

No Means No: Weakening Sexism in Rape Law by Legitimizing Post-penetration Rape

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I. INTRODUCTION

Traditionally, the law has done more than reflect the restrictive and sexist views of our society; it has legitimized and contributed to them. In the same way, a law that rejected those views and respected female autonomy might do more than reflect the changes in our society; it might even push them forward a bit.¹

In today's society, sexism is by no means an extinct concept, made obsolete through the various gender revolutions of the 1960s and '70s. Rather, sexism continues to afflict women in numerous societal domains. Some of these areas have received ample attention and have been accepted by the general public as legitimate areas of social concern—sexism in the workplace, sexism in the military, and sexism in the home, for example. Other areas over which sexism continues to reign, however, have not received as much popular attention and, consequently, continue to reside in unfamiliar territory. Sexism in rape law, as well as sexism in societal attitudes toward rape, is one such arena.²

“Acquaintance rape” is a broad term that describes any rape perpetrated by someone who knows his victim.³ Countless forms of acquaintance rape exist, including rape by a lover, husband, friend, co-worker, neighbor, or relative.⁴ The common denominator in this non-exhaustive list is that each case involves a woman who is forced to have sex, not by a criminal hiding behind the bushes in the park, but rather by the guy next door—an attacker in date's clothing, a perpetrator not easily identifiable as criminal by outward appearances. These

1. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1093–94 (1986).

2. *See id.* at 1090. This is not to say, of course, that literature dealing with rape and rape law is scarce. On the contrary, many scholarly and popular publications have addressed the issue of rape, particularly in recent years. *Id.* For the general public, however, the topic of sexism in rape law is still far from mainstream.

3. Laurie Bechhofer & Andrea Parrot, *What is Acquaintance Rape?*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 9, 12 (Andrea Parrot & Laurie Bechhofer eds., 1991) [hereinafter HIDDEN CRIME].

4. David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1202–03 (1997). “Date rape,” which occurs between two people who are on a date or are dating, is probably one of the most commonly known types of acquaintance rape. Bechhofer & Parrot, *supra* note 3, at 12.

rapists may have no other criminal record either, but instead are men that a woman interacts with in everyday life—they are doctors, mechanics, attorneys, grocers, accountants, teachers.

As such, the law protects these men from criminal punishment for rape.⁵ Both historically and currently, acquaintance rape law has been chiefly reflective of male standards and perspectives, and has thus greatly favored rapists.⁶ Corroboration requirements, resistance requirements, and sexist interpretations of terms like “consent” and “force,” are all prime examples of this phenomenon.⁷ For instance, the utmost resistance requirement, which was the standard for decades and (although no longer the law) continues to influence rape cases, was based almost entirely on the male notion of the amount of resistance a woman should employ during an attack.⁸ How a female victim of rape would realistically respond to such an assault was deemed irrelevant.⁹ In short, although women are the gender most often raped,¹⁰ men are the ones tinkering with exactly what that term means. The male perspective has and continues to dominate.¹¹

While sexism such as this impacts rape in general, this Comment focuses mainly on its effect on claims of post-penetration rape. Post-penetration rape is a relatively unexplored category of sexual assault,¹² perhaps because in the past it has often been enveloped by the more general category of acquaintance rape. Post-penetration rape is one type of acquaintance rape, but is distinguished from other forms of sexual assault by timing. A woman who never gives consent to sex, but is nonetheless forced to engage in intercourse, is a victim of rape. A woman who initially gives consent to sex, withdraws it during intercourse, and is then forced to continue intercourse is a victim of

5. It is estimated that the conviction rate for rape is as low as one to four percent. 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, 1024 (1991).

6. Estrich, *supra* note 1, at 1092.

7. *See id.*

8. *See id.* at 1091.

9. *See* Kara M. DelTufo, Book Review, *Resisting “Utmost Resistance”: Using Rape Trauma Syndrome to Combat Underlying Rape Myths Influencing Acquaintance Rape Trials*, 22 B.C. THIRD WORLD L.J. 419, 424 (2002) (reviewing SUSAN EHRLICH, *REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT* (2001)).

10. *See* SEDELLE KATZ & MARY ANN MAZUR, *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS* 33–34 (1979). Only a very small percentage of reported rapes involved male victims; one study estimated 4 percent. *Id.* at 33. However, the reporting rate among male victims of rape is most likely very low as well, perhaps even lower than within the female population. *Id.*

11. *See* Estrich, *supra* note 1, at 1091, 1094.

12. The term “post-penetration rape” was coined by Amy McLellan, Comment, *Post-Penetration Rape—Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 780 (1991).

post-penetration rape.¹³ In the first example, the act was rape from the moment of penetration, while in the second example it became rape after penetration when consent was withdrawn. Because consent initially exists in post-penetration rape cases, the topic easily falls prey to not only the typical sexism discussed above, but also heightened sexist attitudes about male and female sex roles, men's ability to control their sexual impulses, etc. Post-penetration rape is somewhat of a catch-all for sexism in the world of rape, making it an area very needful of reform.

Despite this, no state legislature has addressed the issue by passing a statute legitimizing claims of post-penetration rape; that is, until recently. In 2003, Illinois became the first state to pass legislation recognizing the existence and validity of the crime of post-penetration rape.¹⁴ The statute makes clear that men must heed women's withdrawal of consent during sex, or else be guilty of rape.¹⁵ Such a statute is a first step toward respecting female autonomy in the field of acquaintance rape law and, as such, has the potential to aid in changing societal attitudes toward post-penetration rape.

This Comment analyzes the ways in which a statute legitimizing the claim of post-penetration rape is likely to affect sexism in rape law. Part II examines the way in which post-penetration rape has been dealt with in various state court decisions. Part III offers a synopsis of the journey sexism in rape law has experienced in the last half-century, and Part IV discusses the ways in which a post-penetration statute could curb this sexism. Part V concludes the Comment, arguing that while a post-penetration rape statute has the potential to weaken sexism surrounding post-penetration rape, its effects are limited, making further reform a necessity.

II. HISTORICAL BACKGROUND

While Illinois is the first state to deal with post-penetration rape legislatively, other states have addressed the issue judicially. Two state courts have issued opinions unequivocally rejecting the concept of post-penetration rape—Maryland and North Carolina.¹⁶ Of the forty-eight remaining states, seven have unequivocally supported it—Maine, Connecticut, California, South

13. The term "consent" can be misleading. Under typical current law, it does not necessarily mean that the victim expressly agreed to sex. STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 268 (1998). "Consent" simply means that the victim had not yet manifested a legally recognized unwillingness to have intercourse. For example, in most states, no law requires courts to treat a solely verbal refusal "at face value"; just saying "no" is not enough to negate consent. *Id.* at 11. Silence is considered implied consent as well. *Id.* at 268. Only a few states insist that sexual consent mandates "affirmative and freely-given permission." *Id.* For criticism of the "silence equals consent" approach, see *id.* at 267–73.

14. 720 ILL. COMP. STAT. 5/12-17 (2003).

15. *See id.*

16. *Battle v. State*, 414 A.2d 1266 (Md. 1980); *State v. Way*, 254 S.E.2d 760 (N.C. 1979).

Dakota, Minnesota, Alaska, and Kansas.¹⁷ In order to comprehend the sexism inherent in acquaintance rape law today, it is helpful to examine these judicial decisions, focusing specifically on the courts' reasoning and how each either attacked or supported the struggle for female sexual autonomy.

A. *Courts Limiting Women's Right to Say "No"*

Only two courts have found that once sex has begun, a woman cannot withdraw her consent. In 1979, the Supreme Court of North Carolina became the first state court to decide the issue in *State v. Way*, holding that consent cannot be withdrawn.¹⁸ The following year, in *Battle v. State*, the Maryland Court of Appeals followed suit by holding that once given, consent is absolute.¹⁹

The facts of each case are very similar. In both cases, the defendant tricked the victim into accompanying him to a secluded area, where he attacked and raped her.²⁰ Also in both cases, the jury sent a note to the judge during deliberation, inquiring as to whether a woman can withdraw consent once penetration has occurred.²¹ Both judges responded in the affirmative, and both were overruled on appeal.²² In *Way*, the North Carolina Supreme Court admitted that consent can be withdrawn, but only when the victim gives consent for a sexual act and then withdraws it regarding independent subsequent acts.²³ If, however, within the *same* sexual act "actual penetration is accomplished with the woman's consent, the accused is not guilty of rape."²⁴

17. *In re John Z.*, 60 P.3d 183 (Cal. 2003); *State v. Jones*, 521 N.W.2d 662 (S.D. 1994); *State v. Robinson*, 496 A.2d 1067 (Me. 1985); *State v. Bunyard*, 75 P.3d 750 (Kan. Ct. App. 2003); *McGill v. State*, 18 P.3d 77 (Alaska Ct. App. 2001); *State v. Crims*, 540 N.W.2d 860 (Minn. Ct. App. 1996); *State v. Siering*, 644 A.2d 958 (Conn. App. Ct. 1994). This list includes only those states that have published opinions expressly finding consent can be withdrawn. Other states' courts may have discussed post-penetration rape as well.

18. *Way*, 254 S.E.2d at 761–62.

19. *Battle*, 414 A.2d at 1268–71.

20. In *Way*, the victim agreed to go on a date with defendant. 254 S.E.2d at 760. After spending the evening at a friend's apartment, defendant asked the victim to go upstairs with him so he could show her something. *Id.* Almost immediately upon entering his room, defendant tried to take the victim's clothes off. *Id.* She told him "no," but defendant responded by hitting her in the face and threatening her with further violence if she did not comply. *Id.* Defendant then forced the victim to have anal, oral, and vaginal sex with him. *Id.* at 760–61. Similarly, in *Battle*, the defendant convinced the victim to give him a ride home and accompany him into his house to view a radio the victim was interested in buying. 414 A.2d at 1267. Upon entering defendant's room, defendant hit the victim and threatened her with a screwdriver, stating that he would kill her if she did not take off her clothes. *Id.* Defendant then forced the victim to engage in sexual intercourse. *Id.*

21. *Way*, 254 S.E.2d at 761; *Battle*, 414 A.2d at 1268.

22. *Way*, 254 S.E.2d at 762; *Battle*, 414 A.2d at 1271.

