] If a misunderstanding occurs, the court must ask whether the defendant had the adequate *mens rea* to commit a rape even though wrongful intent is an element in rape cases that is often set aside.[195]

Third, the court must examine whether, once the defendant understood that the victim revoked consent, the defendant compelled continued intercourse. The amount of force required to

190. *See* Pillsbury, *supra* n. 6, at 934–935 (stating that "in forced-sex cases, communicative breakdowns go beyond language problems," as the forced-sex perpetrator "remains oblivious to his partner's nonconsent, not because of a failure to use the rights words or gestures . . . but because the perpetrator is not interested in her message and . . . finds ways to ignore or reinterpret her expressions to give him permission to continue"). The victim should communicate to the best of his or her ability an unwillingness to continue intercourse.

191. *E.g. John Z.*, 60 P.3d at 190 (Brown, J., dissenting) (stating that the victim's testimony indicated that the defendant did not understand her revocation).

192. *Supra* n. 4 and accompanying text.

193. *John Z.,* 60 P.3d at 190 (Brown, J., dissenting); see also CNN, *Becker: Bryant Case Turns on Consent, Evidence*, http://www.cnn.com/2003/LAW/07/19/cnna.becker/index.html (July 19, 2003) (stating that "it doesn't matter what was in the privacy of this woman's mind. What matters is what she said and did and whether someone in Kobe's position would have understood that there was consent or not.").

194. *See* CourtTV, *New Rape Law Says People Can Change Mind during Sex*, http://www.courttv.com/news/2003/0730/rapelaw_ap.html (updated July 30, 2003) (stating that the Illinois law that allows post-penetration rape claims is "important to make it clear to victims, offenders, prosecutors and juries that people have the right to halt sexual activity at any time").

195. This is because "the law on the *mens rea* for rape is muddled," David P. Bryden, *Redefining Rape*, 3 Buff. Crim. L. Rev. 317, 325 (2000), and "[m]ost state simply fail to discuss levels of intent in rape cases." Robin Charlow, *Bad Acts in Search of* Mens Rea*: Anatomy of a Rape*, 71 Fordham L. Rev. 263, 272 n. 40 (2002) (quoting Berliner, *supra* n. 15, at 2691).

prove the *actus reus* in a forcible rape case traditionally has been a sexual act "by force or against [the victim's] will."[196] The defendant's use of force or threat to use force likely to cause bodily harm to the victim or another person will satisfy the act requirement,[197] but, in an acquaintance rape, it is rare for the defendant to use extreme force that causes injury to the victim.[198] Generally, there is some voluntary interaction in a nonstranger rape.[199] For that reason, the force required to complete penetration without the victim's consent has been held sufficient to complete the act.[200] Because penetration has already occurred in the revoked-consent scenario, it creates an issue of what the required amount of force used by the defendant must be to complete a rape.[201] Courts have found and should continue to find that, once the victim unequivocally revokes consent, the force required to accomplish continued penetration is sufficient to complete the crime.[202] If the defendant compelled intercourse in spite of the victim's objections to stop, he has acted in a manner that constitutes rape.

From that continued penetration spawns another issue: how long must the continued penetration be to turn the consensual intercourse into a rape? There is no magic number of seconds or minutes that makes the defendant's continued penetration too long. The standard must be that of a reasonable time—whether the defendant had a fair opportunity to understand the victim's revocation and to avoid the mistake of continuing intercourse.[203]

196. Dressler, *supra* n. 83, at 577.

197. *Id*. (citing Model Penal Code Commentaries § 2.13.1 at 308 (ALI 1980)).

198. Burt, *supra* n. 154, at 27.

199. *Id.*

200. Dressler, *supra* n. 83, at 583; s*ee In re M.T.S*., 609 A.2d 1266, 1277 (N.J. 1992) (holding that a defendant may be found guilty of forcible sexual assault if he commits sexual penetration of another in the absence of "affirmative and freely given permission . . . to the specific act of penetration. . . .").

