Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should Be a Crime in North Carolina

Erin G. Palmer

Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-penetration Rape Should Be a Crime in North Carolina

On the night of March 23, 2000, in Dorado County, California, seventeen-year-old Laura T. attended a party with four teenage boys.[1] During the course of the evening, she went to a bedroom with two of the boys, defendants Juan G. and John Z.[2] Although Laura repeatedly told the boys she was "not ready" to have sex, they removed her clothing and began kissing and fondling her.[3] John then left the room while Juan raped her.[4] As Laura searched in the dark for her clothing, Juan walked out of the room and John reentered the room, lay down on the bed, and "nudge[d]" Laura to lie down beside him.[5] At first, Laura kissed John voluntarily, but she began to resist after he rolled on top of her and inserted his penis into her vagina.[6] Laura told him that she needed to go home, but John would not stop.[7] John replied, "Just give me a minute."[8] Laura responded, "No, I have to go home."[9] John said, "Give me some time," but again Laura said, "No, I have to go home."[10] John did not stop; according to Laura, he "just stayed inside of me and kept like basically forcing it on me" for another minute to a minute and a half.[11]

The juvenile court found that John's actions constituted rape, and he was committed to a juvenile facility.[12] He appealed, and the Supreme Court of California accepted the case to consider whether a

---

1. *In re* John Z., 60 P.3d 183, 184 (Cal. 2003).
2. *Id.*
3. *Id.*
4. *See id.* at 184–85. Laura struggled against Juan and told him she did not want to have sex, but she was not strong enough to stop him. *Id.* at 185. The court described Juan's actions as rape. *Id.* Juan was originally a co-defendant in the case, but after Laura testified at trial, Juan admitted to charges of sexual battery and unlawful intercourse. *Id.* He was not a party to the appeal. *See id.*
5. *Id.* at 185.
6. *Id.* The court assumed for the sake of argument that Laura consented to penetration but acknowledged that the evidence of consent "was hardly conclusive." *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* John testified to the contrary, claiming he ceased intercourse as soon as Laura said she had to go home. *Id.*
12. *Id.* at 184.

rape occurs when a woman withdraws her initial consent during sexual intercourse, but the man continues despite her withdrawal of consent.[13] In his argument that such actions do not constitute rape, the defendant relied on a North Carolina case, *State v. Way*.[14] In *Way*, the Supreme Court of North Carolina held that for the purpose of determining whether a rape has occurred, a woman's consent is relevant only at the moment of penetration.[15] Under the North Carolina court's holding, so long as a man accomplishes initial penetration with a woman's consent, his subsequent actions during sexual intercourse, no matter the degree of force or coercion, will not constitute rape.[16] The California court, in *In re John Z.*,[17] expressly rejected *Way* and its purported reasoning.[18] In so doing, it shined a light into a dark corner of North Carolina case law. The California case demonstrates the error of the reasoning behind *Way* and reflects a legal trend[19] rejecting the outdated notions of "womanhood" that

---

13. *Id.*

14. *See id.* at 185 (citing State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979)). In *Way*, the evidence for the State showed that the victim was raped after voluntarily accompanying the defendant to an upstairs bedroom where he beat and threatened to kill her. State v. Way, 297 N.C. 293, 294–95, 254 S.E.2d 760, 760–61 (1979). For a more thorough discussion of the facts of *Way*, see *infra* note 28.

15. *See Way*, 297 N.C. at 297, 254 S.E.2d at 762. The defendant in *In re John Z.* also cited a Maryland case with a similar holding. *See In re John Z.*, 60 P.3d at 185 (citing Battle v. State, 414 A.2d 1266, 1268–70 (Md. 1980)). In that case, the Court of Appeals of Maryland stated:

> Given the fact that consent must precede penetration, it follows in our view that although a woman may have consented to a sexual encounter, even to intercourse, if that consent is withdrawn prior to the act of penetration, then it cannot be said that she has consented to sexual intercourse. On the other hand, ordinarily if she consents prior to penetration and withdraws the consent following penetration, there is no rape.

Battle, 414 A.2d at 1270. Of the courts to consider the issue, only those in North Carolina, California, and Maryland have held that a woman's consent is relevant only prior to and at the moment of penetration. *See* People v. Vela, 218 Cal. Rptr. 161 (Cal. Ct. App. 1985), *overruled by* 60 P.3d 183 (Cal. 2003); *Battle*, 414 A.2d at 1270; *Way*, 297 N.C. at 297, 254 S.E.2d at 762.

16. *See Way*, 297 N.C. at 297, 254 S.E.2d at 762.

17. *In re* John Z., 60 P.3d 183 (Cal. 2003).

18. *See id.* at 186 (calling the reasoning of the North Carolina court "unsound").

19. *In re John Z.* is the most publicized case in a series of cases defining post-penetration rape as a crime. *See* McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001) (holding that Alaska statutory law does not "limit sexual penetration to the moment of initial penetration"); State v. Siering, 644 A.2d 958, 961–63 (Conn. App. Ct. 1994) (rejecting the defendant's argument that if there is consent at penetration, the subsequent withdrawal of consent can not convert sexual intercourse into rape); State v. Bunyard, 75 P.3d 750, 756 (Kan. Ct. App. 2003) (stating that "sexual intercourse performed when one person is under force or fear is rape" and that "[i]t does not matter if the force or fear exists at the initiation of the act or whether it comes after consent is withdrawn"); State v. Robinson, 496 A.2d 1067, 1070–71 (Me. 1985) (noting that "common sense" supported its

have defined the issues of spousal rape, date rape, and, now, "post-penetration rape."[20] This Recent Development analyzes North Carolina law on the issue of post-penetration rape in light of *In re John Z.* and this legal trend. It determines that the rule established by *Way* is inconsistent with both current state statutes and expanding legal notions of female sexual bodily autonomy. It concludes that North Carolina statutory law should be amended to make post-penetration rape a criminal offense.

At the core of the crime of rape is the question of the victim's consent.[21] In North Carolina, rape is defined by statute and is divided into the separate crimes of first-degree forcible rape and second-

---

holding that the Maine rape statute prohibited post-penetration rape); State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995) (holding that the crime of rape includes "forcible continuance of initially consensual intercourse"); State v. Jones, 521 N.W.2d 662, 672 (S.D. 1994) (refusing to adopt a rule under which initial consent alone determines whether forcible, continued intercourse is rape). *But see Battle*, 414 A.2d at 1268–70 (holding that if a woman withdraws consent following penetration, a man's failure to cease intercourse is not rape). In 2003, Illinois became the first state to enact a statute in recognition of this legal trend. *See* Act effective July 25, 2003, ch. 38, 2003 Ill. Laws 389 (codified as amended at 720 ILL. COMP. STAT. 5/12-17 (2003)) (providing that a person who initially consents to sexual penetration is deemed not to have consented to any sexual penetration or conduct occurring after the person withdraws consent); Christopher Wills, *Illinois' New Rape Law Clarifies That Consent Can Be Withdrawn During Sex*, NEWS & OBSERVER (Raleigh, N.C.), July 29, 2003 (stating that the National Crime Victim Law Institute believes "the law is the first of its kind in the country"), *available at* http://newsobserver.com/24hour/nation/story/955657p-6689573c.html; *see also infra* notes 116–18 and accompanying text (discussing the Illinois law and proposing a statute for North Carolina modeled after the Illinois law).