23. 254 S.E.2d at 761–62.

24. *Id.* at 762.

The court reasoned that if a jury instruction such as the one at issue were allowed, “the jury could have found the defendant guilty of rape if they believed [the victim] had consented to have intercourse with the defendant and in the middle of *that act*, she changed her mind. This is not the law.”²⁵ In *Battle*, the Maryland Court of Appeals explained that once a man has penetrated a female without consent, it is rape, and “no remission by the woman or consent from her, however quickly following, can avail the man.”²⁶ The court argued that the opposite must also be true—“if she consents prior to penetration and withdraws the consent following penetration, there is no rape.”²⁷ The court implied that post-penetration rape does not exist.

While the overruling courts’ reasoning in each case differed from one another, the main underlying premise was the same. Once sex begins with the woman’s consent, her rights disappear and her partner’s subsequent behavior, however forceful or violent, is justified. His actions are beyond the purview of rape.

B. Courts Upholding Women’s Right to Say “No”

Other courts rejected the reasoning in *Way* and *Battle* and held that initial consent does not preclude a woman from changing her mind. These courts did not explicitly advocate women’s sexual autonomy, but such support can be implied from their reasoning. Specifically, the following courts focused on their respective statutory definitions of rape, while also relying greatly on common sense, in reaching their conclusions.

The Supreme Court of Maine was faced with the issue in *State v. Robinson*.²⁸ In holding that consent can be withdrawn, the court stated that both the legislative intent behind Maine’s Criminal Code “as well as common sense” supported its decision.²⁹ Maine’s Criminal Codes defines rape as “‘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.”³⁰ In defining “sexual intercourse” the court focused on the common, everyday meaning of the term. Plainly, intercourse does not stop with penetration. Thus, continued penetration after a party has withdrawn consent “is factually ‘sexual intercourse.’”³¹ Furthermore, the court stressed

25. *Id.* at 761–62.

26. 414 A.2d at 1269.

27. *Id.* at 1270.

28. 496 A.2d 1067 (Me. 1985). In *Robinson*, the victim let the defendant into her home to make a phone call after he alleged that his car had run out of gas. *Id.* at 1069. The victim testified that defendant then forced her to have sex with him, while defendant claimed that the victim initially consented, but mid-act decided that she did not want to go through with it. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

the absurdity of a contrary holding. If rape occurs only when a “male’s entry of the female sex organ is made as a result of compulsion,” rape cases such as this would “turn on whether the prosecutrix, on revoking her consent and struggling against the defendant’s forcible attempt to continue intercourse, succeeds at least momentarily in displacing the male sex organ.”³² Along with being impracticable, this would be unjust to those who are so overpowered, physically or by threats of violence, as to make any displacement impossible.³³

The court also criticized the North Carolina court’s reasoning in *Way*. In stating that a rule allowing withdrawal of consent would leave the defendant open to a rape charge if the female subjectively changed her mind during sex, the *Way* court completely disregarded the “critical element of compulsion.”³⁴ The victim’s change of mind does not make the continuing intercourse rape. Rather, “[i]t became rape if and when the prosecutrix thereafter submitted to defendant’s sexual assault” due to threat of physical force or another form of compulsion.³⁵

In *State v. Siering*,³⁶ the Appellate Court of Connecticut agreed with *Robinson*’s holding. In finding that consent can be withdrawn, the court focused primarily on Connecticut’s definition of sexual intercourse, as well as common sense. First, the public act defining “sexual intercourse” stated, “Penetration, however slight, is sufficient to complete vaginal intercourse.”³⁷ The court then looked to the ordinary meaning of “sexual intercourse” and concluded that the reference to penetration merely established the “minimum amount of evidence necessary to prove that intercourse has taken place.”³⁸ It did not mean that intercourse concluded upon penetration. To conclude otherwise would run afoul of the “axiomatic” principle that “statutes are not to be interpreted to arrive at bizarre or absurd results.”³⁹ The court went on to assert that “common sense is not to be left at the courtroom door . . . ‘courts will not pretend to be more ignorant than the rest of mankind.’”⁴⁰

Most recently, the Supreme Court of California held that withdrawal of consent subsequent to penetration, if not heeded by the other party involved, supports a claim of rape. In *In re John Z.*, the court overruled a California

32. *Id.* at 1071.

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

34. *Id.* at 1070.

35. *Id.*

36. 644 A.2d 958 (Conn. App. Ct. 1994). Here, the victim met defendant in a bar, drove him home, accompanied him to his room to get his telephone number, and was attacked and raped. *Id.* at 959. Just as in *Robinson*, the defendant alleged that the victim consented but “snapped and yelled rape” mid-act. *Id.*

37. *Id.* at 962.

38. *Id.*

39. *Id.*

40. *Id.* at 963.

Court of Appeals case, *People v. Vela*.⁴¹ The *Vela* court's reasoning epitomized male influence on rape law, stating, "[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."⁴² While the woman may feel a certain degree of this outrage if she withdraws consent and the male forcibly continues the act, thus ignoring her wishes, this outrage "could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood."⁴³ The Supreme Court of California explicitly rejected this reasoning in *In re John Z.*, stating that "we have no way of accurately measuring the level of outrage the victim suffers from being subjected to continued forcible intercourse following withdrawal of her consent. We must assume the sense of outrage is substantial."⁴⁴ Furthermore, nowhere in California's Code does it state that rape is conditioned upon the level of outrage experienced by the victim.⁴⁵ The court here also pointed out that many situations can be imagined where the defendant achieves penetration before the victim even has a chance to object or resist,⁴⁶ such as if the victim were attacked while sleeping.⁴⁷

41. *In re John Z.*, 60 P.3d 183 (Cal. 2003). In *In re John Z.*, the victim, a teenage girl, was forced by the defendant to have sex at a party. *Id.* at 184–85. The court assumed that the victim initially consented but withdrew her consent sometime following penetration. *Id.* at 185.

42. *Id.* at 186 (quoting *People v. Vela*, 172 Cal. App. 3d 237, 243 (Cal. Ct. App. 1985)).

43. *Id.* Several courts expressed disgust for this reasoning. For example, in *State v. Siering*, the Connecticut court found *Vela's* arguments to be "archaic and unrealistic." *Siering*, 644 A.2d at 963. The Alaska Court of Appeals in *McGill v. State* also found that *Vela's* reasoning represented "archaic and outmoded social conventions." *McGill v. State*, 18 P.3d 77, 84 (Alaska Ct. App. 2001).

44. *In re John Z.*, 60 P.3d at 186.

45. *Id.*

46. *Id.* at 187.

47. Courts in four other states—South Dakota, Minnesota, Alaska, and Kansas—have also held that consent can be withdrawn. In *State v. Jones*, the Supreme Court of South Dakota briefly explained, "This court has never held that initial consent forecloses a rape prosecution and . . . we choose not to adopt the position of the *Vela* case." 521 N.W.2d 662, 672 (S.D. 1994). Next, just as in *Robinson* and *Siering*, the Courts of Appeals of Minnesota in *State v. Crims*, Alaska in *McGill v. State*, and Kansas in *State v. Bunyard* found post-penetration rape to be a valid claim based on each state's respective statutes. Minnesota defined "penetration both as the initial intrusion into the body of another and as the act of sexual intercourse." *State v. Crims*, 540 N.W.2d 860, 865 (Minn. Ct. App. 1996). This is "a broader reference point than the moment of slightest intrusion." *Id.* Similarly, Alaska's statutes do "not limit 'sexual penetration' to the moment of initial penetration." *McGill*, 18 P.3d at 84. Rather, "sexual penetration" is defined to include cunnilingus and fellatio, proscribing "a broader range of conduct than genital sexual intercourse." *Id.* Both courts found that these statutes support the conclusion that consent upon penetration is not definitive. Along these same lines, the court in *State v. Bunyard* explained that no Kansas statute states that intercourse ends with penetration. 75 P.3d 750, 756 (Kan. Ct. App. 2003).

These courts took a much more realistic approach to rape than did the courts in *Way* and *Battle* by taking into consideration the intrusive, fear-invoking nature of rape, even when consent is initially given. Most importantly, though, these decisions recognize and respect a woman's right to change her mind and make her own sexual decisions.

III. THE PREVALENCE OF SEXISM IN RAPE LAW, PAST AND PRESENT

The cases mentioned above offer only a glimpse of the ways in which women's sexual autonomy has and continues to be severely restricted, as well as the ways in which these restrictions are being challenged. Sexism in rape law has a long history, and the effort to curb this sexism also has an equally lengthy past. Understanding the journey of rape law in the past half-century, at least on a rudimentary basis, is imperative to the analysis of the role a post-penetration rape statute will play today. Similarly, awareness of the social context within which rape law exists presently is integral to any sort of critique of new rape reform statutes such as the one at issue in this paper. Therefore, this Section will examine rape law from both a historical, as well as a contemporary perspective.

Historically, rape law has been relatively rapist-friendly. This becomes apparent through examination of common rape laws that focused on the victim's behavior instead of the rapist's.⁴⁸ By placing attention on the victim, her actions became the subject of scrutiny—her dress, her behavior, her sexual history were all factors used to determine whether or not she was raped.⁴⁹ The first way in which this tendency becomes apparent is through analysis of the “utmost resistance” requirement prevalent in most jurisdictions until mid-century.⁵⁰ Rape law has traditionally focused on two main factors—force and consent.⁵¹ Rape only occurred when a man had intercourse with a woman *by force and against her will and consent*.⁵² Up until the 1950s, in order to fulfill these requirements, a victim had to prove that she used the “utmost” of resistance against her attacker.⁵³ Focus fell not on the rapist, but rather on the victim—courts asked not whether the rapist committed the actus reus (guilty act) of rape with the required mens rea (state of mind), as is usual with other crimes, but instead asked whether the victim acted appropriately in resisting.⁵⁴ If she did not, the rapist went free.⁵⁵

48. Estrich, *supra* note 1, at 1094.

49. *See id.* at 1099–1100.