201. *Robinson*, 496 A.2d at 1069–1070 (discussing the "critical element" of "continuation under compulsion").

202. *Robinson* held that the critical element of post-penetration rape is "continuation under compulsion," and this is a proper standard. *Id.* Continued penetration should not be construed as harmless persistence. *See John Z.*, 60 P.3d at 190 (Brown, J., dissenting) (questioning whether a defendant's persistence should be viewed as force or compulsion, and if persistence should be punished as forcible rape). If the female revokes consent verbally, she might be scared to physically resist, and she should not have to. Verbal revocation is sufficient for the defendant to understand that the sex is no longer consensual, and it transfers the duty to the defendant to cease intercourse.

203. This is gleaned from George Fletcher's test for assessing culpability. Remick, *supra*

As stated above, a court should disregard any primal urge or unstoppable-male argument when determining whether the defendant's actions met the rape-statute elements.[204] A better test for reasonableness is whether the defendant discontinued intercourse or physically interrupted it as soon as the victim expressed revocation of consent and the defendant understood the victim's actions to be a revocation. As the *John Z.* majority stated, there is no excuse for continuing intercourse when the defendant understood that the victim no longer consented.[205]

Finally, the court must consider the defenses raised. The defendant in a revoked-consent case is likely to raise one of the two following defenses: consent or reasonable belief of consent (also known as "mistake of fact as to consent").[206] A consent defense asserts that the prosecution did not show that the victim revoked consent.[207] A reasonable-belief-of-consent defense asserts that the defendant reasonably believed that the victim consented to the sexual intercourse for the duration of the intercourse.[208] This defense contains subjective and objective components—the subjective component that the defendant believed that the victim consented and the objective component of whether that belief was reasonable.[209] Finally, the defendant may argue that the prosecution did not prove that the crime occurred if the defendant discontinued the intercourse upon the victim's revocation of consent, abiding by the victim's wishes to stop.[210] Therefore, the defendant may argue, there was no rape because the sex that occurred was consensual.[211]

In light of the commonality of conflicting testimony in post-penetration rape cases, the defendant's intent should not be given short shrift.[212] Consider the following examples in which a couple

n. 124, at 1135 (citing George P. Fletcher, *Rethinking Criminal Law* 510 (Little, Brown & Co. 1978)).

204. *Supra* nn. 153–157 and accompanying text.

205. 60 P.3d at 187.

206. Remick, *supra* n. 124, at 1109 (citing Berliner, *supra* n. 15, at 2693).

207. *Id.*

208. *Id.* at 1109–1110.

209. Biebel, *supra* n. 148, at 177 (citing Berliner, *supra* n. 15, at 2693).

210. For example, in *Robinson*, the defendant argued that he stopped intercourse when the victim revoked consent. 496 A.2d at 1069–1070.

211. *Id.*

212. *See In re John Z.*, 60 P.3d at 188–189 (Brown, J., dissenting) (indicating that "[revoked-consent] cases involve a credibility contest in which the victim tells one story [and]

has consensually entered into sexual intercourse, and how the examples relate to the three-prong analysis and the possible defenses:[213]

Case One

The woman turns her head and whispers, "No." The man says, "What?" but she does not respond, so he continues the intercourse. The intercourse ends five minutes later.

Case Two

The man begins to choke the woman and slap her face. She repeatedly screams, "No," but the man does not stop. The intercourse ends five minutes later.

Case Three

The woman, experiencing stomach pains, says, "Wait." The man does not respond. A minute goes by, but she is still in pain, so she repeats, "Wait . . . stop." The man discontinues the intercourse.

