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POST-PENETRATION RAPE—INCREASING THE PENALTY

I. INTRODUCTION

The crime of rape¹ has changed dramatically in the recent past.² Until ten years ago, if a man raped a woman³ he knew, the woman would probably fail to report the rape and it was also probable that a court would not convict the man.⁴ How-

1. Section 261 of the California Penal Code provides:

261. Rape defined

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act

(2) Where it is accomplished against a person's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official.

CAL. PENAL CODE § 261 (West 1988).

2. For example, as in many other states, California has enacted a rape shield law. CAL. EVID. CODE § 1103 (West 1988). In general, rape shield laws prohibit the use of opinion or reputation evidence of the complaining witness in order to prove consent. *Id.*

3. Although the author realizes that men may also be the victims of rape, because the vast majority of rape victims are women, the female pronoun will be used throughout this comment for clarity and consistency.

4. Krasnow, *When a Date Becomes a Nightmare: Rapes by Acquaintances May Be*

ever, when women began to realize that rape was not always committed by strange, unknown men lurking in alleys, they began to report the rapes. This type of rape by an acquaintance has been termed date rape.⁵

This comment will examine a situation somewhat similar to date rape which the author will term "post-penetration rape."⁶ In post-penetration rape, unlike date rape, the woman initially consents to the intercourse with the defendant. However, at some later time during the intercourse, for whatever reason,⁷ the woman makes it clear that she no longer consents and therefore wishes to terminate the sexual intercourse.⁸ Although the victim makes her wishes clear to the defendant, he forces her to continue the sexual intercourse against her will.

Under current California law, post-penetration rape is not punished as rape but may be punished as an assault or battery.⁹ *People v. Vela*¹⁰ was the first California case to address the issue of post-penetration rape. The background of this

Our Most Underreported Crime, L.A. Daily J., May 29, 1985, at 4, col. 3.

5. Date rape occurs when a woman is forced against her will to engage in sexual intercourse with a man with whom she is acquainted. The woman never consents to the intercourse.

6. The term "post-penetration rape" was coined by the author for the sake of clarity, and is not used by either the legal or medical profession. Although penetration is required for rape, the penetration need only be slight. CAL. PENAL CODE § 263 (West 1988). Therefore, vaginal penetration is not required, but penetration of the external genital organs (the labia) is sufficient. *People v. Karsai*, 131 Cal. App. 3d 224, 232, 182 Cal. Rptr. 406, 411 (1982).

7. The facts of the cases are usually in dispute and often do not indicate why the victim withdrew her consent. In one case, although the victim alleged that the defendant forced her to have intercourse against her will, the defendant testified that the intercourse was consensual, but remembered the victim suddenly declaring, "I guess I don't want to do this anymore." *State v. Robinson*, 496 A.2d 1067, 1069 (Me. 1985). In another case, the victim testified that she did not consent to the sexual intercourse. However, the defendant testified that it was consensual, but admitted that "toward the end of the sexual [intercourse] he became violent, pulling [the victim's] hair and choking her." *State v. Brodniak*, 221 Mont. 212, 216, 718 P.2d 322, 325 (1986). These cases illustrate two of the many possible reasons a woman may withdraw her consent. However, the reason for the withdrawal of the consent is not as crucial as the defendant's forcing the victim to continue sexual intercourse with force and against her will.

8. The woman must communicate her withdrawal of consent to the defendant. The fact that a woman changes her mind does not turn the originally consensual intercourse into rape. See *State v. Robinson*, 496 A.2d 1067, 1070 (Me. 1985). It is only when she communicates her withdrawal of consent to the defendant and he continues with force and against her will that a rape occurs. *Id.*

9. *People v. Vela*, 172 Cal. App. 3d 237, 218 Cal. Rptr. 161 (1985).

10. *Id.*

comment begins by exploring recent societal and legal changes in marital and acquaintance rape as two possible factors leading to the recent occurrence of post-penetration rape cases. The background then discusses statutes and cases applicable to post-penetration rape. The background concludes with a brief discussion of the relevance of Rape Trauma Syndrome to post-penetration rape. The analysis will discuss two contrasting views of post-penetration rape. One view is embodied by the California Court of Appeal case, *People v. Vela*.¹¹ The other view is found in a Maine Supreme Court case, *State v. Robinson*.¹² This comment concludes with a proposed statute which would increase the penalty of a post-penetration rape conviction in California from an assault or battery to second degree rape.

II. BACKGROUND

In order to understand post-penetration rape, one need only view the changes which have occurred in rape law in the past twenty years. Reform in the areas of marital and acquaintance rape have allowed women in post-penetration rape cases to bring charges against their partners. A brief review of marital and acquaintance rape helps illustrate why women have recently initiated prosecutions in post-penetration rape situations which they would not have considered bringing only a few years earlier.

A. Marital Rape

Under common law, a man could not be convicted of raping his wife. This concept was named the "marital rape exception" and until recently was followed in most states. However, by 1985, twenty-three states considered marital rape a crime.¹³ The remaining twenty-seven states can be divided into two categories; twenty-three states allow prosecution for marital rape only if the husband and wife are separated, and four states prohibit prosecution for marital rape altogether.¹⁴

Many state legislatures proposed changes in marital rape

11. *Id.*

12. 496 A.2d 1067 (1985).

13. 16 CRIM. JUST. NEWL. 5, Jan. 16, 1985, No. 2.

14. *Id.*

laws after an Oregon trial court in *State v. Rideout*¹⁵ acquitted the defendant of raping his wife. *Rideout* attracted national attention which initiated reform of the marital rape laws in many states.¹⁶ In California, for example, the legislature enacted a new section in the penal code to provide for prosecution of marital rape.¹⁷ The legislature enacted this section in 1979. There are conditions precedent, however, to the applicability of the California marital rape law. For example, a woman is barred from prosecuting her husband if she does not report the rape within ninety days.¹⁸ Section 261 of the California Penal Code, which defines forcible rape,¹⁹ does not have a comparable limitation.²⁰

In addition to marital rape, society's increased awareness of acquaintance rape may have made it easier for women in post-penetration rape cases to press charges against their partners. The next section briefly reviews acquaintance rape in the context of post-penetration rape.

15. No. 108866 (Marion County, Or. Cir. Ct., Dec. 27, 1978).

16. 16 CRIM. JUST. NEWL. 5, Jan. 16, 1985, No. 2.

17. Section 262(a) of the California Penal Code provides in relevant part: 262(a). Rape of Spouse

Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury on the spouse or another, or where the act is accomplished against the victim's will or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this subdivision "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

CAL. PENAL CODE § 262(a) (West 1988).