20. The term "post-penetration rape" was first used by a law student in 1991. *See* Amy McLellan, Comment, *Post-penetration Rape—Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 780 n.6 (1991). For a discussion of antiquated notions of womanhood in spousal rape and date rape, see *infra* notes 36–42, 45 and accompanying text.

21. "Female nonconsent has long been viewed as the key element in the definition of rape." SUSAN ESTRICH, REAL RAPE 29 (1987). Historically, in order to demonstrate nonconsent, a woman was required to resist "to the utmost." CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 23 (1992). As one court phrased the requirement, "[T]here must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated." *See* Brown v. State, 106 N.W. 536, 538–39 (Wis. 1906) (holding that a sixteen-year-old virgin, who screamed and struggled as her assailant attempted to strangle her, failed to make the "terrific resistance which the determined woman should make," and thus did not demonstrate her nonconsent). During the feminist movement of the 1970s, states began to discard the legal requirement of utmost resistance. *See* SPOHN & HORNEY, *supra*, at 23–24; Jeffrey Toobin, *The Consent Defense: Rape Laws May Have Changed, but Questions About the Accuser Are Often the Same*, NEW YORKER, Sept. 1, 2003, at 42. Now, almost all states have repealed the requirement of resistance to the utmost, although most states require at least some evidence of "reasonable" resistance by a rape victim. *See* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 31 (1998).

degree forcible rape.[22] Lack of consent is an element of both offenses.[23] Lack of consent may be established through evidence of the victim's oral protestations; physical resistance by the victim is not required to prove lack of consent.[24] In addition, in North Carolina as elsewhere, a person may freely withdraw consent to sexual intercourse before penetration.[25] Where there are multiple acts of sexual intercourse, consent for a prior act, whether with the defendant or a third party, does not constitute consent for a subsequent act of intercourse.[26] Where, however, there is only one act of sexual intercourse, the Supreme Court of North Carolina has stated that consent may be withdrawn only prior to penetration.[27] As the court held in *State v. Way*: "If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape . . . ."[28] Under its holding, as long as a man accomplishes initial

22. *See* N.C. GEN. STAT. §§ 14-27.2 to -27.3 (2001) (defining first-degree and second-degree rape).

23. *See* §§ 14-27.2 to -27.3 (defining rape as intercourse "against the will of the other person"); *see also* State v. Booher, 305 N.C. 554, 561, 290 S.E.2d 561, 564 (1982) ("The words 'against her will' as used in the law of rape, connote the victim's lack of consent."). Both first-degree rape and second-degree rape involve vaginal intercourse by force and against a person's will. *See id.* A conviction for first-degree rape requires proof of (1) the use of a deadly weapon, (2) aiding or abetting, or (3) serious personal injury to the victim or another person. *See id.*; State v. Barnette, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). By statute, the crime of rape is defined by vaginal intercourse; as such, it is limited to sexual activity that occurs between a man and a woman, specifically, the penetration of the female sexual organ by the male sexual organ. State v. Jones, 249 N.C. 134, 136–37, 105 S.E.2d 513, 514 (1958); State v. Summers, 92 N.C. App. 453, 456, 374 S.E.2d 631, 633 (1988). Crimes not involving vaginal intercourse receive separate treatment as forcible "sexual offenses." *See* §§ 14-27.4 to -27.5. Thus, because rape in North Carolina is limited by definition to vaginal intercourse, this Recent Development discusses rape as a crime involving a man and a woman.

24. *See* State v. Alston, 310 N.C. 399, 408, 312 S.E.2d 470, 475 (1984); State v. Hall, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (1977). North Carolina is in a progressive minority on this issue; most courts in the United States require at least some evidence of physical resistance. *See* SCHULHOFER, *supra* note 21, at 31. *But see infra* notes 81–87 and accompanying text (arguing that North Carolina law does in fact impose a physical resistance requirement on women who withdraw consent for sexual intercourse after penetration).

25. *See* State v. Way, 297 N.C. 293, 296–97, 254 S.E.2d 760, 761–62 (1979).

26. *See id.* (" 'If the particular act of intercourse was without her consent, the offense is rape without regard to the consent given for prior acts to third persons or the defendant' ") (quoting R. ANDERSON, 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 302 (1957)); *see also* State v. Long, 93 N.C. 542, 544–45 (1885) ("[T]he fact that a woman is a common strumpet or the mistress of the defendant, is no bar . . . . Nor can it make any difference that she consented, upon certain terms, if the defendant . . . attempted by force to have carnal knowledge of her person without her consent." (citation omitted)).

27. *See Way*, 297 N.C. at 296, 254 S.E.2d at 761–62.

28. *Id.* at 297, 254 S.E.2d at 762. In *Way*, the evidence for the State showed that Beverly Hester voluntarily accompanied the defendant to an upstairs room. *Id.* at 294, 254

penetration with a woman's consent, his subsequent use of force or coercion during the same act of intercourse will not constitute rape.[29]

This holding was flawed in several respects. First, the *Way* court failed to include a statement of direct authority or other explanation for its interpretation of the law.[30] The court cited only one case in support of its holding: the 1885 case of *State v. Long*.[31] In *Long*, the Supreme Court of North Carolina stated that "[a]lthough [a woman] . . . was taken first with her own consent, if she was afterwards forced against her will, the offense [of rape] would be committed."[32] In other words, when a woman consents to one act of intercourse, her consent does not automatically extend to future acts of intercourse; there must be consent for each act.[33] However, the court failed to explain how this holding supports the holding of *Way* that a woman *cannot* withdraw consent during a single act of

---

S.E.2d at 760. Once upstairs, the defendant told her that "she had ten minutes to take off her clothes or he would beat her." *Id.* When she tried to leave the room, the defendant struck her in the face, and stood over her with his hand raised as she began to cry. *Id.* The defendant told Beverly that by the time anyone came upstairs to help her, her "head would be through the wall." *Id.* He forced her to have anal intercourse, and next threatened to kill her if she did not perform oral sex on him. *Id.* at 295, 254 S.E.2d at 760. He then forced her to have vaginal intercourse after she begged him not to because she was a virgin. *Id.* at 295, 254 S.E.2d at 760–61. The defendant's evidence, on the other hand, tended to show that Beverly took off her own clothes and voluntarily engaged in intercourse with him. *Id.* When she told him she was a virgin, the defendant said he thought she was "just kidding." *Id.*

29. *See id.* at 296–97, 254 S.E.2d at 761–62.

30. *See id.*; *see also* McGill v. State, 18 P.3d 77, 83 (Alaska Ct. App. 2001) (noting that the *Way* court cited no authority); State v. Siering, 644 A.2d 958, 963 (Conn. App. Ct. 1994) (stating that *Way* is "not persuasive because it contains no analysis or explanation but is merely a bald statement that the trial court was wrong"); State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985) (finding that the *Way* court cited no authority on point to come to its "mere *ipse dixit* conclusion").

31. *See Way*, 297 N.C. at 296, 254 S.E.2d at 761 (citing State v. Long, 93 N.C. 542 (1885)).