Case One is an example of post-penetration rape opponents' concerns—that women will barely moan "no" and subsequently claim rape.[214] It is questionable whether the victim's conduct was an unequivocal revocation of consent, and it is unlikely that the defendant understood her conduct. It is also doubtful whether the defendant compelled the victim to continue when five minutes went by without communication, except for the sexual activity in which they were engaged. The defendant may raise a consent defense—that the prosecution did not prove that the victim revoked consent when she whispered "no," and knew that her partner did not hear. Also, assuming that the prosecution can prove the *actus reus* of rape, the defendant may avail himself of the reasonable-belief-of-consent defense—that he did not possess the mental in-

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the defendant another," and pointing out that "the facts in [*John Z*] . . . create doubt both about the withdrawal of consent and the use of force").

213. The "Case" paradigm used in this Comment is based on McLellan, *supra* n. 7, at 806–807.

214. *See supra* n. 4 (discussing post-penetration rape opponents' arguments).

tent to commit a rape, and that a reasonable person would not understand that the victim revoked consent. This defense should ease the concerns of post-penetration rape opponents.

Case Two is an example that even the most resolute critics should not ignore. The defendant in this case may not raise the consent or reasonable-belief-of-consent defenses and may not argue concurrence with the victim's revocation. The victim clearly and unequivocally revoked consent through words and actions, and the defendant forcibly compelled her to continue intercourse for an extended period of time. Five minutes of intercourse achieved by choking and slapping the victim into submission is clearly rape and convincingly illustrates why courts should allow post-penetration rape convictions.

Case Three is a scenario in which it is unlikely that the prosecution will satisfy the elements of rape. The defendant discontinued intercourse as soon as he understood the victim's words to be a revocation. The woman's first comment was not a clear and unequivocal revocation of consent, but the comment "Stop" caused the defendant to cease the intercourse. Therefore, the defendant may successfully raise the consent defense or argue acquiescence to the victim's revocation.

If the defendant knew or should have known that the victim revoked consent, the defendant must discontinue the act. This standard implies that the required *mens rea* for post-penetration rape should be negligence.[215] If the defendant unreasonably continued sexual intercourse after the victim's clear and unequivocal revocation, he should be held culpable. As in Case Three, a mistake that a reasonable person would make regarding revocation of consent should not be punished.[216] However, "[s]exual desire is not a morally acceptable reason for a mistake as to consent."[217]

215. This suggestion of required *mens rea* is gleaned from Remick, *supra* n. 124, at 1131.

216. This is not to say that the defendant may be exempt from culpability because he or she was inattentive and did not listen to the victim's revocation. *E.g.* Balos & Fellows, *supra* n. 184, at 602 (suggesting a heightened duty of care in rape cases that change "the mental element of the crime because the heightened duty of care requires that the defendant be found blameworthy for being inattentive to the victim's words or conduct indicating non-consent, and for failing to obtain consent through positive words or positive actions").

217. Remick, *supra* n. 124, at 1133–1134 (citing Jeremy Horder, *Cognition, Emotion, and Criminal Culpability*, 106 Law Q. Rev. 469 (1990)).

Arguing that desire clouded understanding of whether the intercourse was consensual comes dangerously close to arguing the primal urge theory.[218] Sexual partners are not required to be mind readers, but careless disregard for a partner's wishes is unacceptable.[219]

As these examples illustrate, if the prosecution in a rape case can prove beyond a reasonable doubt that the victim expressed his or her lack of consent to the defendant, that the defendant knew or should have known that the victim revoked consent, and that the defendant compelled the victim to continue, the court should find the defendant guilty under the state's rape or sexual assault statute. A rape is a rape, and, if the defendant's actions meet the elements of the crime, he deserves to be held culpable. Therefore, courts addressing the revoked-consent scenario should reject unpersuasive case law and antiquated rape myths and, after conducting a thorough analysis, allow post-penetration rape claims to be convicted when appropriate.