18. Section 262(b) of the California Penal Code provides in relevant part: 262(b). Rape of Spouse

There shall be no arrest or prosecution under this section unless the violation of this section is reported to a peace officer having the power to arrest for a violation of this section or to the district attorney of the county in which the violation occurred, within 90 days after the day of the violation.

Id. § 262(b).

19. For the sake of clarity, the term "forcible rape" will be used to denote a situation in which a defendant forces a woman to engage in sexual intercourse without her consent. In contrast, the term "post-penetration rape" will be used to describe a situation in which a woman initially consents to sexual intercourse, but withdraws her consent at some point after penetration.

20. CAL. PENAL CODE § 261 (West 1988).

B. *Acquaintance Rape*

As recently as 1985, a prosecutor in New York said it was nearly impossible to take a date rape case to trial because of three factors: (1) state law; (2) lack of public support; and (3) the victim's reluctance to become involved.²¹ However, as indicated previously, the public has become more aware of the incidence of date rape.²² Perhaps as a result of the criminalization of marital rape in many states and the increased number of convictions in date rape cases, courts have begun to hear cases involving post-penetration rape. The liberalization of rape laws throughout the country has created a less hostile environment for rape victims. For example, in previous years if a woman were raped while on a date, she was unlikely to report the crime because of her belief that a jury would equate her consent to the date with consent to sexual intercourse. This was due to the fact that prior to the recent increase in date rape cases, most juries considered rape to be a situation in which a man who is not known to his victim forces her to engage in sexual intercourse.

Just as marital rape and date rape gave women the protection they had previously been denied, an increased penalty for post-penetration rape will also protect women who are now inadequately protected. In addition, punishing post-penetration rape as rape instead of as assault or battery will also protect victims of date rape who initially consent to sexual intercourse but later withdraw their consent after penetration.

This comment suggests that just as legislatures enacted changes in the marital rape exception after *Rideout*, the California legislature should change the California Penal Code to define post-penetration rape as a rape instead of an assault or battery. The only California case that has addressed the issue of post-penetration rape is *People v. Vela*.²³ Because the *Vela* court had little case law to rely upon for guidance, it examined other jurisdictions'²⁴ treatment of the issue as well as sections

21. L.A. Daily J., May 29, 1985, at 4, col. 3.

22. *Id.*

23. 172 Cal. App. 3d 237, 241, 218 Cal. Rptr. 161, 163 (1985).

24. *Id.* at 241-42, 218 Cal. Rptr. at 163.

261 and 263 of the California Penal Code.²⁵ This comment will discuss the various rape statutes before focusing on the applicable case law.

C. *Statutes*

The California Penal Code lists seven circumstances constituting rape. In general, two of these circumstances are relevant to post-penetration rape:

261. Rape defined

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(2) Where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury or death.²⁶

Subdivision two illustrates a situation where the victim submits to sexual intercourse because of threats of immediate harm such as "if you do not have sex with me I'll kill you." On the other hand, subdivision six involves a situation where the victim submits to sexual intercourse because of future threats of harm such as "if you do not have sex with me I'll find your daughter and kill her."

The statute also addresses two issues important in post-penetration rape: consent and penetration. The first issue, consent, is discussed in section 261.6.²⁷ This section defines consent as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."²⁸ The quoted language ensures that consent is given voluntarily and not as a result of fear.²⁹ In a forcible

25. *Id.* at 242-43, 218 Cal. Rptr. at 164.

26. CAL. PENAL CODE § 261 (West 1988).

27. *Id.* § 261.6.

28. *Id.*

29. *People v. Key*, 153 Cal. App. 3d 888, 895, 203 Cal. Rptr. 144, 148

rape case the issue of consent focuses on whether the victim consented to the sexual intercourse. Typically, the victim argues that she never consented to the sexual intercourse.³⁰ In contrast, the defendant usually counters with one of two arguments. The defendant may allege the victim consented.³¹ On the other hand, the defendant may assert that although the victim did not consent, he reasonably and in good faith thought she did.³²

The first issue in post-penetration rape involves penetration. The concept of penetration is crucial to the crime of rape because there can be no rape without penetration. If the defendant does not penetrate the victim, the court will not find the defendant guilty of rape, but may convict him of assault or battery.³³ This analysis leads to the conclusion that when penetration takes place without consent a rape has occurred.

The second issue in a post-penetration rape case involves

(1984).

30. *See, e.g., State v. Way*, 297 N.C. 293, 294-95, 254 S.E.2d 760, 760-61 (1979).

31. *Id.* at 296, 254 S.E.2d at 761.

32. CALJIC § 10.23 provides:

It is a defense to a charge of forcible rape that the defendant entertained a reasonable and good faith belief that the female person voluntarily consented to engage in sexual intercourse. If from all the evidence you have a reasonable doubt whether the defendant reasonably and in good faith believed she voluntarily consented to engage in sexual intercourse, you must give the defendant the benefit of that doubt and acquit him of said charge.

"Reasonable and good faith belief" is a legal term. A reasonable belief is one which a reasonable person would have in the defendant's circumstances. Good faith means that at the time of the alleged rape, the defendant actually believed the woman consented. *See People v. Mayberry*, 15 Cal. 3d 143, 155, 542 P.2d 1337, 1345, 125 Cal. Rptr. 745, 753 (1975).

33. Assault and battery are defined in sections 240 and 242 of the California Penal Code.

Section 240 defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person or another." CAL. PENAL CODE § 240 (Deering 1985). The punishment for assault is a fine not to exceed \$1000.00 or imprisonment in the county jail for not more than six months or both. *Id.* § 241.

Battery is defined as "any willful and unlawful use of force or violence upon the person of another." *Id.* § 242. Battery is punished by a fine of not more than \$2000.00 or confinement in the county jail for not more than six months or both. *Id.* § 243.

In contrast to the punishments for assault or battery, a conviction for rape is punishable by confinement in the state prison for three, six, or eight years. *Id.* § 264.

consent.³⁴ However, in a post-penetration rape case, unlike the typical forcible rape situation, the issue is whether a victim who initially consents to sexual intercourse with a defendant can withdraw her consent after penetration. Therefore, although the issue of consent arises in forcible rape and post-penetration rape, the major distinction between the two involves timing. In a forcible rape case, the victim must consent at the moment of penetration or the defendant becomes guilty of rape.³⁵ The situation changes somewhat in a post-penetration rape case because the victim admits she consented at the moment of penetration but alleges she revoked her consent sometime thereafter during intercourse.³⁶

Following the above analysis, the California courts examine the point of penetration to determine whether the victim consented to the sexual intercourse.³⁷ For example, if the defendant penetrates the victim without her consent, the victim is unable to later change her mind and allege that she did consent.³⁸ On the other hand, under current California law, if the defendant penetrates the victim with her consent, the victim can later withdraw her consent without the interruption of penetration.³⁹ However, the defendant will not be guilty of rape, but may be guilty of an assault or battery.⁴⁰

The preceding section illustrated the penal code sections applicable to post-penetration rape. The following section discusses California's interpretation of these statutes. The following section also examines the treatment post-penetration rape receives in other jurisdictions.