32. State v. Long, 93 N.C. 542 (1885) (emphasis omitted) (quoting Wright v. State, 23 Tenn. (4 Hum.) 193, 198 (1843)).

33. *See id.* at 544–45. In addition to citing an inapplicable case from 1885, the *Way* court ignored an even older criminal law doctrine: the doctrine of concurrence of the elements. *See* HASCAL R. BRILL, CYCLOPEDIA OF CRIMINAL LAW § 88 (1922) (citing early cases requiring concurrence of the elements); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 197–99 (2d. ed. 1995) (citing at least one case from the nineteenth century requiring concurrence of the elements). Generally, for a crime to occur, there must be an actus reus and a mens rea. *Id.* at 177. The State must prove that a defendant caused the proscribed social harm, the actus reus, with the necessary mental state, the mens rea. *Id.* Under the doctrine of concurrence of the elements, a crime does not occur unless there is temporal concurrence between the actus reus and the mens rea. *Id.* As this Recent Development argues, in the crime of post-penetration rape, concurrence of the elements clearly exists. *See infra* note 79 and accompanying text.

intercourse.[34] Subsequent North Carolina cases also offer no explanation.

The court's faulty statement of authority belies a more likely explanation for its holding: archaic views of women. *Way* was decided in 1979, the same year that the North Carolina legislature enacted an express marital rape exemption, also known as the spousal rape defense.[35] The exemption bestowed upon husbands an absolute privilege to rape their wives, with or without the use of force.[36] The underlying rationale for the exemption was the notion of a wife's irrevocable consent.[37] At the moment of marriage, a woman irrevocably consented to sexual intercourse with her husband; once that consent was given, it could not be withdrawn.[38] During the 1980s, feminists and legal reformers attacked the marital rape exemption, arguing that such laws were archaic and inconsistent with modern views of women.[39] In 1993, after significant debate, the North Carolina legislature followed the example of other states and repealed the marital rape exemption.[40]

Although the North Carolina legislature repealed the marital rape exemption, *Way* remains a legal relic in North Carolina case law,

---

34. *See Way*, 297 N.C. at 296–97, 254 S.E.2d at 761–62 (stating merely, "This is not the law").

35. *Compare Way*, 297 N.C. 293, 254 S.E.2d 760 (decided in May, 1979), *with* Act of May 29, 1979, ch. 682, § 1, 1979 N.C. Sess. Laws 725, 726–27 (codified as amended at N.C. GEN. STAT. § 14-27.8 (2001) (enacted in May, 1979)).

36. *See* ESTRICH, *supra* note 21, at 72.

37. *See id.*

38. *See id.* "Between husband and wife, the law's conception of consent remained the one that British Chief Justice Lord Hale had set forth in the seventeenth century: '[B]y their matrimonial consent and contract, the wife hath given herself in this kind unto her husband, which she cannot retract.' " SCHULHOFER, *supra* note 21, at 18 (quoting 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (S. Emlyn ed., 1778)). The marital rape exemption may find its roots in an era that pre-dates even the eighteenth century. The apostle Paul believed that spouses each had rights to the other's body: "The wife has no rights over her own body; it is the husband who has them. In the same way, the husband has no rights over his body; the wife has them." 1 *Corinthians* 7:2–6. The Christian reasoning behind the marital rape exemption was expressed in early American law under the view that a wife was a husband's property: "[T]he two were one, and that one was him." MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 316–17 (2001).

39. Jaye Sitton, Comment, *Old Wine in New Bottles: The Marital Rape Allowance*, 72 N.C. L. REV. 261, 269–76 (1993).

40. *See* Act of July 5, 1993, ch. 274, 1993 N.C. Sess. Laws 540 (codified at N.C. GEN. STAT. § 14-27.8 (2001)); Sitton, *supra* note 39, at 269–86. *But see* CAROLINA A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 232–33 (2000) (noting that the burden of proof and historical presumptions make it difficult to prosecute marital rape cases and arguing that marital rape remains "essentially a legal nullity").

a holdover from the same antiquated ways of thinking that supported the marital rape exemption. *Way*'s status as relic becomes particularly clear when one considers the parallels between the former marital rape exemption and the current law on post-penetration rape. Both are based on a "crucial point" of consent. For the marital rape exemption, the crucial point was the moment of marriage.[41] After the point of marriage, a woman's consent for sexual intercourse with her husband became irrevocable.[42] Similarly, the crucial point of post-penetration rape is the moment of penetration.[43] At penetration, a woman's consent for sexual intercourse with a man becomes irrevocable.[44] In both former marital rape law and current post-penetration rape law, after the crucial point of consent, the degree of force or coercion applied by the man is irrelevant.[45] The initial agreement for sex—formerly in the form of marriage, now in the form of penetration—becomes an irrevocable license for a man to continue sexual intercourse and avoid the penalties associated with rape.

These antiquated views of female sexuality embodied in North Carolina precedent were echoed by the California Court of Appeals in its interpretation of *Way*. In *People v. Vela*,[46] the court determined

---

41. *See supra* notes 37–38 and accompanying text.

42. *See supra* notes 37–38 and accompanying text.

43. *See* People v. Vela, 218 Cal. Rptr. 161, 164 (Cal. Ct. App. 1985) (finding that "the moment of initial penetration appears to be the crucial point in the crime of rape").

44. *See supra* notes 27–29 and accompanying text. As critics of the decision in *In re John Z.* stated, "[O]nce you've said 'yes,' you lose the right to say 'no.' " Cathy Young, *Troubling Questions About Rape and Consent*, BOSTON GLOBE, Jan. 20, 2003, at A15.

45. *See supra* notes 27–29, 37–38 and accompanying text. Interestingly, similar arguments regarding the sexual "point of no return" were made regarding date rape. Lois Pineau argues that women who dress and act in sexually provocative ways are often thought to give a type of irrevocable consent that forms the basis of a "contract" for sex:

> Attempts to explain that women have a right to behave in sexually provocative ways without suffering dire consequences still meet with surprisingly tough resistance. Even people who find nothing wrong or sinful with sex itself, in any of its forms, tend to suppose that women must not behave sexually unless they are prepared to carry through on some fuller course of sexual interaction. The logic of this response seems to be that at some point a woman's behavior commits her to following through on the full course of a sexual encounter as it is defined by her assailant. At some point she has made an agreement, or formed a contract, and once that is done, her contractor is entitled to demand that she satisfy the terms of that contract.

Lois Pineau, *Date Rape: A Feminist Analysis*, *in* SEX, MORALITY AND THE LAW 434–35 (Lori Gruen & George E. Panichas eds., 1997).

46. 218 Cal. Rptr. 161 (Cal. Ct. App. 1985), *overruled by* 60 P.3d 183 (Cal. 2003). In *Vela*, the defendant, a nineteen-year-old man, was charged with raping a fourteen-year-old girl. *Id.* at 162. The defendant reported to a deputy that the girl originally consented but changed her mind during intercourse. *Id.*

that *Way* stood for the proposition that "the crucial point in the crime of rape" is the moment of penetration.[47] In support of this proposition and in concurrence with North Carolina court's holding, the *Vela* court stated:

> [T]he essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. 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 because 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.[48]

The California court concluded that in a situation in which a woman withdraws consent after penetration, the "essential guilt of rape" is absent.[49]

As in *Way*, the error of this reasoning is its dependence on a value assignment grounded in archaic views of women. In *Vela*, the California court applied the *Way* decision as a lens through which it focused on the "magnitude" of a woman's "outrage" after her withdrawal of consent.[50] With the North Carolina holding as a guide, the *Vela* court assumed that a woman would feel less outrage, and thus suffer less of an injury, if she initially consented to sex.[51] According to the court, there can be no "violation of her womanhood" if a woman initially consents to penetration.[52] In other

47. *Id.* at 164.