IV. THE FUTURE OF POST-PENETRATION RAPE LAW

The revoked-consent scenario is more than a sporadic happening. In the year since the *John Z.* decision, at least two post-penetration rape cases entered American courts, both as cases of first impression in their respective states, with one expanding post-penetration rape law precedent.[220] In *State v. Bunyard*,[221] the Kansas Court of Appeals examined the existing precedent from

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218. *Supra* nn. 153–157 and accompanying text.

219. Remick, *supra* n. 124, at 1134. Great sexual desire is never an excuse for nonconsensual sexual conduct because

> [e]ven when the desire for sexual satisfaction is great, we expect, in morality as in law, that the desire will be expressed in relation to another only in the context of a fully consensual relationship with that other person. . . . [T]he experience of such a desire does not *per se* provide what ethically well-disposed agents would regard as a sound moral basis for excusing negligent consequent wrongdoing.

Id. (quoting Horder, *supra* n. 217, at 477).

220. For a discussion of the first case, *Bunyard*, 75 P.3d 750, consult *infra* notes 221–224 and accompanying text. The other possible post-penetration rape case was the case against Kobe Bryant, a player in the National Basketball Association. Bean, *supra* n. 180. Although the Colorado court ultimately did not hear the case, the Bryant sexual assault case perpetuated the controversy over post-penetration rape law. *Id.* (predicting an "ongoing debate over the way sexual assault is addressed in the nation's courts" concerning "how and when . . . a woman's 'no' turn[s] consensual sex into rape").

221. 75 P.3d 750.

other jurisdictions and decided to allow post-penetration rape as an offense because the Kansas statutes do not say that intercourse ends with penetration.[222] Therefore, continued nonconsensual intercourse, coupled with the other elements of rape, met the elements of the rape statute.[223] *Bunyard* expanded the limited precedent of what constitutes a reasonable time for one partner to discontinue intercourse after the other revokes consent by finding that it was not reasonable for the defendant to take five to ten minutes to stop the intercourse.[224]

When the California Supreme Court decided *In re John Z.*, the impact of the holding on the nation was impossible to predict.[225] An important breakthrough occurred in July 2003. In response to *John Z.*, the Illinois Legislature passed a revoked-consent statute.[226] The statute provides, "A person who initially

222. 75 P.3d at 755–756 (relying on the holdings in *John Z.*, *Robinson*, and *Siering*, and rejecting the logic of *Vela*).

223. *Id.* at 756.

224. *Id.*

225. *E.g.* Armond D. Budish, *When a Woman Says No, the Man Had Better Stop*, The Columbus Dispatch 02F (Apr. 18, 2003) (noting that Ohio courts have not declared a position on post-penetration rape, "[b]ut if men want to stay on the right side of the law, they would be wise to listen up and put on the brakes—immediately—when a partner makes it clear she wants to stop"); Family Violence Prevention Fund, *supra* n. 4 (stating "[i]t is unclear what impact, if any, the California Supreme Court's ruling will have on cases in other states").

226. 720 Ill. Comp. Stat. Ann. 5/12-17 (West 2004). The Illinois statute's opponents argue that is unnecessary because it allows women to claim rape when they actually engaged in consensual intercourse, it counteracts rape law reforms, and it confuses the meaning of consent. *See* Bean, *supra* n. 180 (stating that one "should [not] have to codify basic principles of human rights, which is what rape laws are all about"). However, by reviewing the case law of post-penetration rape, it becomes clear that statutory changes are necessary to provide guidance to courts that are addressing the post-penetration rape scenario. Because of the initial consent, it is more burdensome to prove a revoked-consent rape case. *Id.* (noting that in a state without a revoked-consent statute, it is "difficult to convict if the initial penetration is consensual"). A codification of the elements required to prove a post-penetration rape case will ease the burden on prosecutors and ensure that defendants who committed a deviant act will be punished. *NBC News: Saturday Today,* "Kobe Bryant Sexual Assault Charge" (NBC Aug. 2, 2003) (TV broadcast, transcr. available at http://www.royblack.com/tv/transcripts/nbcnews_ aug2_03.html (accessed Sept. 29, 2004)) [hereinafter *NBC News*] (stating that the Illinois statute will overcome that burden because it is "going to be an additional tool for prosecutors to use in their closing argument" and for judges to use when instructing the jury as to "what constitutes consent, [and] therefore, what constitutes rape"). Concerns that a revoked-consent statute will create a slew of fraudulent or frivolous cases in which a woman will "utter a barely audible no" during intercourse and then claim rape are irrational. Greene, *supra* n. 4; *see also NBC News* (stating that the Illinois revoked-consent statute "is going to encourage the false reporting of rape, not real instances of rape"). False reports of rape are no more prevalent