34. The definition of consent in the crime of rape is defined in section 261.6 of the California Penal Code as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." CAL. PENAL CODE § 261.6 (West 1988).

35. See, e.g., *People v. Vela*, 172 Cal. App. 3d 237, 242, 218 Cal. Rptr. 161, 164 (1985).

36. *Id.* at 240, 218 Cal. Rptr. at 162.

37. *Id.* at 242, 218 Cal. Rptr. at 164.

38. *Id.* at 243, 218 Cal. Rptr. at 165.

39. *Id.*

40. *Id.* at 243, 218 Cal. Rptr. at 165.

D. Cases

1. United States Cases

a. California's Treatment of Post-Penetration Rape

As indicated previously, the California courts have considered the issue of post-penetration rape only once, in *People v. Vela*.⁴¹ Because the issue was one of first impression, the court looked to other jurisdictions for guidance.⁴² In *Vela*, the defendant was charged with forcible rape of a 14-year-old child.⁴³ The prosecution presented evidence strong enough to convict the defendant of forcible rape.⁴⁴ However, the prosecution also presented evidence of the defendant's statement to a deputy which indicated the victim initially consented to the act of sexual intercourse, but changed her mind in mid-act.⁴⁵ Although the victim communicated her withdrawal of consent to the defendant, he continued the act of sexual intercourse with force⁴⁶ and against her will.⁴⁷

The jury requested instructions from the trial court on the following question: "Once penetration has occurred with the female's consent, if the female changes her mind does force from that point (where she changes her mind) constitute rape?"⁴⁸ The court answered yes and the jury convicted the defendant of rape.⁴⁹

41. *Id.* at 242, 218 Cal. Rptr. at 163.

42. *Id.* at 241-42, 218 Cal. Rptr. at 163-64.

43. Because of the age of the victim, the defendant was also guilty of unlawful sexual intercourse with a female under the age of 18 under section 261.5 of the Penal Code. CAL. PENAL CODE § 261.5 (West 1988). This section addresses what is commonly known as statutory rape. *Id.* In statutory rape cases, unlike forcible rape cases, consent is not at issue because a female under the age of 18 is unable to consent to intercourse. *People v. MacDonald*, 167 Cal. 545, 140 P. 256 (1914). Therefore, in *People v. Vela*, 172 Cal. App. 3d 237, 218 Cal. Rptr. 161 (1985), because the victim was under age and did not consent to the intercourse, the defendant could be charged with both forcible and statutory rape.

44. *Vela*, 172 Cal. App. 3d at 240, 218 Cal. Rptr. at 162.

45. *Id.*

46. The definition of force, in the crime of rape, is not that degree of force which may produce bodily injury, but is the force needed to overcome the resistance made by the victim. *People v. McIlvain*, 55 Cal. App. 2d 322, 329, 130 P.2d 131, 134-35 (1942).

47. *Vela*, 172 Cal. App. 3d at 240, 218 Cal. Rptr. at 162.

48. *Id.*, 218 Cal. Rptr. at 162-63.

49. The judge then became unsure whether his instruction was an accurate

The court of appeal addressed the validity of the trial court's jury instructions. Before reversing the trial court's decision, the court of appeal analyzed two cases from other jurisdictions.

b. *Maryland's Treatment of Post-Penetration Rape*

The *Vela* court first examined *Battle v. State*,⁵⁰ a Maryland Supreme Court case, which addressed an issue identical to that presented to the *Vela* court. In *Battle*, the victim was a 44-year old grandmother. She parked her car at a lot where the defendant worked. When she returned to her car she noticed that the defendant had washed it. She told the defendant that she did not have any money, and he asked for a ride home instead. During the ride to the defendant's home, the defendant informed the victim that he wished to sell his radio. When they arrived at the defendant's home, the victim agreed to go to the defendant's room to look at the radio because she felt she could trust him since he looked like "a nice old man."⁵¹

At this point, the testimony of the defendant and the victim conflicted. The victim alleged that once she entered the defendant's room he "got nasty"⁵² and ordered her to take her clothes off. When she replied, "[y]ou [sic] got to be kidding,"⁵³ he placed a screwdriver against her head and repeated his order. He also threatened to kill her, adding that he had killed once before. The victim stated that the defendant then forced her to engage in sexual intercourse against her will. The defendant alleged that although the victim asked him to have sexual intercourse with her, he refused and no sexual contact occurred.⁵⁴

reflection of California law. Because of this, the judge polled the jurors on the effect of the instructions on their decision to convict the defendant of rape. Ten jurors said they based their decisions on the judge's instructions and two said they did not. The court then ordered the jury to return to deliberation without any further instructions. In other words, the judge instructed the jury to disregard his previous instruction but offered no substitute instruction in its place. The jury again convicted the defendant of rape. *Id.*, 218 Cal. Rptr. at 163.

50. 287 Md. 675, 684, 414 A.2d 1266, 1270 (1980).

51. *Id.* at 676-77, 414 A.2d at 1267.

52. *Id.* at 677, 414 A.2d at 1267.

53. *Id.*

54. *Battle*, 287 Md. at 678, 414 A.2d at 1267. The facts in this case illustrate

After deliberating, the jury asked the court for guidance on the following question: "[w]hen a possible consensual sexual relationship becomes nonconsensual for some reason during the course of the action—can the act then be considered rape?" The trial judge instructed the jury that "it is possible for a situation to start out as consensual and then become . . . nonconsensual in the course of the event."⁵⁵ The jury then convicted the defendant of assault with intent to rape.⁵⁶

The defendant appealed his conviction alleging that the jury instructions were ambiguous and therefore the case should be reversed and remanded.⁵⁷ The Maryland Supreme Court examined the issue of consent before deciding to reverse and remand the case. The court reached its decision after examining two situations.

The first situation examined by the court involved a defendant who forced the victim to engage in sexual intercourse against her will. However, sometime after the intercourse, the victim decided to consent to the intercourse. This situation clearly constitutes rape because the law does not allow a person to retroactively consent to a crime.⁵⁸

The court then considered a second situation in which the female initially consented to the sexual intercourse, but withdrew her consent prior to penetration.⁵⁹ As in the first

the wide disparity between the victim's and the defendant's description of the facts in post-penetration rape.

55. *Id.* at 678-79, 414 A.2d at 1268.