48. *Id.* at 165. In support of its finding that the crime of rape is grounded in "outrage," the court observed that sexual intercourse with a corpse is not rape because "at the moment of sexual penetration there is no outrage to the feelings of the dead victim." *Id.* at 164–65. The court cited section 263 of the California Penal Code, which provided that outrage is the essential guilt of rape. *Id.* (citing the California Penal Code). North Carolina has no such provision in its rape statutes. *See* N.C. GEN. STAT. §§ 14-27.1 to -27.10 (2001).

49. *See id.*

50. *See Vela*, 218 Cal. Rptr. at 164; *see also In re* John Z., 60 P.3d 183, 186 (Cal. 2003) (calling the reasoning of the *Way* court, the *Battle* court, and the *Vela* court "unsound"); McLellan, *supra* note 20, at 804–08 (accepting the possibility of this conception of the "essential guilt of rape," but arguing it is inconsistent with the California Penal Code).

51. *Vela*, 218 Cal. Rptr. at 164–65.

52. *See id.* at 165. The court did not define the term "womanhood"; its opinion reveals only that "womanhood" is something "violated" by initial, unconsented penetration, and that such a violation is more harmful to a woman than any actions that

words, unconsented penetration is a greater harm than subsequent unconsented sexual intercourse.[53] A value assignment provides the basis for this finding: a greater value is given to a woman's unpenetrated condition. The court's message is that once a woman has been penetrated, she has less to lose; as a result, she will feel less "outrage" over actions that occur after penetration.[54]

This assignment of greater value to women's "unpenetrated" condition is the same value assignment that patriarchal societies have made about women for centuries. In ancient civilizations, women's sexuality was a commodity, valued according to virginity or chastity, and the value of a woman's virginity or chastity accrued to the benefit of her father, husband, owner, or family.[55] Additionally, the loss of a

---

might follow initial penetration. *See id.*

53. *See id.*

54. Professor Catharine MacKinnon might attribute the *Vela* court's assignment of less value to the harms women experience after penetration to the "male supremacy's paradigm of sex" in rape law. *See* Catherine A. MacKinnon, *Rape: On Coercion and Consent, in* SEX, MORALITY AND THE LAW, *supra* note 45, at 420. According to Professor MacKinnon:

> [T]he crime of rape centers on penetration. The law to protect women's sexuality from forcible violation and expropriation defines that protection in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality . . . than it is upon male sexuality. This definitive element of rape centers on male-defined loss. It also centers upon one way men define loss of exclusive access. In this light, rape, as legally defined, appears more a crime against female monogamy (exclusive access by one man) than against women's sexual dignity or intimate integrity. . . . The moment women "have" it—"have sex" in the dual gender/sexuality sense, it is lost as theirs. To have it is to have it taken away. This may explain the male incomprehension that, once a woman has had sex, she loses anything when subsequently raped. To them women have nothing to lose.

Id. Applying Professor MacKinnon's theory to post-penetration rape cases, the *Vela* court employed "male-defined" terms of loss that center on penetration to measure the injury to the victim in that case. *See Vela*, 218 Cal. Rptr. at 164 (noting that once she has been penetrated, a woman's "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"). The court expressed clearly the "male incomprehension" that after a woman is penetrated, she has as much to lose from the subsequent denial of bodily autonomy caused by a man continuing to force sex upon her as she had prior to penetration. *See id.*

55. *See, e.g.*, 1 A HISTORY OF WOMEN IN THE WEST 306 (Arthur Goldhammer trans., Pauline Schmitt Pantel ed., 1992) (noting that in ancient societies, virgin female slaves were sold for higher prices than non-virgin female slaves); BERNARD BRAXTON, WOMEN, SEX AND RACE: A REALISTIC VIEW OF SEXISM AND RACISM 152 (1973) (stating that in both ancient civilizations and in the Victorian Age, women were more valuable in the "marriage market" if they were virgins). One historian describes "female purity" as "a family asset, jealously guarded by the men in the family." GERDA LERNER, THE CREATION OF PATRIARCHY 94 (1986). Lower-class families benefited from the virgin status of daughters and sisters, whose enforced chastity made them eligible to become the

woman's chastity was considered an injury to men.[56] In ancient societies—and in the more recent American common law tradition—women were considered the legal property of their husbands and fathers.[57] When women were raped, the injury of that rape was a devaluation of men's property.[58] This archaic view of women as property, valued according to their sexual relations with men, has largely faded away.[59] The *Vela* court's holding in 1985, however, assigning greater value to a woman's unpenetrated condition, is a modern-day echo of this archaic view of women as property and is out

---

wives and concubines of upper-class men. *See id.* Upper-class families arranged the marriages of their daughters "to consolidate their own social and economic power" through "military and business alliances." *See id.* at 111. Families also benefited from the bride-prices received from the marriages of daughters. *See id.* at 106. In ancient Mesopotamia, for example, "[t]he main value to a family in having daughters was their potential as brides. The bride-price received for a daughter was usually used to finance the acquisition of a bride for a son." *Id.* Thus, the "family asset" of female virginity could be inextricably linked to the success of the family as a whole. *See id.*

56. *See, e.g.*, LERNER, *supra* note 55, at 116 (stating that the ancient rape laws "all incorporated the principle that the injured party is the husband or father of the raped woman").

57. *See id.*; *see also* Brief Amici Curiae of the ACLU et al. at 6, 11, Coker v. Georgia, 433 U.S. 584 (1977) (No. 75-5444), *available at* 1976 WL 181482 (noting that the origin of the death penalty for the crime of rape in the United States came from the conception of rape as a crime against the husband or father of a victim).

58. In ancient societies, the devaluation of men's property rights in female virginity was punished:

> A virgin was considered a valuable asset .... Any infringement upon [the ownership of women's sexual and reproductive function] through premarital relations rendered the asset less valuable, and might even turn it into a liability. Therefore, [a] rapist was required to pay for and remove the liability because the rapist destroyed its value.

Ricki Lewis Tannen, *Setting the Agenda for the 1990s: The Historical Foundations of Gender Bias in the Law: A Context for Reconstruction*, 42 FLA. L. REV. 163, 172 (1990). Under the laws of the Hebrew Bible, the devaluation of men's property rights in female virginity required reimbursement: a man who raped a virgin was required to provide her father with a payment, and the rape victim was required to marry her rapist. "If a man find a damsel that is a virgin ... and lie with her, and they be found; [t]hen the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife." *Deuteronomy* 22:28–29. Similarly, if a man married a woman, and then wrongfully claimed she was not a virgin, he was required to pay the woman's father one hundred shekels of silver "because he hath brought up an evil name upon a virgin of Israel." *See id.* at 22:13–19. On the other hand, if the man rightfully claimed that his bride was not a virgin, "[t]hen ... the men of her city shall stone her with stones that she die: because she hath wrought folly in Israel, to play the whore in her father's house." *Id.* at 22:20–21.

59. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 52 (1980) ("Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside ....").

of place in modern legal jurisprudence.[60] Unfortunately, in North Carolina, this value assignment survives in the holding of *State v. Way*.