50. DelTufo, *supra* note 9, at 423–24.

51. Estrich, *supra* note 1, at 1093.

52. *Id.*

53. DelTufo, *supra* note 9, at 423–24.

54. Estrich, *supra* note 1, at 1094.

55. For a compelling argument that resistance requirements are derived from the “male-dominated justice system’s suspicion of rape victims,” see Sakthi Murphy, Comment, *Rejecting*

Resisting to the “utmost” of one’s ability was by no means an easy standard to meet. While fault lay with the woman if she did not respond appropriately, what was “appropriate” was gauged by a male standard.⁵⁶ What men thought women should do and the extent to which they should be able to resist governed. If attacked, a man would surely respond by punching, pushing, or overpowering his assailant. This response was thus deemed to be “the standard,” meaning everyone, including women, could and should react similarly. How a reasonable woman would most likely react when attacked, being greatly overpowered and often fearful of her life, was not considered.⁵⁷ Unless the victim fought back with almost Herculean strength, her rapist was acquitted by the court, “not by judging the man and finding his behavior legitimate, but by judging the woman and finding her conduct substandard.”⁵⁸

The utmost resistance requirement eventually relaxed by the 1950s and 60s as courts came to the revelation that, besides being impracticable, resisting to the utmost of one’s power could potentially increase the victim’s chances of further physical harm.⁵⁹ However, the idea of resistance as a prerequisite to a rape conviction endured.⁶⁰ “Utmost resistance” evolved into “reasonable resistance.”⁶¹ Women were thought to be too ambivalent toward sex, not knowing what they wanted, to eradicate the requirement altogether.⁶² They said “no,” but they meant “yes,” making it unfair to hold a man guilty of rape

Unreasonable Sexual Expectations: Limits on Using a Rape Victim’s Sexual History to Show the Defendant’s Mistaken Belief in Consent, 79 CAL. L. REV. 541, 545–46 (1991) (“[T]he resistance requirement has never been part of other crimes. If the general fear were of fabricated crimes, then all victims would be required to resist, not just victims of rape.”).

56. Estrich, *supra* note 1, at 1094.

57. See DelTufo, *supra* note 9, at 424. In practice, the utmost resistance requirement “discounts the paralyzing nature of women’s fear and therefore reconstructs the events in question as consensual sex. It presupposes that women have choice and options when confronted with the threat of sexual aggression and that women are unconstrained in their choice of appropriate avenues of resistance,” when in reality fear, panic, and inferior strength make these “choices” highly impracticable. *Id.*

58. SUSAN ESTRICH, REAL RAPE 32 (1987). See generally Mustafa K. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on Its Head*, 11 WIS. WOMEN’S L.J. 37, 53–54 (1996). Kasubhai uses *Brown v. State* as a prime example of the extreme nature of the utmost resistance requirement. *Id.* at 53. In *Brown*, a sixteen-year old girl was attacked in a field by a neighbor, pushed to the ground, and raped. 106 N.W. 536, 536 (Wis. 1906). Despite the fact that the victim repeatedly screamed and struggled against her attacker “as hard as [she] could,” the court found that the victim failed to establish lack of consent. *Id.* The court stated “[n]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration of her person.” *Id.* at 538; see also Estrich, *supra* note 1, at 1121–32.

59. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799 (1988).

60. DelTufo, *supra* note 9, at 424.

61. ESTRICH, *supra* note 58, at 37.

62. See *id.* at 38–41.

if he forced sex upon a woman who said “no” yet did not physically attempt to fend off his attack.⁶³ Crying and screaming were not even enough evidence to put the rapist on notice that his actions were unwanted.⁶⁴ The victim’s burden remained high.

Along with the resistance requirement, victims faced a corroboration requirement that was intensely pro-rapist as well. This mandate stated that a defendant could not be convicted of rape unless the victim produced corroborating evidence of sexual assault; the victim’s own testimony was not enough.⁶⁵ Even though no other crime besides perjury mandated corroboration,⁶⁶ proponents of the requirement maintained that it was vital to protecting men charged with acquaintance rape. They argued that there existed a grave “danger of false charges by vindictive or mentally disturbed women,” although, ironically, no empirical evidence existed to corroborate this assertion.⁶⁷ In short, women were liars.⁶⁸ The corroboration requirement was also incredibly hard to meet, for rape almost by definition takes place in private with no witnesses.⁶⁹ The difficulty in producing evidence was especially acute in acquaintance rape cases where, as will be discussed later on, physical injuries are uncommon.⁷⁰ As a result, “in states where a corroboration requirement [was] strictly enforced, the effect [was] a comparatively low rate of conviction.”⁷¹

63. *Id.* at 38. Estrich also points out that rape is not the only crime subject to a consent defense, but of those crimes, it is the only one that mandates physical resistance. *Id.* at 40. For example, regarding trespass, “the posting of a sign or the offering of verbal warnings generally suffices to meet the victim’s burden of nonconsent.” *Id.* Or in the case of *Miranda v. Arizona*, “a suspect’s ‘no’ must mean no, and questioning must be terminated.” *Id.* at 41.

64. *Id.*

65. PEGGY REEVES SANDAY, *A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL* 176 (1996). Some states’ corroboration requirements were more stringent than others. In the 1960s and ’70s, New York, for example, was the most “stringent in the country in requiring that ‘every material element of a rape—penetration, force and the identity of the rapist—must be corroborated by evidence other than the victim’s testimony.’” *Id.* This standard was almost impossible to meet, resulting in only twenty rape convictions *statewide* in New York in the average year in the 1960s. *Id.*

66. ROSEMARIE TONG, *WOMEN, SEX, AND THE LAW* 104 (1984).

67. CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 24 (1992).

68. The only way in which corroboration requirements could possibly be justified is if women, as a class, are liars. TONG, *supra* note 66, at 104. Because if women are not liars, “no state should still *require* that rape charges be corroborated with some evidence other than the victim’s testimony.” *Id.* Corroboration of any crime is always helpful to the fact-finder in a trial, but only if the witness were a liar would corroboration be mandated.

69. SPOHN & HORNEY, *supra* note 67, at 25.

70. Linda S. Williams, *The Classic Rape: When Do Victims Report?*, in *RAPE AND THE CRIMINAL JUSTICE SYSTEM* 55–56 (Jennifer Temkin ed., 1995) [hereinafter *CRIMINAL JUSTICE SYSTEM*].

71. SPOHN & HORNEY, *supra* note 67, at 25.

While victims in general suffered under sexist rape laws, none did more so than women raped by their husbands. “Rape” was often “defined in terms limited to a man’s rape of a woman who was not his wife,”⁷² leaving sexually abused wives outside the scope of legal protection altogether. The “marital rape exemption” gave men an “absolute privilege to rape their wives, using whatever degree of force or coercion they pleased.”⁷³ A husband could force his wife to submit to intercourse using a gun or a knife.⁷⁴ He could tie his victim/wife up, beat her, and rape her repeatedly if he wanted.⁷⁵ And husbands did—it has been estimated that as many as half of battered women are also victims of marital sexual assault.⁷⁶ Despite the frequent incidence of marital rape, the law has traditionally refused to punish these rapists. However much force husbands used, “[w]hatever the degree of indignity, humiliation, or brutality he may impose on her,” the man could not be charged with rape.⁷⁷ Consequently, “[u]nconditional sexual access to women [was] permanently institutionalized in marriage.”⁷⁸

Sexually active women in general felt the wrath of sexist rape laws. “Under common law, evidence of the victim’s sexual history was admissible to prove she had consented to intercourse and to impeach her credibility.”⁷⁹ This rule of evidence persecuted the victim as much as the rapist, allowing the defense to cross examine the victim in front of judge, jury, and spectators about her personal sex life. Defense attorneys attempted to make the victim look promiscuous or “easy,” as if her prior consent to sex necessarily meant she consented to sex on the occasion in question. Or worse yet, attorneys implied that through the victim’s prior sexual acts she, and not the rapist,

72. Kasubhai, *supra* note 58, at 58.

73. Jaye Sitton, *Old Wine in New Bottles: The “Marital” Rape Allowance*, 72 N.C. L. REV. 261, 261 (1993); *see also* Kasubhai, *supra* note 58, at 58.

74. DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 1 (1985).

75. *Id.* Situations such as this are far from uncommon. In a study conducted by Finkelhor and Yllo, 10 percent of the 323 Boston women surveyed reported that their husbands had forced them to engage in sexual intercourse by force or threats. *Id.* at 6–7. The authors list specific instances of marital rape as well—one woman surveyed was “jumped in the dark by her husband and raped in the anus while slumped over a woodpile.” *Id.* at 18. Another “had a six-centimeter gash ripped in her vagina by a husband who was trying to ‘pull her vagina out.’” *Id.* Other wives were raped at knifepoint or were severely beaten before, during, and after the rape. *Id.* at 18, 23.

76. *Id.* at 22.

77. *Id.* at 1.

78. Kasubhai, *supra* note 58, at 58. This is a very brief overview of the marital rape exception. For a more in-depth analysis, *see generally* FINKELHOR & YLLO, *supra* note 74; Rene Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559 (1991); Sitton, *supra* note 73.

79. SPOHN & HORNEY, *supra* note 67, at 25.

should be held responsible for the attack.⁸⁰ These tactics worked, making it “less likely that a rapist would be convicted where the victim had a prior sexual history.”⁸¹ Understandably, more women chose not to report their rapes, knowing that they would be the ones put on trial.⁸²

Today, rape law is more victim-friendly, but only in comparison to the rape laws of the past.⁸³ Despite reform efforts, rape law continues to give rapists the advantage. While most statutes no longer require the victim to resist, “definitions accorded to force and consent may render ‘reasonable’ resistance both a practical and a legal necessity.”⁸⁴ Any time force is an element of rape, it will surely be lacking if the victim did not first resist at least to some degree, since force would be unnecessary without initial resistance.⁸⁵ Thus, even though proof of resistance may not be required by law, it remains an essential part of a rape conviction.⁸⁶ The same principle applies to corroboration requirements. Such requirements “may have been repealed, but they continue to be enforced as a matter of practice in many jurisdictions.”⁸⁷ Prosecutors still decline to prosecute rapists based on lack of strong corroborating evidence, and jury instructions regarding the irrelevance of corroborating evidence remain in the judge’s discretion. No safeguard exists to keep juries from equating lack of corroboration with the rapist’s innocence.⁸⁸

Similarly, while the marital rape exception has experienced declining popularity in recent years, it is far from being extinct.⁸⁹ As of 1996, thirty-two states and the District of Columbia had completely abolished the exception.⁹⁰ However, eighteen states continue to give husbands special sexual privileges by categorizing marital rape differently than other types of rape, thereby

80. Garth E. Hire, *Holding Husbands and Lovers Accountable for Rape: Eliminating the “Defendant” Exception of Rape Shield Laws*, 5 S. CAL. REV. L. & WOMEN’S STUD. 591, 593–94 (1996). Hire calls this cross-examination the “second rape” endured by the victim. *Id.* at 593.