56. Maryland law punishes assault with intent to rape more severely than assault. *See Christensen v. State*, 33 Md. App. 635, 640, 365 A.2d 562, 565 (1976). The elements of assault with intent to rape are "(a) an assault, (b) an intention to have [sexual intercourse with] a female, and (c) with force and against the consent of the female. *Middleton v. State*, 6 Md. App. 380, 383, 251 A.2d 224, 227 (1969). An assault is defined as a threat to inflict injury on another together with the apparent ability to do so. BLACK'S LAW DICTIONARY 105 (5th ed. 1979).

57. An appellate court reverses a lower court decision by making it void. BLACK'S LAW DICTIONARY 1185 (5th ed. 1979). On the other hand, a remand occurs when an appellate court sends a case back to the trial court so that further action can be taken. *Id.* at 1162.

58. *Battle*, 287 Md. at 681, 414 A.2d at 1269. The rationale behind not allowing a woman to retroactively consent to a crime is usually described with respect to the state's interest in criminal prosecutions. In other words, because a prosecutor represents the public and not the victim, the fact that a victim believes she was not injured is irrelevant. The injury to the public remains. *Id.* at 682, 414 A.2d at 1269-70 (quoting W. LAFAVE AND A. SCOTT, HANDBOOK ON CRIMINAL LAW 57 (1972)).

59. *Id.* at 682, 414 A.2d at 1270.

situation, because the defendant accomplished the penetration with force, a rape occurred.⁶⁰

After examining the legal analysis in the above two situations, the Maryland court concluded that the victim must grant consent prior to penetration. The court applied its conclusion to the post-penetration rape case and decided that if a woman consented prior to penetration but withdrew her consent sometime thereafter, no rape had occurred.⁶¹

c. *North Carolina's Treatment of Post-Penetration Rape*

Vela also examined a North Carolina Supreme Court decision, *State v. Way*.⁶² The facts of *Way*, like *Vela* and *Battle*, were in dispute. The victim and the defendant talked on the phone regularly but had never dated. On the date of the alleged rape, the defendant and the victim picked up a friend of the victim's. The trio then went to another person's apartment where everyone except the victim drank beer or wine and smoked marijuana. A short time after they arrived, the defendant asked the victim to accompany him upstairs because he wanted to show something to her. He took her to an upstairs bedroom and attempted to undress her. When the victim attempted to stop the defendant, he told her that if she did not comply with his demands he would beat her. The victim tried to escape but the defendant punched her in the face. She also tried to call her friend but the defendant informed her that by the time her friend arrived, the victim's "head would be through the wall."⁶³ The defendant forced the victim to engage in anal and vaginal intercourse with him. He also forced her to perform fellatio.⁶⁴

During the act of sexual intercourse, the victim experienced severe pain in her stomach. This scared the defendant and he called the victim's friend for help. The defendant and the victim's friend then took the victim to the hospital. The doctor who examined the victim observed that she had bruises and swelling on her face, and her vagina showed evidence of

60. *Id.* at 683-85, 414 A.2d at 1270.

61. *Id.* at 683, 414 A.2d at 1270.

62. 297 N.C. 293, 254 S.E.2d 760 (1979).

63. *Id.* at 294-95, 254 S.E.2d at 760-61.

64. Fellatio is "oral stimulation of the penis." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 455 (1988).

recent trauma. In addition, the doctor noted that her hymen⁶⁵ had recently torn.

The defendant alleged the victim initially consented to the sexual intercourse and that during the act she began complaining about stomach pains. The defendant stated that he then called the victim's friend and they drove the victim to the hospital.⁶⁶

During deliberations, the jury asked whether consent could be withdrawn after penetration.⁶⁷ The court replied "yes"⁶⁸ and the jury convicted the defendant of second degree rape.⁶⁹

After the court of appeal affirmed the defendant's conviction, he appealed to the Supreme Court of North Carolina. The supreme court granted a new trial based on the fact that although consent can be withdrawn after penetration, this usually occurs in cases involving more than one act of sexual intercourse.⁷⁰ The court stated that this situation usually arises when a woman consents to an initial act of sexual intercourse with the defendant. However, at some point after the initial consensual act of intercourse, the woman withdraws her consent and is forced into subsequent acts against her will. In this situation, the nonconsensual acts of sexual intercourse will be considered rape.⁷¹ However, the court refused to extend this concept to post-penetration rape situations.⁷²

65. *Way*, 297 N.C. at 294-95, 254 S.E.2d at 761. The hymen is a membrane covering the opening of the vagina. BLACK'S LAW DICTIONARY 591 (5th ed. 1979).

66. *Way*, 297 N.C. at 295-96, 254 S.E.2d at 761.

67. *Id.* at 296, 254 S.E.2d at 761.

68. The judge's instructions stated that "consent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this would constitute the crime of rape." *Id.*

69. North Carolina has two degrees of rape. A defendant is guilty of first degree rape if he engages in vaginal intercourse with another person by force and against the person's will under any of the following situations:

(a) While using or displaying a dangerous weapon.

(b) While inflicting serious personal injury on the victim or another.

(c) While aided and abetted by another person or persons.

N.C. GEN. STAT. § 14-27.2 (1986).

Second degree rape is defined as engaging in vaginal intercourse either (a) by force and against the will of another person or (b) with a person who is "mentally defective, mentally incapacitated or physically helpless." *Id.* § 14-27.3.

70. *Way*, 297 N.C. at 296, 254 S.E.2d at 761.

71. *Id.*

72. *Id.* at 296-97, 254 S.E.2d at 761-62.

Based upon an analysis of these two cases, the court in *People v. Vela*⁷³ held that a defendant who forced a woman to continue sexual intercourse against her will is not guilty of rape, but may be charged with an assault or battery. An equally important case dealing with post-penetration rape which was not addressed by the *Vela* court was *State v. Robinson*⁷⁴ which is discussed in the following section.

d. *Maine's Treatment of Post-Penetration Rape*

The Supreme Court of Maine affirmed a defendant's conviction of post-penetration rape in *State v. Robinson*.⁷⁵ As with the other cases, the facts of *Robinson* were in dispute. The victim testified that the defendant appeared at her door saying that he ran out of gasoline and needed to use her telephone. She allowed him to enter, but instead of using the phone, he joined her in the living room where she was watching a movie. The victim alleged the defendant then forced her to have sexual intercourse against her will. However, the defendant alleged that the victim consented to the intercourse although sometime during the act she said, "I guess I don't want to do this anymore."⁷⁶ The defendant alleged that he then dressed and left.⁷⁷

During deliberations, the jury asked the judge for instructions on the following question: "If two people begin consenting to an act, then one person says no and the other continues—is that rape?"⁷⁸ The judge replied:

If a couple consensually engages in sexual intercourse and one or the other changes his or her mind, and communicates the revocation or change of mind of the consent, and the other partner continues the sexual intercourse by compulsion . . . then it would be rape. The critical element

73. 172 Cal. App. 3d 237, 218 Cal. Rptr. 161 (1985).