Assigning greater harm to the moment of penetration, while minimizing subsequent harms women suffer when raped, also ignores the reality of the experience of rape for many women. Admittedly, initial unconsented penetration is a terrible injury; it is in this moment of intrusion that a person's right to control their bodily integrity is first violated. This Recent Development does not seek to minimize that harm. Instead, it contends that the *Vela* and *Way* courts ignored the harm of loss of sexual autonomy that continues beyond the moment of initial penetration *whenever* sex is imposed against a person's will. As feminist scholars, medical practitioners, and victims have observed, the harm of rape is about more than penetration—it is about the loss of autonomy, dignity, and control that arises from being a target of intimate violence, power, and rage.[61] The *Vela* court disregarded, or at least considered minimal, the outrage a woman might feel at the loss of sexual bodily autonomy that occurs from the violence of rape beyond the moment of initial penetration.[62] Its value assumptions also ignore the fact that courts generally have no way to measure the true outrage a victim feels when denied sexual bodily autonomy.[63] The Supreme Court of California noted the error of

---

60. *See* McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001) (rejecting a defendant's reliance on *Vela* and stating that "a view that our sexual assault statute is based on considerations of 'outrage' to a victim's 'womanhood'... represents archaic and outmoded social conventions"); State v. Siering, 644 A.2d 958, 963 (Conn. App. Ct. 1994) (declaring the *Vela* court's reasoning "archaic and unrealistic").

61. Feminist scholar Catharine MacKinnon argues:

> [Rape is an] attack on the self, which can be shattered; the degradation of human dignity; the violation of trust and destruction of spirit.... Rape can destroy one's sense of safety, belief in integrity and worth, belief in and enjoyment of intimate relationships, and faith in one's place of respect in family or community.... Dread and terror of rape and anticipation of its possibility can set limits on women's freedom and access to a full life.

CATHARINE A. MACKINNON, SEX EQUALITY: RAPE LAW 778 (2001). As stated by Stephen Schulhofer: "[U]nwanted sex [can be] degrading, physically painful, damaging to self-esteem, and productive of lasting psychological damage." SCHULHOFER, *supra* note 21, at 279. Psychiatrists have theorized that the "profound and devastating loss" experienced by rape survivors arises in part from the threat of annihilation present in all rapes. Deborah S. Rose, *"Worse Than Death": Psychodynamics of Rape Victims and the Need for Psychotherapy*, 143 AM. J. PSYCHIATRY 817, 818 (1986). For a poignant and powerful account of rape and its psychological aftermath, see generally NANCY VENABLE RAINE, AFTER SILENCE: RAPE AND MY JOURNEY BACK (1998).

62. *See* People v. Vela, 218 Cal. Rptr. 161, 165 (Cal. Ct. App. 1985), *overruled by* 60 P.3d 183 (Cal. 2003).

63. *See In re* John Z., 60 P.3d 183, 186 (2003). Unlike the California Court of

these assumptions in *In re John Z.*, and correctly rejected the holdings of the *Vela* and *Way* courts.[64]

Moreover, if—as indicated by *Vela*—the holding of *Way* is grounded in notions of "outrage" felt by victims when their "womanhood" is violated,[65] the holding is grounded in error. Although outrage and suffering by victims are significant and valid reasons for punishing rapists, they are not essential elements of the crime of rape in North Carolina.[66] The North Carolina statutes do not make outrage a mandatory condition, or even an aggravating factor, in determining the crime of rape.[67]

Indeed, an accurate reading of the North Carolina statutes indicates that a man who refuses to cease intercourse immediately after a woman withdraws consent has committed second-degree rape. Under the North Carolina second-degree rape statute: "A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person by force and against the will of the other person."[68] The elements to be established in a second-degree rape case are: (1) vaginal intercourse, (2) with a person, (3) by force and against the person's will.[69] These elements are met when a woman withdraws consent after penetration but a man continues imposing sex on her, either by physical force or against her wishes, regardless of initial consent for penetration.[70] As to the first element, vaginal intercourse, North Carolina case law defines it to mean "sexual intercourse," specifically, the penetration of the female sexual organ by the male sexual organ.[71] There is nothing in this definition of vaginal intercourse to suggest that the vaginal intercourse

---

Appeals, the Supreme Court of California assumed a victim's outrage would be "substantial." *Id.*

64. *Id.*

65. *Vela*, 218 Cal. Rptr. at 165.

66. Similarly, the court in *In re John Z.* concluded that victim outrage was not an element of the offense of rape in California. *In re John Z.*, 60 P.3d at 186.

67. *See* N.C. GEN. STAT. §§ 14-27.2 to -27.3 (2001). North Carolina does not include virginity as an element of any rape offense. *See* INST. OF GOV'T, UNIV. OF N. CAROLINA AT CHAPEL HILL, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 144 (Robert L. Farb ed., 5th ed. 2001) [hereinafter INST. OF GOV'T]. Arguably, such an element would improperly focus on the victim's "outrage" over the rape rather than the defendant's actions.

68. § 14-27.3.

69. *See* INST. OF GOV'T, *supra* note 67, at 146.

70. *See id.* In addition, if a perpetrator used a weapon, inflicted serious bodily injury on a victim, or was assisted by other individuals to force a woman to continue having sex with him after she withdrew consent, he would arguably be guilty of first-degree rape. *See supra* note 23 (setting out the elements of first-degree rape in North Carolina).

71. *See* State v. Jones, 249 N.C. 134, 136–37, 105 S.E.2d 513, 514 (1958).

occurring after withdrawal of consent is not vaginal intercourse within the meaning of the statute. As noted by other state courts, "In anybody's everyday lexicon, continued penetration of the female sex organ by the male sex organ . . . is factually 'sexual intercourse.' "[72] These courts came to this conclusion on the basis of both elementary principles of statutory construction and basic common sense.[73] In addition, in North Carolina, the slightest penetration is sufficient to violate the rape statute.[74] North Carolina cases have not held that "intercourse is complete" upon penetration, or that only initial penetration constitutes intercourse. Such a holding would mean that the act that begins intercourse, namely penetration, is also the act that completes intercourse. Such an interpretation would defy common sense.[75]

The second and third elements of the North Carolina second-

---

72. *See* State v. Siering, 644 A.2d 958, 963 (Conn. App. Ct. 1994) (quoting State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985)); *see also* McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001) (holding that Alaska statutory law does not "limit sexual penetration to the moment of initial penetration"); State v. Bunyard, 75 P.3d 750, 756 (Kan. Ct. App. 2003) ("Nowhere [in the Kansas rape statute] does it state that the act of sexual intercourse *ends* with penetration. Instead, the [statutory definition of sexual intercourse] merely establishes a minimum amount of contact necessary to prove the offense.").

73. *See, e.g.*, *Siering*, 644 A.2d at 963 (citing "our own best judgment of the meaning of our statute interpreted in the light of the common sense of the situation before us" in support of its holding); State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985) (citing the legislative intent behind the statute and "common sense" in support of its holding).

74. *See* N.C. GEN. STAT. § 14-27.10 (providing that "[p]enetration, however slight, is vaginal intercourse"); State v. Murry, 277 N.C. 197, 203, 176 S.E.2d 738, 742 (1970) ("It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient."); State v. Summers, 92 N.C. App. 453, 456, 374 S.E.2d 631, 633 (1988) (stating that vaginal intercourse includes even the slightest penetration).