81. *Id.* at 594.

82. *Id.*

83. For a state-by-state guide to rape laws, see generally RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* (1996).

84. Estrich, *supra* note 1, at 1091.

85. David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 356 (2000). As a result, most statutory attempts to diminish the resistance requirement, without simultaneously discarding the force requirement, are merely “semantic.” *Id.* at 357.

86. *Id.* at 357–58.

87. Estrich, *supra* note 1, at 1091.

88. SPOHN & HORNEY, *supra* note 67, at 163. Spohn and Horney explain that in all six of the jurisdictions they studied, officials were still “substantially affected by corroboration and resistance factors in judging the likelihood of a jury conviction.” *Id.*

89. Kasubhai, *supra* note 58, at 59.

90. *Id.* at 58.

merely lessening the marital exception's impact.⁹¹ Louisiana is the only state that still exempts husbands from charges of rape entirely.⁹²

In addition to laws that favor marital rapists, sexist public attitudes toward victims of marital rape are still common as well.⁹³ Men, as well as women, believe that consent is implied from the marital contract.⁹⁴ Although women promise only to "love and honor," society imputes upon them a promise to submit to violent, abusive rape, essentially taking away a married woman's right to say "no." As a result, women who are regularly raped by their physically abusive husbands,⁹⁵ or (as is common) women who are raped by a vengeful spouse during the course of separation or divorce,⁹⁶ continue to find little societal or legal support.⁹⁷

Probably the most popular type of rape reform in the last decade has been the rape shield statute, a reform effort that has encountered mixed results.⁹⁸ Rape shield statutes prohibit the defense from introducing evidence of the victim's past sexual activities in order to prove consent, subject to certain exceptions.⁹⁹ The positive impact of shield statutes, however, has been greatly limited by narrow readings of, and exceptions to, the rule.¹⁰⁰

91. *Id.* at 58–59.

92. *Id.* at 59.

93. *Id.* For example, in 1992, a rape case arose in South Carolina in which a man physically abused his wife, tied her up, taped her mouth shut, and raped her. *Id.* Despite the fact that this entire ordeal was videotaped by the husband and shown to the jury, the jury, composed mostly of women, acquitted the rapist. *Id.*

94. Chamallas, *supra* note 59, at 798.

95. Finkelhor and Yllo report that 50 percent of the women in their study had been raped by their husbands twenty times or more. FINKELHOR & YLLO, *supra* note 74, at 23. One woman admitted, "[i]t happened half of the time we had sex during those three years." *Id.*

96. *Id.* at 24–25.

97. Laws as well as societal attitudes reflect a certain degree of incredulousness at the notion that a husband can rape his wife. Yet, both easily recognize other crimes committed by a husband against his wife. A husband who beats or murders his wife is certainly subject to criminal and/or civil liability, as is a husband who commits adultery (at least in certain states); the "marital contract" apparently does not impute these rights upon a husband. The "contract" does, however, provide him a right to rape. The law (and society) will therefore protect a woman from physical violence, such as a slap in the face, but not from sexual violence, like forced penetration. It will protect her from a husband who cheats, but not one who rapes. The absurdity of this reality further underscores the degree of control the legal and social systems are willing to give men over women's sexual freedom.

98. The common argument in favor of rape shield statutes, and the argument relied upon by state legislatures in passing such statutes, was that "information that the prosecuting witness sleeps with her boyfriend or goes around with married men or has borne some illegitimate children cannot help the jury decide on any reasoned factual basis whether or not she agreed to relations with *this* person on *this* occasion." SPOHN & HORNEY, *supra* note 67, at 26.

99. Murphy, *supra* note 55, at 542.

100. See generally Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping With Preconceptions Through Discretion*, 51 EMORY L.J. 559 (2002).

First, evidence of the victim's sexual history is only barred when it would be used to show consent; it is still admissible to support the defendant's mistake of fact defense, which states that a rapist who mistakenly believed that his victim consented to sex is not guilty of rape.¹⁰¹ In jurisdictions that require this mistake to be honest as well as reasonable, the mistake of fact exception supports the idea that if a man knows a woman is sexually experienced, he is reasonable in believing she consented to sex on the particular occasion in question, regardless of her actions or protestations during the actual encounter.¹⁰² Even if she fought back, shouted, cried, and said "no," evidence of her prior sexual acts will still be admitted to show that the rapist was reasonable in interpreting all of these signs as consent. Essentially, this means that *any* woman who has ever had sex before, even if only with her boyfriend or husband, is subject to this ludicrous inference.¹⁰³ Another common exception is the "defendant exception," which states that evidence of the victim's prior sexual acts is admissible to show consent if these acts were between the victim and defendant.¹⁰⁴ This exception rests on the incorrect assumption that because a woman has consensual sex with a man on one occasion, as is common in marriage especially, it is more likely that she consented on all subsequent occasions.¹⁰⁵ It is not hard to see how exceptions such as these have greatly undercut the purpose of rape shield statutes, which

101. Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L.J. 27, 58 (1996).

102. Murphy, *supra* note 55, at 541. According to Murphy, this belief is unreasonable. Murphy states, "Sexual experience is not probative of whether a woman consented to sex on a particular occasion; a reasonable person infers consent based on communication during the encounter in question rather than on knowledge that a woman is sexually experienced." *Id.* at 544.

103. Sarah Gill argues, "[u]ntil men can no longer claim that they are misled by societal stereotypes about women's sexualities, and until society becomes less accepting of such mistakes of fact," prosecutors will continue to fight a losing battle and rapists will continue to "mistake" consent. Gill, *supra* note 101, at 58.

104. Hire, *supra* note 80, at 592.

105. *Id.* at 599. Hire explains that this assumption is incorrect for several reasons, grouping these reasons into several different categories: (1) "Women are not slaves to their emotions." *Id.* at 601. Even if the victim married her attacker, and thus assumedly loved him, the "emotion of love" present during the rape "bears no relation to the existence of her consent." *Id.* at 602. (2) "Past lack of force is not relevant to present lack of force." *Id.* (3) "A woman's mindset is not static." *Id.* Women can and do change their minds. Just because a woman was willing to have sex on one particular occasion "does not make it more probable that her state of mind was the same on a later occasion." *Id.* at 603. (4) "Archaic stereotypes and invidious inferences." *Id.* The idea that when a woman consents once, she gives implied consent to all subsequent sexual encounters with that person is based "on the same archaic stereotypes and invidious inferences about women that instigated the enactment of rape shield laws in the first place." *Id.*

were meant to keep irrelevant evidence out of the trial in order to protect the victim from unfair persecution.¹⁰⁶

Rape law has traditionally reflected sexist male attitudes toward women and women's sexuality, and while reform efforts have helped, the same holds true today. More must be done to change both the law and societal attitudes. The next section will explore the ways in which a post-penetration statute is likely to aid this effort.

IV. ILLINOIS'S STATUTE

On July 25, 2003, Illinois became the first state to codify the legitimacy of a post-penetration rape claim through passage of Public Act 93-0389,¹⁰⁷ popularly known as the "No Means No" law.¹⁰⁸ This amendment states, "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct."¹⁰⁹ The main impetus of this law's passage was the three-year controversy in California over the issue, the culmination of which was the California Supreme Court's decision in *In re John Z.*, discussed above.¹¹⁰ The statute's sponsors explained, "With Illinois [sic] and California's laws being very similar, we wanted to craft a bill that would prevent us from going down the same path in Illinois that California did."¹¹¹ As is discussed in the next two Subsections, great potential exists for this statute to positively impact rape law; however, serious limitations exist as well, making Illinois's "No Means No" statute a starting point rather than an ending one.

A. *Positive Effects of a Post-penetration Rape Statute*

"[M]ost rape-case attrition appears to be due to a combination of the victim's unwillingness to seek legal redress, the prosecution's burden of proof

106. Other exceptions include evidence of conduct with third parties to show that they, and not the defendant, were the source of disease, pregnancy, or semen; evidence used to rebut sexual conduct evidence introduced by the prosecutor; evidence that tends to show the victim's bias against the defendant or show the victim has motive to lie; evidence that the victim made previous false rape allegations; and evidence of prior sexual encounters with third parties similar to the one at issue with the defendant. SPOHN & HORNEY, *supra* note 67, at 26-27.

107. "No Means No," 720 ILL. COMP. STAT. 5/12-17 (2003), available at <http://www.legis.state.il.us/legislation/publicacts/fulltext.asp?name=093-0389>.

108. Jeff Goldblatt, *Illinois First to Pass 'No Means No' Law*, Fox News, at <http://www.foxnews.com/story/0,2933,95184,00.html> (Aug. 19, 2003).

109. 720 ILL. COMP. STAT. 5/12-17(c) (2003).

110. Laura Jastram, *Bill Ensures 'No Means No' in Illinois*, THE DAILY ILLINI, July 30, 2003, available at http://www.illinimedia.com/di/jul03/jul30/news/stories/news_story01.shtml.

111. Robert Baxter, *Law Re-examines Consensual Sex*, ROCKFORD REGISTER STAR, July 18, 2003, available at http://www.rstar.com/localnews/your_community/belvidere/20030718-13344.shtml.

in criminal cases, and jurors' attitudes."¹¹² This Section addresses the first and third factors, examining how a post-penetration rape statute could increase reporting rates and change public attitudes toward victims of rape, as well as toward rape in general. In short, the Author argues that even if the post-penetration statute's "impact is [largely] symbolic [it] may affect attitudes that eventually change society," although perhaps in subtle ways.¹¹³ The following segments attempt to describe how such changes are likely to occur.