74. 496 A.2d 1067 (1985). Although the court in *People v. Vela* examined other jurisdictions before reaching its decision, there is no mention of *State v. Robinson*. The *Vela* court was unable to examine the *Robinson* decision because the two cases were decided at essentially the same time. If the *Robinson* case were decided before *Vela*, however, it is likely the California court would have analyzed the Maine case before reaching its own decision.

75. *Id.*

76. *Id.* at 1069.

77. *Id.*

78. *Id.*

there is the continuation under compulsion.⁷⁹

After receiving the court's instructions, the jury convicted the defendant of class A rape and he appealed.⁸⁰

On appeal, the defendant asserted that an act of initially consensual sexual intercourse was not transformed into rape when a woman withdrew her consent after penetration. The defendant admitted, however, that if a man compels a woman to continue the sexual intercourse under these circumstances he may be convicted of simple or aggravated assault, but not rape. The appellate court disagreed with the defendant and held that a man who compelled a woman to continue sexual intercourse after she revoked her consent was guilty of rape.⁸¹

The court also disagreed with *State v. Way*.⁸² The *Robinson* court believed that *Way* would allow a woman's mere change of mind to transform an initially consensual sexual intercourse into rape.⁸³ The *Robinson* court emphasized that intercourse did not become rape when the victim changed her mind. The act turned into rape:

[I]f and when the prosecutrix thereafter submitted to defendant's sexual assault only because of physical force, threats of physical force or a combination thereof . . . [made her] unable to physically repel the [defendant] or . . . produce[d] in [her] a reasonable fear that death, serious bodily injury or kidnapping might be imminently inflicted upon [her].⁸⁴

In other words, the significant factor was continuation of sexual intercourse under compulsion. Therefore, if a defendant physically forced a woman against her will to continue intercourse with him after she revoked her original consent, he

79. *Robinson*, 496 A.2d 1067, 1068-69.

80. *Id.* Maine law formerly grouped crimes into classes for sentencing purposes. Under the 1983 criminal code, penalties were provided for each class (class A, B, C, D, and E) instead of each crime. ME. REV. STAT. ANN. tit. 17-A § 4 comment (1983).

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

82. 297 N.C. 293, 254 S.E.2d 760 (1979).

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

84. *Id.* A prosecutrix is a female who prosecutes another person for a crime in the name of the government and is used to describe the woman alleging the crime of rape. See BLACK'S LAW DICTIONARY 1099-1100 (5th ed. 1979). Courts now commonly use the terms complainant or victim. In addition, the court may use the woman's given name.

then became guilty of rape.⁸⁵ This situation can be contrasted with that found in *State v. Way* which would allow a mere change of the victim's mind to transform an initially consensual sexual intercourse into rape. Therefore, in *Way*, the defendant could be found guilty of rape even though the victim did not communicate her withdrawal of consent to the defendant.

Because of the lack of United States cases on the issue, it may be helpful to examine the treatment given to post-penetration rape in foreign jurisdictions. A New Zealand court recently decided a post-penetration rape case. As New Zealand law is based on English law (as is American law), New Zealand precedent is helpful in analyzing the issue of post-penetration rape, especially in light of the fact that there are so few American cases on the subject.

2. *New Zealand's Treatment of Post-penetration Rape*

A recent New Zealand case, *Kaitamaki v. The Queen*,⁸⁶ addressed an issue identical to that in *Vela*.⁸⁷ In *Kaitamaki*, the defendant broke into the victim's home. The fact that two acts of sexual intercourse occurred was not in dispute. The defendant argued that both acts were initially consensual, but that after the second act of penetration, he realized the woman no longer consented. However, the defendant did not cease having sexual intercourse with the woman after her withdrawal of consent.⁸⁸

The trial judge instructed the jury "that if, having realised she is not willing, he continues with the act of intercourse, it then became rape."⁸⁹ The defendant alleged that the instruction was an incorrect statement of the law and therefore appealed to the New Zealand Court of Appeal. The defendant argued that under the law of New Zealand, if penetration is initially consensual, a man cannot be guilty of rape if he continued the sexual intercourse after he realized the woman no

85. *Id.* at 1071.

86. 1985 App. Cas. 147 (1985).

87. The issue in *Kaitamaki*, as in *People v. Vela*, involved the question of whether a woman who initially consents to sexual intercourse can withdraw her consent after penetration.

88. *Kaitamaki*, 1985 App. Cas. at 151.

89. *Id.*

longer consented.⁹⁰

The New Zealand Court of Appeal based its affirmation of the trial court's decision on the construction of sections 127 and 128 of the Crimes Act.⁹¹ Section 127 defines sexual intercourse as "complete upon penetration."⁹² The relevant portions of section 128 defined rape as "the act of a male person having sexual intercourse with a woman or girl . . . [w]ithout her consent."⁹³ The defendant's only argument was that because rape is defined as penetration without consent, once penetration is complete the act of intercourse is finished. Therefore, the defendant contended that if intercourse is continued after consent is withdrawn, the defendant is not guilty of rape because the intercourse is complete upon penetration.⁹⁴

The court of appeal rejected the defendant's argument because the purpose of section 127 was to establish the minimum conduct required to prove sexual intercourse.⁹⁵ The court explained that the term "complete" did not mean being at an end as the defendant alleged, but meant coming into existence.⁹⁶ Therefore, the court concluded that sexual intercourse is a continuing act which ends with withdrawal by the male partner. Since section 128 defined rape as "having" intercourse without consent, if the defendant continued intercourse after the withdrawal of consent he was guilty of rape.⁹⁷ The defendant then appealed to the Privy Council⁹⁸ which affirmed the New Zealand Court of Appeal decision.⁹⁹

The above discussion addressed the problems of consent and penetration in a post-penetration rape case by focusing on relevant statutes and cases. A topic which also merits discussion, but involves evidentiary problems which are indirectly

90. *Id.*

91. The New Zealand Court of Appeal had the same problem as the *Vela* court in that there was little case law on point.

92. Crimes Act, § 127 (N.Z. Stat. 1961).

93. *Id.* § 128.

94. *Kaitamaki*, 1985 App. Cas. at 151.

95. *Id.*

96. *Id.*

97. *Id.* at 151-52.

98. The Privy Council serves as a court of ultimate appeal in certain cases. BLACK'S LAW DICTIONARY 1080 (5th ed. 1979).

99. *Kaitamaki*, 1985 App. Cas. at 153.

related to consent and penetration, is Rape Trauma Syndrome (RTS). The following section explores the relevance of RTS in a post-penetration rape.