75. *See Siering*, 644 A.2d at 962–63. The Connecticut Court of Appeals, in construing the state's rape statute, made this point:

> We construe the statutory reference to penetration as establishing the minimum amount of evidence necessary to prove that intercourse has taken place. The statute does not read that "intercourse is complete" upon penetration; rather, it provides that "penetration, however slight [is sufficient] to complete . . . intercourse." We do not construe this to mean that only the initial penetration constitutes intercourse. The defendant's argument would mean that the act that commences intercourse is also the act that simultaneously concludes intercourse.

Id. at 962 (citation omitted). The court went on to conclude that such an interpretation of its statute would be "bizarre" and "absurd." *See id.* Connecticut makes reference to the "slightest penetration" criterion in its statute. *See* CONN. GEN. STAT. § 53a-65(2) (2003) ("Penetration, however slight, is sufficient to complete vaginal intercourse."). The logic of the argument applies to North Carolina as well, where both statutory and case law have defined intercourse to include any penetration, however slight. *See* N.C. GEN. STAT. § 14-27.10; *Murry*, 277 N.C. at 203, 176 S.E.2d at 742; *Summers*, 92 N.C. App. at 456, 374 S.E.2d at 631.

degree rape statute are also satisfied by post-penetration rape. The second element, requiring vaginal intercourse to be "with a person,"[76] obviously would be met where the victim of the post-penetration rape is a woman. Finally, the third element, requiring the intercourse to be "by force and against the person's will,"[77] would be met where a woman withdraws her consent during sexual intercourse, but a man employs actual or constructive force to continue sexual intercourse.[78] Additionally, in a post-penetration rape, all three of these elements exist concurrently, satisfying the doctrine of concurrence of the elements.[79] Thus, as a matter of statutory construction, post-penetration rape should constitute the crime of second-degree rape in North Carolina. Indeed, other state courts have interpreted their rape statutes in this fashion to determine that post-penetration rape falls within the meaning of their rape statutes.[80] These courts, however, did not have binding case law to hinder this interpretation of their rape statutes. North Carolina, on the other hand, has the rule established by the state supreme court in *State v. Way*, which might prevent a court from interpreting the state rape statutes to prohibit post-penetration rape.

Moreover, the rule established by *Way* impliedly imposes a physical resistance requirement on rape victims. Under the *Way* court's holding, where a woman withdraws consent following penetration, whether a rape has occurred depends on how successful

---

76. N.C. GEN. STAT. § 14-27.3 (2001).

77. *See id.*

78. *See, e.g.*, State v. Roberts, 293 N.C. 1, 13, 235 S.E.2d 203, 211 (1977) ("The force necessary to meet the . . . requirement, as explained on numerous occasions by this Court, need not be physical force but may take the form of fear, fright, or coercion.").

79. Under the doctrine of concurrence of the elements, for a crime to have occurred, there must be concurrence of the actus reus and mens rea. DRESSLER, *supra* note 33, at 177. The actus reus is the proscribed social harm. *Id.* The mens rea is the requisite mental state required by the criminal statute. *Id.* The principle of concurrence of the elements requires that the defendant possess the requisite mens rea at the same time that his conduct causes the proscribed social harm. *Id.* The temporal concurrence of the mens rea and actus reus must be more than coincidental; the defendant must be motivated by the thought processes that constituted his mens rea to create the social harm. *Id.*

A case of post-penetration rape satisfies the doctrine of concurrence of the elements. Admittedly, at the moment of penetration, a defendant in such a case would not have the requisite mens rea for a crime to occur, since at that moment the woman consented to sexual intercourse. However, after the woman withdraws consent for sexual intercourse, and the defendant persists in imposing intercourse on her, concurrence of the elements is satisfied. At that moment, the defendant knowingly, with the requisite mens rea, forces vaginal intercourse on his victim against her will, the actus reus. Special thanks to Eric L. Muller, George R. Ward Professor of Law at the University of North Carolina at Chapel Hill School of Law, who suggested this concurrence of the elements analysis.

80. *See Siering*, 644 A.2d at 963; State v. Robinson, 496 A.2d 1067, 1069 (Me. 1985).

she is in her physical struggle against her attacker.[81] For example, a woman who is strong enough to resist her attacker so that she is able to dislodge the male organ, however briefly, will have a viable rape claim if he penetrates her again.[82] In such a scenario, through physical resistance, she has effectively manifested her withdrawal of consent prior to the moment of the subsequent penetration.[83] On the other hand, a woman who unsuccessfully attempts to extricate herself from her attacker will have no rape claim so long as her attacker maintains penetration.[84] The *Way* court's holding thus accomplishes two things: first, it protects North Carolina defendants from rape prosecution based solely on their strength and use of force.[85] Second, it imposes a strength requirement on women who withdraw consent during sexual intercourse; women must physically struggle against their attackers *and* they must be strong enough to extricate themselves at least briefly in order for a rape to have occurred. This requirement for physical resistance is inconsistent with North Carolina law[86] and modern rape law generally.[87]

Nonetheless, there are those who would defend the rule of law established in *Way*. Perhaps not surprisingly, its defenders, in attacking *In re John Z.*, have made the same arguments that were made in opposition to the repeal of the spousal rape defense. Opponents of the decision in *In re John Z.*, like opponents of the repeal of the rape exemption for husbands, charge that the law

---

81. *See* State v. Way, 297 N.C. 293, 297, 254 S.E.2d 760, 762 (1979).

82. *See Robinson*, 496 A.2d at 1070–71.

83. *See id.* In addition, it is possible that woman might be able to trick a man into removing his penis. This method, however, would not adequately communicate her withdrawal of consent in the same way that physical resistance or a clear statement would. Thus, she would not have a valid rape claim if he penetrates her again.

84. *See id.* The *Robinson* court identified this inconsistency not as a physical resistance requirement, but rather as a practical unfairness, stating that "it hardly makes sense to protect from 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." *Id.*

85. *See Siering*, 644 A.2d at 963 (rejecting a construction of the Connecticut rape statute to allow post-penetration rape, finding that it would be "absurd" to "protect[] from prosecution a defendant whose physical force is so great or so overwhelming that there is no possibility of the victim's causing even momentary displacement of the male organ").

86. *See, e.g.*, State v. Alston, 310 N.C. 399, 408, 312 S.E.2d 470, 476 (1984) (holding that physical resistance by a victim is not required to prove lack of consent); State v. Hall, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (1977) (same).

87. *See, e.g.*, SCHULHOFER, *supra* note 21, at 30–31 (noting that most states have repealed resistance requirements); David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 357 (2000) (noting that modern statutory reforms largely have eroded the requirement of physical resistance).

victimizes men.[88] For example, in North Carolina, the repeal of the spousal rape defense was opposed by a " 'coterie of lawmakers who raised the specter of vengeful wives victimizing their husbands.' "[89] Similarly, critics of *In re John Z.* fear that the decision invites victimization of men, and that spiteful women will use the law as an opportunity to falsely cry rape[90] or to absolve themselves of responsibility when they later feel guilty about their choice to have sex.[91] These arguments, however, overlook the harm to women who are raped and instead focus on the potential harm to accused men.[92] Like the marital rape exemption, the denial of post-penetration rape as a crime is "inherently sexist, in that [it] elevate[s] men's interests in

---

88. *See, e.g.*, James R. Petersen, *Rape or Regret?*, PLAYBOY, May 2003, at 50, 51 (stating that the *John Z.* decision "calls for outrage" and that the "real violation" may have been that John Z. was committed to a juvenile facility); Young, *supra* note 44 (noting that *In re John Z.* has been characterized as an "anti-male witchhunt" that smacks of "political correctness run amok"). Some men, apparently, feel personally victimized when a woman withdraws consent for sex:

> Over the years—and especially recently—I've had countless discussions with men of various ages and backgrounds, who lamented finding themselves with a woman who initially indicated by word, action, or both that she wanted to have sex, but changed her mind for whatever reason after the deed was started. Some of those men admitted to forcing the action, but the vast majority owned up to being left worked up, baffled, and angry.... Almost without exception, each of the men confiding in me believed that it was misleading, maddening, and perhaps just plain wrong, among other arguments, for a woman to change her mind.