1. Taking the First Step

Scholars have reported that "[t]he single most important reason why most rapists are not punished is the failure of victims to report the crime to the police, or their later refusal to cooperate as a prosecution witness."¹¹⁴ Acquaintance rape occurs often—one in four women in the United States are raped or are victims of attempted rape by the time they reach their mid-twenties, and it has been estimated that approximately three-fourths of these incidents are between people who know one another.¹¹⁵ It is in these very cases, where the victim and attacker knew each other, that underreporting is most likely.¹¹⁶ Victims of acquaintance rape are reluctant to report the assault for a variety of reasons, most of which reflect outdated, yet widespread, concepts of exactly what rape is. First, victims may choose not to report a sexual assault because they are uncertain that what they experienced constitutes rape.¹¹⁷ Such ambiguity could at least in part spawn from what most of the public views as the "real' rape."¹¹⁸ The stereotype goes as follows: Rape occurs between two strangers; the woman is attacked at night in a dark alley; the assailant uses a weapon and is very violent; the victim struggles, fights back, and most likely incurs bruises, cuts, broken bones, or other serious, visible injuries in the process.¹¹⁹

Few, if any, victims would have trouble identifying the above-described scenario as rape, for it is the image most commonly associated with sexual assault. The common acquaintance rape, however, does not conform to this stereotype. The most obvious divergence is that in acquaintance rape, the assailant and victim know one another.¹²⁰ The assailant is the victim's friend,

112. Bryden & Lengnick, *supra* note 4, at 1384.

113. *Id.* at 1292.

114. *Id.* at 1214.

115. HIDDEN CRIME, *supra* note 3, at ix.

116. Bryden & Lengnick, *supra* note 4, at 1220–21.

117. Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 293 (1993).

118. Martha R. Burt, *Rape Myths and Acquaintance Rape*, in HIDDEN CRIME, *supra* note 3, at 27.

119. *Id.*

120. MARCIA MOBILIA BOUMIL ET AL., DATE RAPE: THE SECRET EPIDEMIC: WHAT IT IS, WHAT IT ISN'T, WHAT IT DOES TO YOU, WHAT YOU CAN DO ABOUT IT 3 (1993).

date, boyfriend, or a man who otherwise fails to fit into the category of “stranger.”¹²¹ Most acquaintance rapists do not use a weapon, and most victims do not incur visible injuries “beyond minor bruises or scratches.”¹²² Furthermore, acquaintance rapes tend to occur indoors, either in the assailant’s or victim’s home.¹²³ Acquaintance rapes differ from the stereotype in every pertinent way, which, for many, makes identification of the act as “rape” difficult. These victims “may not recognize the experience as rape because it does not fit the paradigm of the stranger in the bushes; in rejecting the label ‘rape,’ [the victim] may have no word to explain the experience.”¹²⁴

Even if substantial force is used by the assailant, the victim may still not recognize the act as rape. In denying that their attack constitutes rape, victims like this “mean that they were not raped in a way that is legally provable [T]here was not enough violence against them to take it beyond the category of ‘sex.’”¹²⁵ Like the rest of society, they see acquaintance rape as less serious than the stereotype, or “real rape,”¹²⁶ and therefore do not even categorize it as rape at all. Other victims may themselves believe that they were raped, but do not think that the law classifies their experience as such. This misperception is particularly prevalent for victims of post-penetration rape who consent to the sexual activity but thereafter change their mind. They may question “their ‘right’ to withdraw consent once sexual activity had begun and the man had become aroused,”¹²⁷ especially if the law itself is unclear on this issue. In short, victims’ misidentification of their experience as outside the scope of “rape,” as well as lack of knowledge regarding state rape laws, leads many victims to stay silent. Reporting rates consequently remain at a minimum.

Second, a victim may not report a sexual assault because she fears she will not be believed.¹²⁸ Even though no empirical data exists to suggest that false accusations of rape are more prevalent than false accusations of any other crime, society tends to believe the myth that rapists are often unjustly

121. Burt, *supra* note 118, at 27. The term “acquaintance rape” is broad, and is not restricted to rape perpetrated by husbands, boyfriends, or friends. For example, if a woman meets a man at a bar and is raped later that night, it is acquaintance rape. BOUMIL ET AL., *supra* note 120, at 3. If the rapist is the victim’s co-worker, but is someone with whom the victim has never spoken, it is still acquaintance rape. *Id.* The key is that there is “some basis for an ongoing relationship that creates an element of trust . . . in the victim.” *Id.*

122. Burt, *supra* note 118, at 27.

123. BOUMIL ET AL., *supra* note 120, at 3.

124. Coombs, *supra* note 117, at 293.

125. *Id.* (internal quotations omitted) (quoting CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 88 (1987)).

126. Gill, *supra* note 101, at 30.

127. Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 683 (1999).

128. Williams, *supra* note 70, at 52.

accused.¹²⁹ They believe that many women's allegations of rape are really attempts to cover up an embarrassing or unwanted pregnancy, or to punish a man who has rejected them.¹³⁰ Victims are amply aware of this "societal and official skepticism toward victims of acquaintance rape."¹³¹ Victims themselves may have even held similar beliefs at one point. As a result, they fear that unless they have strong evidence that a rape occurred, police officers, prosecutors, and even members of their own family will accuse them of lying. As previously discussed, strong evidence like weapons used or injuries sustained by the victim are unlikely to exist in acquaintance rape cases. Accordingly, victims do not report their attacks.¹³²

A post-penetration rape statute has the potential to change social misperceptions about rape and, in turn, increase reporting rates. Empirical evidence indicates that rape reform statutes increase reporting rates among rape victims¹³³ as long as such statutes receive enough publicity to make their existence known to the general public.¹³⁴ A reform such as a post-penetration

129. Torrey, *supra* note 5, at 1028. The strength of the myth derives partly from "reports of a high proportion of 'unfounded' rape complaints," which are complaints dismissed by the police after deciding that no rape took place. *Id.* Police officers decide not to pursue complaints for several reasons, including the existence of a prior relationship between the victim and rapist, lack of physical evidence, and intoxication of the victim (indicating that many officers themselves subscribe to sexist rape myths). *Id.* at 1029. Actually, "[e]stimates indicate that only 2 percent of all rape reports prove to be false, a rate comparable to the false report rate for other crimes." *Id.* at 1028.

130. JANET BODE, RAPE: PREVENTING IT; COPING WITH THE LEGAL, MEDICAL, AND EMOTIONAL AFTERMATH 23–24 (1979).

131. Bryden & Lengnick, *supra* note 4, at 1224.

132. Underreporting continues to be greatest in situations where the victim knew her assailant and no weapon was used. *Id.* at 1223.

133. In fact, many of the reform efforts discussed in the previous section were initially passed with reporting rates in mind. Most scholars believe such reforms have been successful, for reporting rates have risen. *Id.* at 1224–25.

134. *Id.* at 1225–27. In *Rape in the Criminal Justice System*, David Bryden and Sonja Lengnick summarize Cassia Spohn and Julie Horney's findings. See SPOHN & HORNEY, *supra* note 67. Spohn and Horney examined rape reform efforts in several jurisdictions within the U.S. and reported the increase or decrease in reporting rates that followed. *Id.* at 1225. They found that highly publicized rape reform statutes had the greatest likelihood of increasing reporting rates. *Id.* at 1225–27. They also found that reporting rates increased in jurisdictions that passed reforms legislatively, as opposed to states that attempted reform only judicially. *Id.* at 1227. For example, Michigan passed a comprehensive rape reform law "package," which received a great deal of publicity, and reporting rates subsequently increased. *Id.* at 1226. Judicial reforms in Washington, D.C, however, were followed by an actual decrease in reporting rates. *Id.* at 1226. Bryden and Lengnick explain that, because the D.C. reforms "were achieved by judicial decisions, and at different times, rape victims probably were unaware that the law had changed." *Id.* at 1227. Regular citizens are more likely to be aware of black-letter law set out by the legislature than of judicial decisions handed down by state district or appellate courts, some of which may not even be published or publicized in any way. *Id.* These findings offer guidance for

rape statute could increase reporting rates in several ways. First, the statute would enhance victims' "sensitivity to the importance of rape, or their impression of public support."¹³⁵ A statute that clearly states the legitimacy of a post-penetration rape claim, even though the assault does not conform to the rape stereotype will, at a minimum, help victims become aware that their experience constitutes rape. They will now at least have a name for what has happened to them, a category into which they can place their situation, which perhaps will lead them to report rapes to the authorities. Further, the statutes will raise awareness about states' rape law policies. Victims will not only know that their assault was rape, but they will also know that the law classifies it as rape as well. This is particularly important for victims of post-penetration rape, who, as mentioned before, tend to have trouble categorizing their experiences.

A post-penetration rape statute could also give rise to "attitudinal changes" in rape victims that could lead them to report their sexual assaults.¹³⁶ A statute rejecting the idea that it is never too late to change one's mind and that once "aroused," men cannot be expected to restrain their sexual impulses could help break down the mindset that rapes outside of the stereotypical definition are without merit. Victims may grow to realize that women have the right to say "no" at any point during intercourse. This realization could further diminish the ambiguity many post-penetration rape victims experience after the assault, questioning whether or not they were actually raped, and blaming themselves for consenting to sex in the first place.

2. Changing the Way People Think

So far, this Comment has focused on sexism in rape laws and has greatly blamed these laws for the persecution of rape victims. However, in achieving this end, these laws do not act alone. Laws do not return "not guilty" verdicts in rape prosecutions; laws do not reverse rape convictions based on sexist interpretations of "consent" or "resistance"; and laws do not attack victims who take the witness stand, portraying them as "teases" deserving of rape. The law plays none of these roles; individuals do, members of society—juries, judges, and attorneys.¹³⁷ It is thus society's attitudes toward rape and rape

the numerous states that have not yet decided the post-penetration rape issue—in order to increase the impact of reform on reporting rates, these state legislatures should not wait for a post-penetration rape case to be decided by the judiciary, but should rather take a proactive approach and pass post-penetration rape statutes.

135. Bryden & Lengnick, *supra* note 4, at 1225.

136. *Id.*

137. See generally GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 200–33 (1989). LaFree interviewed former rape trial jurors and found that jurors' attitudes regarding male and female gender roles greatly influenced their decisions to acquit. *Id.* at 225.

victims that are largely responsible for the impact sexist laws are allowed to make.