3. *Proof Problems and the Use of Rape Trauma Syndrome*

One of the possible reasons for the dearth of post-penetration rape cases involves the problem of proof. In many rape cases the question of the defendant's guilt or innocence hinges upon whether the jury believes the defendant's version of the facts or the victim's. In other words, it is the defendant's word against the victim's. However, in forcible rape cases there is more likely to be evidence of physical trauma indicating that the sexual intercourse was not consensual.¹⁰⁰ In contrast, because a post-penetration rape situation begins consensually, there is a decreased likelihood of finding physical evidence which would indicate the sexual intercourse was not completely consensual. Therefore, it will be more difficult for a prosecutor to prove a post-penetration rape case than a forcible rape case. This problem may be one of the reasons so few post-penetration rape cases are prosecuted.

A possible solution to the proof problem in post-penetration rape cases would be the introduction of evidence of RTS to aid in the determination of whether the sexual intercourse was completely consensual. RTS is one of a group of psychiatric disorders collectively known as Post Traumatic Stress Disorder (PTSD).¹⁰¹ Other traumatic events including military combat, bombing and torture may also cause PTSD.¹⁰²

Women who experience RTS suffer from many of the same symptoms, including a reliving of the rape, an inability to maintain previously close relationships, and a general sense of nervousness known as the startle response.¹⁰³

100. Examples of evidence of physical trauma would include blood inside the vagina, scratches, cuts and bruises. *State v. Brodniak*, 221 Mont. 212, 718 P.2d 322 (1986).

101. *Cling, Rape Trauma Syndrome: Medical Evidence of Nonconsent*, 35 MED. TRIAL TECH. Q., 154, 157 (1989).

102. Note, *Expert Testimony that Rape Victim Suffered Post Traumatic Stress Disorder is Admissible to Rebut a Defense of Consent*, 16 BALTIMORE L. REV. 141, 142 (1986).

103. E.g., *Cling*, *supra* note 102 at 157.

Evidence of RTS would be helpful to the prosecution because in the typical post-penetration rape case the defense will argue that the sexual intercourse was completely consensual¹⁰⁴ and the prosecution will argue that although the intercourse was initially consensual, consent was withdrawn at some point thereafter and the victim was forced to continue the act against her will. Therefore, if the prosecution can show that the victim suffered from RTS after the incident, the jury will have one more piece of evidence to consider in determining which version of the facts to believe, the defendant's or the victim's. Unfortunately, under current California law RTS is not admissible to prove that a rape occurred and therefore would not be admissible to prove withdrawal of consent in a post-penetration rape situation.¹⁰⁵

III. ANALYSIS

A. Case Analysis

As previously indicated, the *Vela* court concluded that a defendant in a post-penetration rape case faces an assault or battery conviction, but not a rape conviction.¹⁰⁶

In reaching its conclusion the court engaged in deductive reasoning. The court began with two different factual situations. In the first factual situation a woman is forced to engage in sexual intercourse against her will. Because the intercourse lacked consent, the woman is not allowed to subsequently consent in order to "void" the rape.¹⁰⁷ The second situation is generally thought of as date rape. In a date rape case a woman may consent to various sexual acts prior to the sexual intercourse. If the woman withdraws her consent prior to penetration, however, the act becomes rape.¹⁰⁸ From this analysis the court concluded that the presence or absence of rape must be determined at penetration.¹⁰⁹ Therefore, in a date rape situation, the fact that the woman consented before penetra-

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

105. *People v. Bledsod*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

106. *People v. Vela*, 172 Cal. App. 3d 237, 243, 218 Cal. Rptr. 161, 165 (1985).

107. *Id.* at 242, 218 Cal. Rptr. at 164.

108. *Id.*

109. *Id.*

tion is irrelevant because consent was not present at penetration. After examining the above two situations, the court concluded "[i]t follows that if consent is given at the moment of penetration, the act of intercourse will be shielded from being a rape even if consent is later withdrawn during the act."¹¹⁰

The court used three different sources to reinforce its conclusion. First of all, the court looked to other states to examine their analysis in post-penetration rape situations. At the time *Vela* was decided, the court could only find two cases involving post-penetration rape, *Battle v. State*¹¹¹ and *State v. Way*.¹¹² As discussed *supra*, both cases held that a rape cannot occur if consent is present at the moment of penetration. The *Vela* court found these cases to be persuasive.

Next, the *Vela* court examined the California Penal Code and found that it also focused on the moment of penetration in determining whether consent was present. For example, the court stated that "[i]t is well settled that '[a]ny sexual penetration, however slight, is sufficient to complete the crime.'"¹¹³ From the language of this section, the court deduced that the legislature intended that the courts determine whether consent exists at the moment of penetration.¹¹⁴ However, the court did not reinforce this conclusion with any legislative history and therefore it is possible that this was not the real legislative intent. By enacting section 263, the legislature could have intended to clarify the minimum requirements for a charge of rape. For example, the legislature could have enacted the statute in response to cases such as *People v. Karsai*.¹¹⁵ In *Karsai*, the defendant appealed his conviction of rape because of his belief that he did not sufficiently penetrate his victim.¹¹⁶ The victim testified that the defendant forced his erect penis between her labia but did not penetrate her vagina.¹¹⁷ The court rejected the defendant's argument that he did not penetrate the victim sufficiently to be charged with rape and held

110. *Id.*

111. 287 Md. 675, 414 A.2d 1266 (1980).

112. 297 N.C. 293, 254 S.E.2d 760 (1979).

113. *Id.* (quoting CAL. PENAL CODE § 263 (West 1988)).

114. *Vela*, 172 Cal. App. 3d at 242, 218 Cal. Rptr. at 164.

115. 131 Cal. App. 3d 224, 182 Cal. Rptr. 406 (1982).

116. *Id.* at 232, 182 Cal. Rptr. at 411.

117. *Id.* at 232, 182 Cal. Rptr. at 410.

that adequate penetration had occurred.¹¹⁸ In response to cases with facts similar to *People v. Karsai*,¹¹⁹ the legislature could have intended to make a clear statement regarding the degree of penetration required for a rape conviction. Therefore, without an adequate examination of the legislative history behind section 263, the court should not have so easily reached its conclusion that the purpose behind the section was to focus the determination of whether consent exists at the moment of penetration.

Finally, the court noted that "the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood."¹²⁰ The court concluded that because the outrage to the victim is less in a post-penetration rape situation than in the forcible rape situation, a rape could not have occurred in the post-penetration rape situation:

If [the woman] withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood. It would seem, therefore, that the essential guilt of rape as stated in Penal Code section 263 is lacking in the withdrawn consent scenario.¹²¹

Although the court's conclusion is possible, it is not the only conclusion the court could have reached. Another possibility is that because post-penetration rape involves penetration, a rape has occurred. This possibility would better reflect the current California Penal Code. The penal code differentiates between sexual battery and rape.¹²² Sexual battery

118. *Id.*

119. *Id.*

120. *Vela*, 172 Cal. App. 3d at 243, 218 Cal. Rptr. at 164.