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."[227] It is the first revoked-consent law in the United States and was passed for several reasons. First, the Illinois Legislature wanted to avoid a lengthy court battle like that of *John Z.* if a post-penetration rape case was prosecuted in Illinois courts.[228] Second, the law was intended to redefine consent by codifying the idea that a person may halt sexual activity at any time.[229]

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than false reports of other serious crimes. Burt, *supra* n. 154, at 28. The same concerns were articulated by those "opposed to abolishing the marital rape exemption"—that vindictive wives would bring false lawsuits. Allison & Wrightsman, *supra* n. 20, at 91. Eliminating the marital rape exemption did not create a flood of matrimonial rape claims. *Id.* Similar to the increasing acceptability of acquaintance-rape claims, a revoked-consent statute will empower the post-penetration rape victim to come forward with greater confidence that the law protects the victims of crimes as well as the defendants who perpetrate crimes. Because so many acquaintance rapes go unreported, a codification of the principle that a person may revoke consent may empower some victims to go forward with a rape claim. One study found that only five percent of acquaintance-rape victims reported the assault. *Id.* at 61.

A revoked-consent law does not counteract rape law reforms. Although rape reform resulted in courts taking the focus off of the victim's conduct to a heavier examination of the defendant's conduct, the victim's actions are a necessary inquiry in a post-penetration rape case. A victim's-rights advocate stated that the Illinois law thwarts rape law reform because it should never be codified that a woman can change her mind. Bean, *supra* n. 180. However, other areas of law codify a person's right to change his or her mind regarding consent. Trespass law is illustrative of why a revoked-consent statute can apply in the arena of rape law. If you invite a person to come to your home and he or she gets rowdy and unpleasant, you have the right to revoke your consent to have that person in your home. If the offending person remains, the person may commit a trespass. Similarly, if one consents to sexual intercourse, and then revokes consent, the offending person may still commit a rape.

Finally, the Illinois statute does not confuse what constitutes consent. Rather, the statute clarifies the meaning of consent by providing that if a person initially consents to sexual activity, consent may not be presumed for any subsequent activity after withdrawal of consent. 720 Ill. Comp. Stat. Ann. 5/12-17 (West 2004). In effect, the statute negates the waiver approach to consent and protects the right of sexual autonomy. Further, the statute prevents confusion in the courtroom that has occurred in past post-penetration rape cases. Because the statute clearly allows people to withdraw consent, the likelihood of jury questions is significantly decreased.

227. 720 Ill. Comp. Stat. Ann. 5/12-17 (West 2004).

228. *See NBC News*, *supra* n. 226 (describing Illinois's reaction to *John Z* as "a clarification to what constitutes consent").