“[G]ender . . . stereotypes . . . embedded in our societal consciousness” contribute to rape case attrition.¹³⁸ In the arena of rape law, these stereotypes are often reflected in rape myths. Rape myths are defined as “prejudicial, stereotyped, or false beliefs about rape, rape victims, or rapists.”¹³⁹ These myths are extremely damaging to legitimate claims of rape, for they “have the effect of denying that many instances involving coercive sex are actually rapes.”¹⁴⁰ “[P]eople use [rape myths] to justify dismissing an incident of sexual assault from the category of ‘real’ rape.”¹⁴¹ This makes rape myths very powerful, for excluding such assaults from the definition of “rape” altogether makes their prosecution very difficult, and even impossible in some instances.¹⁴² “Accepting or believing rape myths leads to a more restrictive definition of rape and is thus rape-supportive”¹⁴³

In *Rape Myths and Acquaintance Rape*, Martha Burt instructs readers that, in order to understand rape myths, the reader must consider the legal definition of rape “and then ask why, when faced with a sexual assault that fits this legal definition, many people are still not willing to call this assault a rape.”¹⁴⁴ The reader should keep this question in mind while reading the next Section. Also, while many rape myths exist, this Comment will only deal with those that are most likely to affect victims of post-penetration rape.

a. “No Means No”—The Simple Concept Society Ignores

“[W]e are still culturally ambivalent about what nonconsensual sex actually is and whether it is always morally wrong.”¹⁴⁵ Society as a whole has trouble distinguishing between sex and rape, especially if the activity in question falls outside rape’s stereotypical definition. This is evidenced by the fact that a post-penetration rape statute is even necessary. If society considered nonconsensual sex as rape, period, there would be no need for state legislatures to explain to the public that a woman can withdraw consent once sex has commenced. It would be self-evident. Unfortunately, though, it is apparently not that clear of a concept. Society still grapples with the issue of when a woman can say “no.” Rape myths exist to suggest that women are limited in

138. Gill, *supra* note 101, at 27.

139. Burt, *supra* note 118, at 26.

140. *Id.*

141. *Id.* at 27.

142. *Id.*

143. *Id.*

144. Burt, *supra* note 118, at 26.

145. Baker, *supra* note 127, at 665.

the right to refuse sexual advances, thereby severely restricting women's sexual autonomy.¹⁴⁶

Rape Myth Number One is that “[o]nce women entice men . . . the men are absolved . . . of their moral responsibility to control their sexual appetites.”¹⁴⁷ In other words, the victim's behavior makes “the woman . . . an unworthy victim.”¹⁴⁸ In *Telling the Victim's Story*, Mary I. Coombs separates “situations in which fact finders discredit women's claims” of rape into two categories—“Not True” and “So What.”¹⁴⁹ The “So What” category describes the attitudes of those who adopt the above-mentioned myth. They “accept the truth of the woman's assertions as to what happened but decide that these actions are not legitimate grounds for complaint by a ‘woman like that.’”¹⁵⁰ A “woman like that” apparently does not have the right to say “no,” and jurors consequently “refuse to deem [her assault] ‘rape.’”¹⁵¹ What exactly a woman has to do to be categorized as a “woman like that” is unclear—perhaps her skirt is too short, her shirt too tight, or her behavior too flirtatious. Or maybe the woman is drunk or sexually active.¹⁵² In *Sex, Rape, and Shame*, Katharine A. Baker labels such qualities “neutralization factors.”¹⁵³ According to the myth, these qualities negate the woman's right to refuse a man sex and cause society to see “behavior that would generally be considered immoral . . . as

146. Regarding restrictions on sexual autonomy, Criminal Law Professor Stephen J. Schulhofer remarks:

Of all our rights and liberties, few are as important as our right to choose freely whether and when we will become sexually intimate with another person. Yet, as far as the law is concerned, this right—the right to sexual autonomy—doesn't exist. Citizens simply do not have a legally recognized claim to protection for their freedom of sexual choice. . . .

If a man in a bar notices another patron . . . staggering from too many drinks, he can carry her to a booth, stretch her out on the seat, tear off her clothes, and penetrate her. So long as the woman is not actually unconscious, his conduct is perfectly legal, because the woman never said “no,” and he never used what the law calls “force” [B]ecause sexual autonomy isn't protected in its own right, the law asks only whether the woman proved her reluctance . . . [and] never asks whether there is any indication that she *chose*—and chose freely—to participate.”

SCHULHOFER, *supra* note 13, at 274, 278.

147. Baker, *supra* note 127, at 683.

148. Coombs, *supra* note 117, at 282.

149. *Id.* at 280.

150. *Id.* at 281. In contrast, the “Not True” category denies that a legally recognized sexual assault even took place. *Id.* Juries decide that the victim's story is too different from what they already “know” about the types of men who rape and the types of women who are raped. *Id.* For instance, only uneducated, lower-class men rape, and “[w]omen who appear sexually available were not really raped, because they must have said ‘yes.’” *Id.* As a result, juries conclude that these women must be lying, fueling the rape myth that a large percentage of women make false accusations of rape. *Id.* at 282.

151. *Id.* at 281–82.

152. *Id.* at 283.

153. Baker, *supra* note 127, at 684.

justifiable under certain conditions.”¹⁵⁴ Simply put, such factors neutralize society’s willingness to classify an assault as rape.¹⁵⁵

Rape Myth Number Two deals not with whether a woman *can* say no, but rather with what the woman means when she says it. Directly conflicting with the concept that “no means no,” Myth Two states that when a woman says “no,” she really means “yes.”¹⁵⁶ This myth is grounded in the assumption that “[a]ggression and [v]iolence [a]re [m]erely [an] ‘[a]rt of [s]eduction.’”¹⁵⁷ Men are aggressive and will naturally pursue, while women are passive and will naturally feign resistance.¹⁵⁸ Therefore, when a woman says “no,” or even when she remains silent, what she really means is that she wants the man to engage in “aggressive or even violent convincing.”¹⁵⁹ But whatever she means, she “‘never mean[s] no.’ At some level, women . . . always . . . ‘want it,’ no matter what they say.”¹⁶⁰ This sexual stereotype, portraying men as aggressive and women as passive, fuels the idea that sex is game, with men playing the offense, women the defense.¹⁶¹ As in any game, “one wins and the other loses . . . one rapes and the other is raped.”¹⁶² However archaic these assumptions are, many men, either because they are lying, “dense, self-deluded, or driven by wishful thinking,” still report that they believe that “no” means “yes.”¹⁶³ A study of college students in Hawaii reported that 50.9 percent of men think a woman means “yes” when she says “no.”¹⁶⁴ On average, these men indicated that “a woman had to say ‘no’ 2.6 times before

154. *Id.*

155. The prevalence of these neutralization factors is great. One study of high school students in Los Angeles reported that 56 percent of women and 76 percent of men thought forced sex was acceptable under some circumstances. *Id.* at 679. The Author acknowledges that this particular survey is dated, but notes that the societal attitudes its findings represent are probably still widespread. *Id.* at 679–80.

156. Torrey, *supra* note 5, at 1014–15.

157. Gill, *supra* note 101, at 46.

158. *Id.*

159. *Id.*

160. Burt, *supra* note 118, at 30.

161. Kasubhai, *supra* note 58, at 51. The Author bases this analogy on the writings of Jean-Jacques Rousseau, who stated, “To win this silent consent is to make use of all the violence permitted in love. To read it in the eyes. . . in spite of the mouth’s denial. . . . If he then completes his happiness, [i.e. rapes her] he is not brutal, he is decent.” *Id.* For theories that come to a conclusion similar to Rousseau’s, consider Locke’s and Hobbes’s theories on women’s submission to men’s desires. *Id.* at 48–50.

162. *Id.* at 51.

163. SCHULHOFER, *supra* note 13, at 60. Schulhofer points out, “These are the men to whom the emphatic warning—‘no means no’—is addressed. It’s high time that these men ‘get it.’” *Id.* Clearly, while “no means no” has become a well-known feminist view, and is facially a very simple concept, it is by no means “obvious and uninteresting.” *Id.* at 59.

164. Baker, *supra* note 127, at 668.

they would believe her.”¹⁶⁵ The concept that “no means no” is apparently not obvious to many.

Both of these myths infringe upon women’s sexual freedom, either by denying women the right to make their own decisions about sex, or by characterizing women as incapable of knowing their own minds.¹⁶⁶ A post-penetration rape statute, though, rejects these myths, weakening their prevalence. First, in order to dispel Myth One, which states that certain factors annul a woman’s right to say “no,” circumstances such as drunkenness or flirtatiousness need to lose their “neutralization” status. Public attitudes need to change to accept a more modern, less sexist, view of women’s behavior, specifically rejecting the idea that certain circumstances sanction rape.¹⁶⁷ A post-penetration rape statute could aid in doing just this. The statute addresses the ultimate neutralization factor—a woman who has actually consented to sex. Such a woman would surely fall into the “woman like that” category discussed above, for not only is she probably sexually active, or at least has had sex before, but she also consented to have sex on the particular occasion in question. Under the myth, these circumstances would deny the woman’s right to complain if the man forces her to continue intercourse.

A post-penetration rape statute, however, nullifies this scenario. The statute explicitly provides a woman in the above situation a cause of action against her attacker. Regardless of what the victim was wearing, how much alcohol she drank, or whether she initially consented to sex, the assault constitutes rape. The statute makes clear that a “woman like that” still has the legal right to say “no,” and not even the ultimate neutralization factor can take this right away.¹⁶⁸ Furthermore, since the “ultimate” factor (consent to sex) fails, it follows that all lesser factors such as drunkenness or dress must also fail. While the law cannot force jurors and other members of society to stop considering these neutralization factors when making their decisions of guilt, it at least has the potential to change their attitudes and their treatment of rape victims.

165. *Id.*

166. Proponents of Illinois’s statute had similar hopes. Kelly Henry, a legal advocate for Rape Crisis Services in Illinois, stated, “This is a step in the right direction because it is going to get people talking about what is sexual assault and what is not sexual assault. . . . Cultural attitudes can change from this law being out there.” Jastram, *supra* note 110.