121. *Id.*

122. The definition of sexual battery is found in section 243.4 of the Penal Code. Sexual battery is defined as touching an intimate part (the sexual organs, anus, groin or buttocks of any person and the female's breasts) against a person's will when the person is unlawfully restrained. CAL. PENAL CODE § 243.4 (West 1988 & Supp. 1990). The Code clearly states that rape is a separate crime and is not to be included under sexual battery. *Id.* The different punishments for rape

means the touching of an intimate part of another against the other's will.¹²³ In contrast, the crime of rape requires penetration.¹²⁴ The code emphasizes that a crime involving penetration cannot be classified as a sexual battery but must be rape.¹²⁵ Therefore, because post-penetration rape involves penetration, classifying it as sexual battery instead of rape contradicts the express language of the penal code.

The *Robinson* court would also find fault with the *Vela* court's conclusion that consent must be absent at the moment of penetration to transform the sexual intercourse into rape. The defendant in *Robinson* alleged an argument similar to the one presented in *Vela*. The defendant contended that when a woman consents to penetration, her revocation of consent does not change the continued sexual intercourse into rape.¹²⁶ The court rejected the defendant's argument.¹²⁷ The court felt that if it accepted the defendant's argument, that a rape occurs only when the defendant penetrates the victim by compulsion, the decision of whether a rape occurred would depend on whether the woman managed to dislodge the defendant's penis.¹²⁸ In other words, if a woman initially consents to sexual intercourse and later withdraws her consent two situations may arise. In the first situation, the defendant forces the victim to continue the intercourse against her will. Under the defendant's argument, no rape occurred. In the second situation, the woman revokes her consent and the defendant forces her to continue. However, the victim manages to dislodge the defendant's penis. In this second situation, if the defendant penetrates the victim again without her consent he will be guilty of rape. The different conclusions reached in the above two similar situations created an injustice which the *Robinson* court found no logical reason to tolerate.¹²⁹ To

and sexual battery reinforce this. The punishment for sexual battery is either imprisonment in the county jail for not more than one year, or for two, three or four years in the state prison. *Id.* § 243.4(a). The punishment for rape is imprisonment in the state prison for three, six or eight years. *Id.* § 264.

123. *Id.* § 243.4.

124. *See id.* § 263.

125. *Id.* § 243.4.

126. *State v. Robinson*, 496 A.2d 1067, 1069 (1985).

127. *Id.*

128. *Id.* at 1071.

129. *See id.*

avoid perpetuating the injustice which would occur if the above two situations were treated differently, the court affirmed the defendant's rape conviction.

The *Vela* court also appeared concerned about protecting future defendants from falsified charges of post-penetration rape. The court in *State v. Way* also expressed similar reservations.¹³⁰ In essence, all three courts believed that a defendant would be subject to conviction in post-penetration rape cases merely because a woman changed her mind in midact. The *Robinson* court responded to this concern. The *Robinson* court argued that even in a post-penetration rape case the prosecution must prove all the elements of rape.¹³¹ The court emphasized that the woman's revocation of consent did not transform the sexual intercourse into rape. The act became rape when the defendant forced the woman to continue the sexual intercourse against her will.¹³² Because of this, the prosecution's burden in a post-penetration rape case is identical to that in forcible rape cases. In fact, the prosecutor in a post-penetration rape case has the added burden of the victim's initial consent. The prosecution must contend with the fact that the average juror will in all likelihood have less sympathy for a post-penetration rape victim than a forcible rape victim.

Another argument the *Robinson* court did not address which would assuage the *Vela* court's concerns about the possibility of victims bringing false charges of post-penetration rape against defendants involves the defendant's possible defenses. A defendant may raise as a defense to any rape charge that he reasonably and in good faith believed the victim consented.¹³³ The strength of this defense is indicated in *People v. Hampton*.¹³⁴ In *Hampton*, the court held that even if a rape victim did not consent to sexual intercourse, if the defendant reasonably and in good faith believed she did consent a jury cannot convict him of rape.¹³⁵ This holding places an increased burden on the prosecution. In addition to proving the

130. 297 N.C. 293, 296, 254 S.E.2d 760, 761 (1979).

131. See *Robinson*, 496 A.2d 1067, 1070 (1985).

132. *Id.*

133. See *supra* note 34 and accompanying text.

134. 118 Cal. App. 3d 324, 173 Cal. Rptr. 268 (1981).

135. *Id.* at 329-30, 173 Cal. Rptr. at 271.

victim did not consent, the prosecution must convince the jury that the defendant could not have reasonably and in good faith believed that the victim consented.

B. *Rape Trauma Syndrome*

As previously discussed, the use of Rape Trauma Syndrome (RTS) in post-penetration rape cases may be useful in determining whether the defendant's or victim's version of the events is closer to the truth.

At the present time, RTS is not admissible to prove that a rape occurred,¹³⁶ but may be admissible under other circumstances. For example, prosecutors may use RTS to dispel myths about rape victims. Therefore, if the defendant alleges that the victim's conduct after the rape is inconsistent with the "average" rape victim, the prosecution can use RTS to show the jury that such conduct is not atypical in a rape victim. *Delia v. Torres*¹³⁷ illustrates the use of RTS to dispel myths about rape. In *Torres*, the defendant alleged that the victim delayed reporting the rape which indicated that no rape had in fact occurred.¹³⁸ The prosecution used RTS to show that victims often delay reporting rapes. The court allowed the use of RTS because the prosecution did not offer it to prove a rape occurred, but to clarify the victim's seemingly inconsistent behavior.

Because the courts do allow evidence of RTS under certain circumstances, it may be possible to allow its use in post-penetration rape cases because of the special circumstances involved concerning the burden of proof. If evidence of RTS were allowed in post-penetration rape cases the jury would have more evidence to consider in determining whether to believe the defendant's version of the facts or the victim's, which as mentioned previously, is usually the most debated issue.

It may be helpful to illustrate the legal implications of the *Vela* decision by applying its holding to three hypothetical factual situations.

136. *People v. Bledsoe*, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

137. 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (1982).

138. *Id.* at 478, 184 Cal. Rptr. at 792.

1. *Case 1*

The first case is the most extreme of the three. A man and a woman are on their first date. When they return home they decide to have sexual intercourse. Initially the woman consents. However, in the middle of the act the man becomes violent and begins to pull her hair and choke her.¹³⁹ She withdraws her consent but he forces her to continue the act against her will.