229. *See NBC News*, *supra* n. 226 (emphasizing the fact that, under Illinois law, "consent is a freely-given agreement to the act of sexual penetration or sexual contact in question" and describing the law under the new statute as providing that "any time during that sexual activity the person withdraws consent and the other person continues, then that's force and that's a crime in the [S]tate of Illinois"). This codification negates the waiver

Because it is likely that post-penetration rape will be an increasingly tried claim, legislatures should follow Illinois's lead by passing a revoked-consent statute. A statutory amendment will provide a bright-line standard to guide the jurisdictions within the state court systems. This will prevent jurisdictional splits such as the one that existed in California until 2003[230] and provide guidance for courts that are hesitant to address the revoked-consent scenario.[231]

The Illinois statute is instructive of how a revoked-consent statute should read. Because each state's rape or sexual assault statute uses different terminology and elements, there may not be one model statute nationwide. However, the legislature that drafts a revoked-consent or post-penetration rape statute should consider at least the following elements: [232]

A. Definition of Post-penetration Rape

The defendant may be found guilty of post-penetration rape if, during consensual sexual intercourse, the victim revoked consent, the defendant knew or should have known that the victim's words or actions were a revocation, and the defendant compelled the victim to continue the intercourse. Nonconsensual continued penetration for an unreasonable time shall constitute post-penetration rape.

B. Definition of Consent

Initial consent to sexual activity does not imply consent to future sexual activity. The victim's revocation of consent may be made verbally, by physical actions, or both. The words or actions

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approach to consent. Review *supra* notes 170–172 and accompanying text for a discussion of the waiver approach to consent.

230. *Supra* n. 3 and accompanying text.

231. *Supra* n. 64 and accompanying text.

232. These elements are based on the Illinois statute listed at *supra* notes 226–227 and accompanying text, and McLellan, *supra* note 7, at 805–806 (proposing a post-penetration rape statute for California). *See also* Karen M. Kramer, Student Author, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rape*s, 47 Stan. L. Rev. 115, 152 (1994) (proposing a consent statute that provides that "[p]resumptively, no consent is obtained where . . . the complainant, having consented to engage in the sexual activity, expresses by words or conduct a lack of agreement to continue to engage in the activity.").

must be such that a reasonable person would understand the actions to be a revocation of consent.

C. Concurrence Disproving Post-penetration Rape

The defendant may use this to rebut the prosecution's claims that the defendant penetrated the victim at any time without the victim's consent. If, upon understanding that the victim no longer consented, the defendant discontinued sexual activity within a reasonable time, the defendant's actions were not sufficient to complete the crime.

In the absence of a statutory revision, courts are left with the difficult task of determining how to approach post-penetration rape in their respective states. Virtually all post-penetration rape trials result in confusion among jurors over whether a post-penetration rape is convictable as rape.[233] As post-penetration rape precedent grows, there is a likelihood of inter- and intra-jurisdictional division because of the conflicting precedent created by past post-penetration rape cases.[234] Legislatures should prevent that possibility by enacting a revoked-consent statute.

V. CONCLUSION

Rape law is a constantly changing body of law, and the number of post-penetration rape cases continues to grow. Courts deciding post-penetration rape cases should reject strict statutory construction when appropriate, reject social myths and conventions that unfairly hinder a post-penetration rape conviction, and adhere to the sound reasoning from cases that allowed post-penetration convictions. In light of the increasing number of revoked-consent cases in American courts and conflicting precedent from those cases, legislatures should consider passing revoked-consent statutes. Such codification will provide guidance to the courts that are addressing the post-penetration rape scenario for the first time. Further, it will prevent confusion among jurors re-

233. *Supra* pt. II.A.–B. (discussing cases in which jurors submitted questions to the court about whether post-penetration rape was a possibility).

234. One of the attorneys who argued *John Z.* stated, "There may be a need later on for instructions to deal with specific [post-penetration rape] situations." Mike McKee, *Court: Rape Can Occur Even after Consent*, 127 The Recorder 4 (Jan. 8, 2003). The Court declined to "explore or recommend instructional language." *John Z.*, 60 P.3d at 187–188.

garding what constitutes consent and revocation of consent. Finally, it will continue the work of rape law reformers in seeking to protect every person's sexual autonomy and freedom to choose what happens with his or her body. Preserving the right to sexual autonomy is the trend of modern rape law, and that trend should be expanded especially to post-penetration rape law.