Derrick K. Baker, *Men, Protect Yourselves: No Means No*, N'DIGO, Aug. 7, 2003, at 10.

89. *See* Sitton, *supra* note 39, at 287 (quoting Joseph Neff, *House Votes to Revoke Old Law That Prevents Marital Rape Charges*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 7, 1993, at A1).

90. One men's rights attorney stated, "I hope to God that this case doesn't set a precedent.... In California, all I can say is men are fair game if they pick the wrong sex partners." *The Tavis Smiley Show* (NPR radio broadcast, Jan. 24, 2003) [hereinafter Leving Interview] (interviewing Jeffrey Leving, "men's rights attorney"), *available at* 2003 WL 7628543. Another commentator stated, "Once upon a time ... the deck was stacked against women [in rape cases].... Now it's the accused whose rights are increasingly abused." Mike Rosen, *Victims Not Always Honest*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Aug. 15, 2003, at 39A.

91. *See* Petersen, *supra* note 88, at 51; Young, *supra* note 44. *See generally* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1132 (1986) (stating that "[t]he fear that women, acting from shame or spite or vengeance, will abuse any power they are afforded in sexual relations at the expense of 'innocent' men is the most pervasive theme in the legal commentary on rape"); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025–31 (1991) (discussing false accusations as a prevailing rape myth). Statistics on the number of false rape reports vary. The FBI has stated that the false report rate is eight percent, while other studies have put the report rate at approximately forty percent. *See* Dick Haws, *The Elusive Numbers on False Rape*, COLUM. JOURNALISM REV. (Nov/Dec. 1997), *available at* http://archives.cjr.org/year/97/6/rape.asp (last visited Feb. 13, 2004) (on file with the North Carolina Law Review).

92. *See* Sitton, *supra* note 39, at 288.

their reputations over the right of women to be free" from rape.[93]

Although men's interests in their reputations should not outweigh women's rights to be free from rape, sufficiency of proof issues in post-penetration rape cases remain a significant point of concern.[94] Where a woman withdraws consent during sexual intercourse, the case is likely to come down to a "credibility contest" between the victim and the defendant.[95] Because the woman initially consented to intercourse, evidence of physical resistance is unlikely, which—though not required in North Carolina—serves an important evidentiary function in many rape cases.[96] In determining whether a defendant's guilt has been proved beyond a reasonable doubt, this lack of evidence is an important factor and provides a possible rationale, at least in hindsight, for the North Carolina court's holding in *State v. Way*.

The increased likelihood of a good faith mistake regarding consent in post-penetration rape is another reason to scrutinize these cases carefully. In most states, a rape defendant may argue reasonable mistake-of-fact in his defense.[97] Indeed, the defendant in *In re John Z.* made such an argument. He argued that it was unclear that Laura effectively communicated her withdrawal of consent to John by replying "No, I need to go home" when John said, "Give me a minute."[98] Commentators have cited *In re John Z.* to suggest that the Supreme Court of California has eradicated the defense of good faith mistake regarding consent.[99] A more accurate summary of the

93. *See id.*; *see also* State v. Robinson, 496 A.2d 1067, 1071 (Me. 1985) (finding "no reason to strain to limit the ordinary meaning of the language of [the Maine] rape statute [to allow post-penetration rape] for fear of a flood of possibly trumped up charges").

94. In her dissent in *In re John Z.*, Justice Brown agreed with the majority that a woman has an "absolute right" to withdraw consent after the commencement of sexual intercourse, but Justice Brown maintained that the majority ignored the "critical questions about the nature and sufficiency of proof in a postpenetration rape case." *In re* John Z., 60 P.3d 183, 188 (Cal. 2003) (Brown, J., dissenting); *see also* McLellan, *supra* note 20, at 796 (noting the decreased likelihood of physical evidence in rapes that begin as consensual intercourse).

95. *See id. See generally* MACKINNON, *supra* note 61, at 818 (noting that when consent is raised as a defense to rape, a woman's credibility is a pivotal issue).

96. *See* SCHULHOFER, *supra* note 21, at 31.

97. *See* Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW & PHIL. 95, 97–98 (1992).

98. *See In re John Z.*, 60 P.3d at 190 (Brown, J., dissenting) (questioning whether a reasonable person in the defendant's position would understand "I need to go home" as a demand to desist). The court found, however, that Laura's actions and words clearly communicated her withdrawal of consent and that "no reasonable person in the defendant's position" could have interpreted them otherwise. *Id.* at 187.

99. *See* Leving Interview, *supra* note 90 (arguing that Laura did not communicate her withdrawal of consent and that the defendant in the case made a good faith mistake);

case, however, is that the California court missed an opportunity to state that a clear, unequivocal withdrawal of consent is required for the State to meet its burden of proof in post-penetration rape cases.

While valid, these concerns regarding sufficiency of proof in post-penetration rape cases should be weighed against the benefits of defining post-penetration rape as a crime. As victims' advocates have suggested, recognizing post-penetration rape as a crime reflects a view of women as "responsible, autonomous beings who possess the right to personal, sexual, and bodily self-determination."[100] All persons deserve the right to choose or decline sexual intimacy.[101] Legal preservation of this right to choose or decline intimacy protects individuals from the emotional vulnerability and physical dangers accompanying unwanted sexual interaction.[102] Additionally, requiring men to stop intercourse when women withdraw consent or face rape charges requires men to listen to women in sexual relationships.[103] Moreover, recognizing post-penetration rape as a crime is likely to protect young women and teenagers, who are perhaps the most likely to be ambivalent about sex or feel pressured to have sex.[104]

Petersen, *supra*, note 88, at 51 ("It was a he-said, she-said case, with murky accounts of what had transpired and serious questions about what John should or should not have surmised.").

100. *See In re John Z.*, 60 P.3d at 188 (Brown, J., dissenting) (quoting Berger et al., *The Dimensions of Rape Reform Legislation*, 22 LAW & SOC'Y REV. 329, 330 (1988)).

101. "Few of our other freedoms, if any, are as essential to emotional well-being and our capacity to lead a flourishing life.... It is time to recognize sexual autonomy as an essential component of the freedoms that society properly guarantees and supports for every human being." SCHULHOFER, *supra* note 21, at 282.

102. *Id.* at 100–01.

103. *Fox News: The O'Reilly Factor* (Fox television broadcast, Jan. 16, 2003) [hereinafter Wolf Interview] (interview with Christopher Wolf, Victim's Rights Advocate), *available at* 2003 WL 6663734 (on file with the North Carolina Law Review); *see also* Mike McKee, *Rape Can Occur After Consent*, RECORDER (San Francisco, C.A.), Jan. 7, 2003, at 1 (stating "when a woman says no to sex, even after intercourse has begun, a man had better pay attention") (on file with the North Carolina Law Review).