167. *See* Baker, *supra* note 127, at 684. Baker proposes

If there was an underlying consensus that what date rapists did was morally wrong . . . neutralizations would be irrelevant. If taking sex without consent were seen as something completely other than consensual sex, if it were seen more like sex with a four year old, then no degree of drunkenness and no manner of dress could excuse the action.

The prevalence and power of the neutralization factors in date rape situations suggest an extreme societal ambivalence about the deviance of the act.

Id.

168. *See* Jastram, *supra* note 110.

Similarly, a post-penetration rape law weakens Myth Two as well. There is a great danger that women who initially consent to sex and then withdraw that consent post-penetration will fall victim to the “no means yes” myth. In this situation, where the male is already engaged in sex, he is even more likely to disregard the protestations of his victim—if she consented to sex in the first place, she surely could not mean it when she says “no” now. Post-penetration rape statutes clear up this “ambiguity” for the rapist. Illinois’s statute is even popularly labeled the “No Means No” statute.¹⁶⁹ This title reinforces the argument that one of the statute’s purposes is to educate men on the meaning of “no.” It is not code for “yes” or “maybe” or “please force me to have sex.” Shockingly to some, it actually means “no,” a revelation that could at least partially diminish a rapist’s defense that he thought his victim’s protests constituted consent.

b. Victim-Blaming: The Rapist’s Best Friend

Simply put, society blames victims for their own rape.¹⁷⁰ Since the victim is to blame, punishing the rapist is viewed as unjust. The rapist therefore goes free, a reality that makes victim-blaming significantly dangerous to the success of rape prosecutions.

Rape Myth Three states that the victim deserved to be raped. This myth “admit[s] that there was sex and that the sex was forced, but [holds] the woman responsible—therefore the act was not a rape.”¹⁷¹ Two facets of this myth merit analysis. The first version of this myth is based on the idea that women who violate their proscribed gender norms deserve “whatever they get.” One may wonder what gender norms a woman must violate to be deemed blameworthy for a violent act perpetrated solely by her attacker. According to the myth, if the woman “was flirting; if she was attractively dressed; if she was, in the man’s perception, a tease; if she went out with a man, necked with him, and invited him to her apartment for coffee; even if she only said ‘hello’ to him at the office—it was her fault.”¹⁷² Based on these wide-ranging categories of behavior, it would not be too far of a stretch to say that, under the myth, *any* contact with a member of the opposite sex forms a sufficient basis to blame the victim. Only if a woman keeps herself completely isolated from all men, making sure not to exude any form of sexuality, no matter how mild, is she worthy of protection from sexual attacks. Only then does she not deserve to be raped.¹⁷³

169. Goldblatt, *supra* note 108.

170. HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 54 (1980).

171. Burt, *supra* note 118, at 31.

172. *Id.*

173. In contrast, men are free to flirt, or even engage in sexual activities, with as many women as desired without violating any gender norms and without being forced to suffer violent

While this last statement may seem a bit facetious, it is not too far off the mark. Society sympathizes with victims of rape by strangers, but not victims of rape by acquaintances.¹⁷⁴ The public, and more specifically juries, will blame a rape victim if her “pre-rape behavior violated traditional norms of female prudence or morality.”¹⁷⁵ Understandably, the most common defense of an accused acquaintance rapist is that his victim asked for it—she, not he, provoked the attack.¹⁷⁶ The simplest rationale for this victim-blaming myth “appeals to an injunction against sexually provocative behavior on the part of women.”¹⁷⁷ A woman who violates this injunction “deserves to suffer the consequences.”¹⁷⁸

In *Date Rape: A Feminist Analysis*, Lois Pineau argues that, in countering this rape myth, the question to be asked should be, “Why shouldn’t a woman be sexually provocative? Why should this behavior warrant any kind of aggressive response whatsoever?”¹⁷⁹ She warns, though, that in making this argument, stiff resistance will be met, for “[e]ven 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.”¹⁸⁰ It is not just the extremely conservative who maintain this oppressive rape myth—the sexually liberated do as well.

The second version of this victim-blaming, “women deserve it” myth is based on the idea that women should be held responsible for their own rapes pursuant to the legal concept of contributory negligence. In other words, despite the fact that negligence is not a defense to rape,¹⁸¹ “women will face juries that are prejudiced against victims whom they believe engaged in contributory behavior.”¹⁸² Women are deemed to have “contributed” to their

consequences. Society does not blame or judge them either, leaving men’s sexual autonomy absolute.

174. Bryden & Lengnick, *supra* note 4, at 1202–03.

175. *Id.* at 1204.

176. Lois Pineau, *Date Rape: A Feminist Analysis*, in *SEX, MORALITY, AND THE LAW* 434 (Lori Gruen & George E. Panichas eds., 1997). One defense attorney put it this way:

Though I’m embarrassed to admit it, I used to bring the woman’s character in all the time.

If I was successful in convincing the jury that she was a “loose woman who gave it away on every street corner,” they’d disbelieve her, even in a stranger rape. (Sex past) always mattered, even in a brutal rape. You could hint to the jury that she invited the attack.

JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 54 (1982).

177. Pineau, *supra* note 176, at 434.

178. *Id.* This myth is somewhat ironic. People willing to chastise women for violating their “pure” gender norms are the same ones arguing that women who display any degree of sexuality lose their right to say “no” and should follow through with sex.

179. *Id.*

180. *Id.*

181. Bryden & Lengnick, *supra* note 4, at 1328.

182. Hire, *supra* note 80, at 591.

sexual attacks by getting “‘into the game’ of sexuality” in the first place.¹⁸³ Either by flirting, going on dates, or by engaging in mild sexual activity with a man, the woman is responsible for whatever violent consequences follow. Once in the game, “society loads her with the full responsibility for whatever happens.”¹⁸⁴ If the game gets rough and the woman is raped, it is her own fault, for she should have known better. In essence, she “asked for it.”¹⁸⁵ By flirting or dating, she could not have expected the man to realize that she was looking for more than sex, that her actions did not necessarily mean she wanted to have intercourse. The myth “do[es] not differentiate between her ‘asking for’ companionship, friendship, and a date and her ‘asking for’ rape.”¹⁸⁶

Societal support for the idea of contributory negligence in acquaintance rape is ubiquitous. In *The Second Assault*, the authors conducted a survey in which they asked respondents, “[W]hat is the one thing that would reduce rape the most? . . . [T]he majority of responses fell into two . . . categories: a ‘law and order’ approach and a perceived need for women to change their behavior.”¹⁸⁷ According to the survey responses, women needed to change how they acted, what they wore, the places they went, and the nature of their interaction with men.¹⁸⁸ The authors found that this “perceived need for women to accept responsibility for alleviating rape [was] consistent with [the] perception of the problem as ‘caused’ by female behavior.”¹⁸⁹ Few respondents saw societal problems or sex-role problems as “causally related to rape.”¹⁹⁰ Consistent with this finding, another study of public perceptions of rape found that sixty-six percent of those polled believed that women provoke rape by their dress or behavior, thirty-four percent thought “women should be

183. Burt, *supra* note 118, at 31.

184. *Id.* Jurors interviewed by Gary LaFree made statements consistent with the argument that jurors’ victim-blaming attitudes contribute to rape acquittals. The most extreme example comes from a male juror who stated, “I don’t think a woman can be raped . . . I ask why are they out at that time of the night? What did they do to provoke it? . . . She can scream and kick if she’s awake and [really] doesn’t want it.” LAFREE, *supra* note 137, at 225.

185. One male juror noted, “Some women put themselves on men. It is the way that they dress. It is in the clothes.” LAFREE, *supra* note 137, at 225. Other jurors noted that “through their clothing and behavior women often ‘ask’ to be raped.” *Id.*

186. Burt, *supra* note 118, at 31. Again, men, on the other hand, never lose their right to say “no.”

187. JOYCE E. WILLIAMS & KAREN A. HOLMES, *THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES* 120 (1981).

188. *Id.* “This attitude is, of course, role-restrictive for the female since it disallows freedom in movement, dress, and interpersonal relationships.” *Id.* at 123.

189. *Id.* at 123.

190. *Id.* For a thorough, complex analysis of the impact of rape on victims as well as societal attitudes regarding cause and prevention of rape, see generally *id.* The authors “focus[] on how rape was experienced by some victims in one geographic area as juxtaposed to their community’s perception of rape.” *Id.* at xi.

held responsible for preventing their own rape,” and eleven percent reported that women who are raped must have been “asking for it.”¹⁹¹

Contrary to the frequent incidence of blaming victims of acquaintance rape, the general concept of blaming victims for their own attacks is quite novel and unprecedented. “Date rape is the only type of criminal conduct that people often believe was caused by the victim’s behavior, not the assailant’s.”¹⁹² No parallel exists in other crimes.¹⁹³ If a person is strolling through a dangerous neighborhood late at night and is robbed “no one denies that the *crime* happened, even when it is clear that the victim used poor judgment.”¹⁹⁴ And yet society, in an effort to retain rigid control over women’s sexuality, is more than willing to blame victims of rape. Society is willing to assert that because a woman allowed a man to walk her home, or come into her apartment for a cup of coffee, she is to blame for the violent crime that thereafter ensued; she is responsible for the pain, injuries, pregnancies, or potentially deadly sexually transmitted diseases she acquired pursuant to the forcible intercourse. While it is illogical at best to hold these victims blameworthy while sympathizing with victims of other crimes, crimes much less physically or psychologically damaging, society nonetheless continues to do so.

Passage of post-penetration rape statutes would be a good first step in an effort to minimize the harmful effect of both facets of the victim-blaming rape myth. First, in much the same ways that the statute would aid in negating “neutralization factors” that take away a woman’s right to say “no” to sex,¹⁹⁵ it would likewise aid in decreasing the incidence of victim-blaming. As discussed earlier, society blames a victim for her own rape if her character or behavior violates “traditional norms of female prudence.”¹⁹⁶ The statute, however, is meant to apply to women who initially agree to have intercourse but thereafter withdraw consent.¹⁹⁷ It specifically faces the reality that women can and do have sex. And even though the women targeted by the statute (those who consent to sex) surely violate the traditional gender norm that women are to be chaste, the statute correctly places blame not on the victim for

191. FEILD & BIENEN, *supra* note 170, at 54. Twelve percent of those polled actually reported that “[i]f a woman is going to be raped she might as well relax and enjoy it,” sixteen percent believed that “[i]t would do some women some good to get raped,” and six percent said that “[r]ape serves as a way to put or keep women in their ‘place.’” *Id.* at 50–51.

192. Gill, *supra* note 101, at 31.

193. Burt, *supra* note 118, at 32.

194. *Id.*

195. Baker, *supra* note 127, at 684.

196. Bryden & Lengnick, *supra* note 4, at 1204.

197. Jastram, *supra* note 110.

her lack of purity, but rather on the rapist.¹⁹⁸ At least symbolically, this stance could help change the sexual double standard innate in victim-blaming.¹⁹⁹

Furthermore, the statute, at least on its face, negates the concept of contributory negligence. According to the myth, which again states that women contribute to sexual assault by dressing provocatively, going on dates, and being flirtatious, initially agreeing to sex would be the pinnacle of contributory behavior. The victim did not just wear a low-cut shirt or ask her date up to her apartment; rather, she actually agreed to have intercourse. The statute, though, places no contribution liability on the victim. Read in the terms of the myth, the statute even assumes the victim will “contribute” by initially consenting to sex.²⁰⁰ The blame, however, falls not on her, but instead on her attacker. As a result, legitimizing post-penetration rape is a step toward loosening society’s sexist constraints on women; it is a step toward treating victims of acquaintance rape with the same respect and sympathy society has long afforded victims of every other violent crime.

c. Men Can Control the World, but Not Their Sex Drives?

One of the oldest and most scientifically unsound rape myths is that “[m]en [c]annot [c]ontrol [t]heir [s]exual [u]rges [a]fter a [w]oman [h]as [t]urned [t]hem [o]n.”²⁰¹ Many men and women alike believe that if a woman entices a man, the man is helpless to control his sexual impulses; therefore, any sexual activity that occurs thereafter, however violent or forced it may be, is understandable.²⁰² A UCLA study reported that fifty-four percent of teenage boys surveyed thought it was okay “to force sex if the woman

198. *Id.* Ross Wantland, a coordinator of sexual assault education in Illinois, commented, “The terminology (of this law) takes the emphasis off of the victim and puts it on the perpetrator.” *Id.*

199. Lois Pineau, *supra* note 176, at 436, attacks victim-blaming using contract law. She explains that even if a woman does assume a contractual obligation to have sex with a man through her dress, behavior, or through initially consenting to sex, “whatever the terms of a contract, there is no private right to enforce it. So if I make a contract with you on which I renege, the only permissible recourse for you is through due legal process,” *not* through violence. *Id.* Pineau continues:

Thus, even if we assume that a woman has initially agreed to an encounter, her agreement does not automatically make all subsequent sexual activity to which she submits legitimate. If during coitus a woman should experience pain, be suddenly overcome with guilt or fear of pregnancy, or simply lose her initial desire, those are good reasons for her to change her mind. Having changed her mind, neither her partner nor the state has any right to force her to continue . . . Thus establishing that consent occurred at a particular point during a sexual encounter should not conclusively establish the legitimacy of the encounter. What is needed is a reading of whether she agreed throughout the encounter.

Id.

200. Jastram, *supra* note 110.

201. Gill, *supra* note 101, at 48.

202. Burt, *supra* note 118, at 32.

changed her mind after somehow indicating that she would have sex with him.”²⁰³ A different study found that fifty percent of high school males surveyed “believed that if a female ‘gets him physically excited’ or ‘says she’s going to have sex with him and then changes her mind,’” forcing her to have intercourse is acceptable.²⁰⁴ These findings demonstrate the pervasiveness of the myth that men are justified in being helpless agents of their libido.²⁰⁵

No evidence exists, however, to corroborate the assertion that sexual arousal cannot be stopped or that desire is uncontrollable.²⁰⁶

While there may be a few seconds in the “plateau” period just prior to orgasm in which people are “swept” away by sexual feelings to the point where we could justifiably understand their lack of heed for the comfort of their partner, the greater part of a sexual encounter comes well within the bounds of morally responsible control of our own actions.²⁰⁷

The myth simply has no basis in reality, but is rather an excuse for men “not to be held responsible for their own excitement and what they do with it.”²⁰⁸ Paradoxically, both men and women are eager to hold women responsible, “not only for keeping themselves chaste but also for controlling men’s sexuality.”²⁰⁹ Again, men are not to be held responsible for their actions, women are. According to the myth, because “men’s sexuality is not active but is simply a response to stimuli supplied by women,” men cannot be expected to control themselves once the stimulus is supplied.²¹⁰ In *Acquaintance Rape: The Hidden Crime*, Martha Burt explains how ludicrous such a theory is:

To be somewhat facetious, this myth implies that if a scantily clad woman walks down the street and a man sees her, he will go out of control, the situation can end only in rape, and the man is not responsible for it because he saw her knees and they drove him over the edge. Put this way, it should be obvious that this myth excuses men’s assaultive behavior and helps remove such incidents from the category of “real” rapes.²¹¹

Post-penetration rape statutes such as the one in place in Illinois further dispel this myth. The statute places on men the sole responsibility for controlling their sexual urges. It makes clear that even once sex has

203. Gill, *supra* note 101, at 49.

204. *Id.*

205. For a brief analysis of the role of mass media in fostering rape myths, see Torrey, *supra* note 5, at 1031–37.

206. Pineau, *supra* note 176, at 437.

207. *Id.*

208. Burt, *supra* note 118, at 33.

209. *Id.*

210. *Id.* at 32.

211. *Id.*

commenced, if the woman changes her mind, intercourse must cease.²¹² By the time consent is withdrawn, the man will surely be aroused and will most likely be under the impression that the woman was willing to complete intercourse. The statute itself even rests on this assumption—it assumes that both parties were initially willing and sex has commenced (meaning the male is of course aroused). And yet, fully aware that the man will be sexually excited, the statute does not absolve him of accountability if he fails to control his actions. Rather, it again shifts responsibility away from the victim and places it where it rightly should fall—on the rapist. He will be guilty of rape if he continues the sexual act, and no amount of arousal will insulate him from this charge.

B. Limits on the Impact of a Post-penetration Rape Statute

Unfortunately, rape reform efforts in general do not tend to increase the incidence of rape convictions.²¹³ In *Rape in the Criminal Justice System*, David Bryden and Sonja Lengnick point out various reasons why. Bryden and Lengnick explain that, despite reforms, the burden of proof remains on the prosecution, and “[y]ou can’t legislate a credible rape victim.”²¹⁴ As explained earlier in this comment, even in states with rape shield laws, the victim’s sexual history will still oftentimes be admitted into evidence.²¹⁵ Even if it is not, it is likely that at least some evidence of the victim’s character will be allowed.²¹⁶ Similarly, evidence related to the victim’s “contributory negligence” will inevitably be revealed through testimony about the events that led up to the rape.²¹⁷ Therefore, regardless of the rape reform law in place and the amount and kinds of evidence it successfully excludes from the juror’s ears, it is still highly likely that the jury will hear evidence from which it can infer, however unfairly, that the victim is to blame.

Along these same lines, a post-penetration statute will probably not increase conviction rates either. While a post-penetration statute has the potential to increase reporting rates and dissipate gender stereotypes and rape myths, it alone cannot perform miracles. Most importantly, a post-penetration rape statute that does no more than state that consent can be withdrawn will most likely not help the prosecutor fulfill her burden of proof, for the statute “does not change the definition of sexual assault or the process of proving what was communicated.”²¹⁸ The prosecutor still has to jump all of the typical

212. 720 ILL. COMP. STAT. 5/12-17 (2003) (“No Means No”), available at <http://www.legis.state.il.us/legislation/publicacts/fulltext.asp?name=093-0389>.

213. Bryden & Lengnick, *supra* note 4, at 1284.

214. *Id.* at 1287.

215. *Id.*

216. *Id.*

217. *Id.* at 1288.

218. Jastram, *supra* note 110.

hurdles in proving that the victim withdrew consent and that she communicated such withdrawal to the defendant. The prosecutor must overcome strong societal biases against rape victims, attempt to keep the victim's sexual history out of evidence, and work with definitions of "consent" and "force" that tend to be pro-rapist. Sexist stereotypes and rape myths often support jury findings that the victim consented.²¹⁹ Jurors can (and most likely will) just as easily use these same stereotypes to find that the victim continued to consent, i.e., did not withdraw consent mid-act. So while a post-penetration rape statute has the potential to impact sexist societal attitudes toward rape, it has several practical limits as well.

V. CONCLUSION

Sexism in rape law greatly impedes rape victims' ability to obtain justice, and it will continue to do so until serious reforms take place, reforms that recognize women's right to sexual autonomy. A post-penetration rape law like the one in place in Illinois is a first step toward achieving this end. Changing deeply engrained social stereotypes regarding any issue is a slow, formidable task, and a post-penetration rape statute will surely not be this rule's exception. However, simply because a reform is unlikely to change the world does not mean that it is a pointless endeavor. At least symbolically, a post-penetration rape law represents the way the public needs to view rape—as nonconsensual sex, regardless of any other factor, including whether the victim and assailant were acquaintances or were already engaged in sex when consent was withdrawn. In the same vein, it represents how the public should view sex altogether—as a privilege, not a right.

Of course, even the statute's symbolic value will fall short of the ultimate goal of changing society's anti-rape-victim attitudes. Wide-ranging reforms are needed and are not necessarily restricted to legislative or even judicial reforms. In *Dismantling Gender and Race Stereotypes*, Sarah Gill proposes that the best way to change public attitudes is through education.²²⁰ Educating young people about "the definition of date rape, the statistics of date rape among teen-agers, why men and women are silent victims and rarely report rape, rape trauma syndrome, the role of socialization, steps to use to prevent rape, and how to help a rape survivor" is crucial to raising a more rape-conscious generation less likely to blindly believe harmful rape myths.²²¹ Practical reforms such as this, teamed with strong legislative and judicial reforms, have the potential to change the way that we as a society view rape,

219. LAFREE, *supra* note 137, at 225.

220. Gill, *supra* note 101, at 70–71.

221. *Id.* at 71.

consent, and victims of sexual assault. Post-penetration rape statutes are just one step in women's journey toward sexual freedom.

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