104. The victims in several of these cases were teenagers. *See, e.g.*, *In re John Z.*, 60 P.3d at 184 (noting that Laura was seventeen years old); People v. Vela, 218 Cal. Rptr. 161, 162 (Cal. Ct. App. 1985) (noting that the victim was fourteen years old); State v. Jones, 521 N.W.2d 662, 665 (S.D. 1994) (noting that the victim was between twelve and sixteen years of age). Some studies indicate that younger girls are more likely to be coerced or forced into sexual intercourse. *See* KRISTIN A. MOORE ET AL., BEGINNING TOO SOON? ADOLESCENT SEXUAL BEHAVIOR, PREGNANCY AND PARENTHOOD: A REVIEW OF RESEARCH AND INTERVENTIONS, U.S. DEP'T OF HEALTH & HUMAN SERVS., *available at* http://aspe.os.dhhs.gov/hsp/cyp/xsteesex.htm (last visited Jan. 25, 2004) (on file with the North Carolina Law Review). Research indicates that more than half of all female rape victims in the United States are teenagers. *See* U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN iii–iv, *at* http://www.ncjrs.org/pdffiles1/nij/183781.pdf (Nov. 2000) (on file with the North Carolina Law Review).

Most importantly, recognizing post-penetration rape as a crime debunks the "myth of the unstoppable male."[105] In his defense, John Z. argued that men need a "reasonable amount of time" in which to end sexual intercourse after a woman withdraws her consent.[106] The defendant stated:

> 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 withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time to quell his primal urge . . . .[107]

Citing the "primal urge" of the "male," the defendant disclaimed both control over and responsibility for his actions, and denied legal culpability for imposing sex on an unwilling partner.[108] According to his argument, it was only "natural" that he should be given time to "quell his primal urge."[109] In effect, the defendant claimed that men, by their very natures, would be biologically incapable of abiding by a law that required them to listen and respond when their partners withdrew consent for sex.[110] This claim is insulting to men and frightening for women who expect personal sexual autonomy and the right to bodily integrity. Fortunately, the court rejected this "male

---

105. *See* Wolf Interview, *supra* note 103 (employing the phrase "myth of the unstoppable male").

106. *In re John Z.*, 60 P.3d at 187.

107. *Id.*

108. *See id.*

109. *See id.*

110. *See id.* As noted by Lois Pineau, the "primal urge" argument was once made by those who would offer excuses for date rapists:

> [People] tend to suppose that women must not behave sexually unless they are prepared to carry through some fuller course of sexual interaction. . . . [The rationale for this supposition] comes in the form of a belief in the especially insistent nature of male sexuality, an insistence which lies at the root of natural male aggression, and which is extremely difficult, perhaps impossible, to contain. At a certain point in the arousal process, it is thought, a man's rational will gives way to the prerogatives of nature. His sexual need can and does reach a point where it is uncontrollable, and his natural masculine aggression kicks in to assure that this need is met. Women, however, are naturally more contained and so it is their responsibility not to provoke the irrational in the male. If they do go as far as that, they have both failed in their responsibilities, and subjected themselves to the inevitable. One does not go into the lion's cage and expect not to be eaten.

Pineau, *supra* note 45, at 434–35. For a discussion of the ways in which the myth of the "male irresistible impulse" has been used to excuse criminal behavior by men and to perpetuate societal sex discrimination, see generally Jane H. Aiken, *Differentiating Sex from Sex: The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357 (1984).

primal urge" theory, finding a lack of supporting authority for it.[111] Nonetheless, the court left the myth of the unstoppable male at least partially intact.[112] By failing to address the issue directly, and instead stating merely that the defendant in this case was given "ample" time to desist, the court offered no guidance as to what constitutes a "reasonable time" and left open the possibility that a reasonable time might not be immediately.[113] Thus, it is possible that the court expected men to control their sexual urges eventually, although not immediately upon a withdrawal of consent. This is a disturbing result.

In this and other ways, the California decision in *In re John Z.* and the legal trend in other states on this issue[114] should serve as a lesson to North Carolina, and North Carolina should define post-penetration rape as a criminal offense.[115] North Carolina is in need of a statutory solution to the case law problem created by the Supreme Court of North Carolina in *State v. Way.* As a solution to this problem, this Recent Development recommends an amendment to the North Carolina rape statutes. As a model for such a statute, North Carolina legislators should look to Illinois, which on July 25, 2003, became the first state to enact a statute expressly making post-penetration rape a crime.[116] The Illinois statute provides: "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or conduct."[117] A similarly-worded provision appended to section 27 of Chapter 14 of the General Statutes of North Carolina would invalidate the outdated holding of

111. *In re John Z.*, 60 P.3d at 187.

112. *See id.*

113. In her dissent, Justice Brown mused, "[H]ow soon would have been soon enough? Ten seconds? Thirty? A minute?" *Id.* at 190 (Brown, J., dissenting); *see also* State v. Bunyard, 75 P.3d 750, 756 (2003) (rejecting the defendant's contention that he should have been allowed a "reasonable time" to cease intercourse and stating that "continuing intercourse for 5 to 10 minutes is not reasonable and constitutes rape").

114. *See supra* note 19 and accompanying text.

115. *See* McLellan, *supra* note 20, at 804–08 (advocating a revised statute for California).

116. *See* Wills, *supra* note 19.

117. Illinois legislators were criticized for enacting what some commentators believed was an unnecessary law. *See id.* Unlike North Carolina, Illinois does not have binding precedent excluding post-penetration rape from the statutory definition of rape. The director of a victim's rights group, who said she could not imagine Illinois courts refusing to uphold a woman's right to withdraw consent during intercourse, stated: "To me, it's demeaning.... It's like the old saying: 'If it ain't broke, don't fix it.' I don't think [the law in Illinois] was broke." *Id.* Illinois lawmakers, however, wanted to avoid the type of "legal battle" in Illinois that California endured in *In re John Z. Id.*

State v. Way and would bring North Carolina in line with other states on this issue.[118] In addition to the statutory language employed by Illinois, a statutory amendment in North Carolina should state explicitly that upon withdrawal of consent by one individual, the other individual must cease sexual intercourse or contact immediately.

An amendment to the rape statutes would be an important advance for North Carolina. It would constitute recognition that men are not driven by "primal urges" that make them incapable of immediately acknowledging a woman's withdrawal of consent for sexual intercourse. It would reflect a view of women as sexually autonomous individuals with a right to bodily integrity, who have a right to withdraw consent at any time—even after intercourse has begun. It would acknowledge that women should not be valued according to whether they have already been "penetrated." It would reconcile conflicts between case law and statutory law,[119] and it would remove the physical resistance and strength requirements that the rule of *Way* imposes upon women who withdraw consent during intercourse.[120] Women in North Carolina deserve the same rights to—and legal protections of—sexual autonomy and bodily integrity that are accorded women in other states. The North Carolina General Assembly should take action to remedy the injustice of *State v. Way* by enacting a statutory amendment to the rape statutes making post-penetration rape a crime. In North Carolina, as elsewhere, "no" should mean "no," whenever it is spoken.

ERIN G. PALMER

118. *See supra* note 19 and accompanying text.
119. *See supra* notes 68–80 and accompanying text.
120. *See supra* notes 81–86 and accompanying text.