Under *Vela*, there would be no rape in this case because the consent was withdrawn after penetration. However, the man may be guilty of assault or battery. This case illustrates the injustice the *Vela* holding will cause. Although the woman initially consented to the sexual intercourse, she was forced to continue against her will after revoking her consent. Because the sexual act involves penetration, the defendant should face some form of rape charge instead of a charge of sexual battery. The *Vela* decision would result in a holding that no rape had taken place under these circumstances and thus the defendant would only be guilty of a sexual battery.

2. *Case 2*

In contrast to the first case, consider a case in which a man and woman engage in sexual intercourse and the woman simply changes her mind.¹⁴⁰ She then expresses her desire to stop but he protests and she acquiesces, without saying anything further.

As in case one, the *Vela* court would not convict the man of rape because the intercourse was initially consensual. This decision is not unjust. Although the woman withdrew her consent and communicated this to the defendant, he did not force her to continue against her will. She merely changed her mind. As emphasized in *Robinson*, a woman's mere change of mind will not transform an initially consensual sexual intercourse into rape because the elements of rape are not present. In this case it would be unfair to convict the defendant of

139. See *State v. Brodniak*, 221 Mont. 212, 216, 718 P.2d 322, 325 (1986).

140. Her reason for this change of mind is irrelevant. For example, she may feel pangs of guilt if she is married to someone else, she may be late for an appointment or the intercourse may be painful.

post-penetration rape because he did not forcibly compel the woman to continue the sexual intercourse against her will.

3. *Case 3*

Finally, consider an intermediate case. The facts are similar to those in the first two cases. The woman initially consents, however, sometime after penetration she withdraws her consent, for any reason, and clearly communicates her desire to her partner. Her partner does not comply and continues. She again relates her wish to end the sexual intercourse. At this point, her partner calls her some names and tells her she had better submit "or else." The woman, who has never before witnessed this side of her partner, becomes fearful and submits in the hope that he will not harm her.

Again, as in cases one and two, *Vela* would not classify this as rape. As in the first case, this result is unjust. In this case, the victim clearly communicated her withdrawal of consent to the defendant and, therefore, the defendant cannot claim a defense of consent. Therefore, because the elements of rape were present after the victim revoked her consent, the court should find the defendant guilty of some form of rape.

The above hypotheticals illustrate the injustices possible with the application of the *Vela* rule. To rectify the problems presented by the *Vela* decision, an amendment to the California Penal Code is needed. An amendment is preferable to a reversal of the *Vela* decision because the legislative process is more conducive to input from the community. This comment proposes the following amendment which would punish post-penetration rape as second degree rape.

IV. PROPOSAL

A. *Proposed Statutes Pertaining to the Definition and Punishment of Post-penetration Rape*

Because a defendant who is guilty of post-penetration rape deserves a harsher sentence than that given a defendant convicted of an assault or battery, this comment proposes a modification to the California Penal Code. The proposed statute creates a section defining post-penetration rape. In addition, the proposed statute alters section 264 of the California Penal Code which provides punishment for rape and unlawful sexual

intercourse. Section 264 currently provides the punishment for rape, rape of spouse, and unlawful sexual intercourse. In essence, the current statute classifies sexual offenses into three degrees by providing different penalties for rape, rape of spouse, and unlawful sexual intercourse. The proposed statute clarifies the concept of degrees of rape by providing punishment for first and second degree rape in addition to punishment for unlawful sexual intercourse. The proposed statute classifies rape as defined in section 261 as first degree rape and post-penetration rape and rape of spouse as second degree rape with a correspondingly lesser punishment than first degree rape. Punishment for unlawful sexual intercourse is not classified in terms of degrees but is included in the section providing punishment for first and second degree rape. A proposed statute follows:

262.5. Post-penetration rape

A person is guilty of post-penetration rape if the person forces another to continue an initially consensual act of sexual intercourse against the other's will by threats of immediate or future harm against the victim or another.

262.6 Post-penetration rape—withdrawal of consent

(a) In a rape as defined in section 262.5, the person withdrawing consent must clearly communicate his or her withdrawal of consent. Clear communication of a withdrawal of consent means withdrawal of consent in such a way that a reasonable person would be aware that consent has been withdrawn.

(b) It is a defense to post-penetration rape that a person reasonably and in good faith believed that the other person did not withdraw their consent.

264. Punishment for rape and unlawful sexual intercourse

(A) First degree rape

Rape as defined in section 261 is first degree rape and is punishable by imprisonment in the state prison for three, six, or eight years.

(B) Second degree rape

Rape as defined in sections 262 and 262.5 is second degree rape and is punishable by either imprisonment in the county jail for not more than one year or in the state prison for three, four or five years.

(C) Unlawful sexual intercourse

Unlawful sexual intercourse as defined in section 261.5 is punishable by imprisonment in the county jail or the state

prison for a term not to exceed one year.

B. *Proposed Statute Pertaining to Rape Trauma Syndrome*

In addition to enacting a statute giving the definition and punishment for post-penetration rape, a statute is needed to allow an exception for the use of Rape Trauma Syndrome as evidence. The proposed statute allows RTS to be used in case of post-penetration rape to give the jury one more piece of evidence to aid in its determination of whether the sexual intercourse was completely consensual. Notwithstanding the use of RTS, the prosecution must still prove that after consent was withdrawn by the victim and communicated to the defendant, the defendant committed all of the elements required to sustain a charge of rape. A proposed statute follows:

There shall be an exception to the rule established in *People v. Bledsoe*, which prohibits the use of Rape Trauma Syndrome, to prove that a rape occurred in cases involving post-penetration rape. Notwithstanding this exception, to convict a defendant of post-penetration rape, the prosecution must prove beyond a reasonable doubt that the victim withdrew her initial consent after penetration, communicated her withdrawal to the defendant and the defendant forced the victim to continue the sexual intercourse with force and against her will.

In order to understand the differences between the current law and the proposed statute, it may be helpful to apply the proposed statute to the three hypotheticals discussed above.

1. *Case 1*

Case one involved a woman who withdrew her consent in midact when her partner became violent. Although current law did not find a rape in this situation because the woman consented at the moment of penetration, the defendant could be charged with post-penetration rape under the proposed statute. The woman clearly communicated her withdrawal of consent to the man. However, he continued the sexual intercourse with force and against her will. Under the proposed statute the man is guilty of post-penetration rape.

2. Case 2

Case two involved a woman who did not clearly communicate her withdrawal of consent to her partner. The treatment of this case under the proposed statute is identical to the treatment it would receive under the current law. The proposed statute would not find a rape under these circumstances because although the woman withdrew her consent she was not forced against her will to continue the sexual intercourse. In other words, the elements of rape were not present after the woman communicated her initial revocation of consent. The woman merely changed her mind, communicated that fact to her partner and then acquiesced when her partner began to protest. In this case it would be unfair to convict the woman's partner of post-penetration rape because he did not use compulsion to force her to continue the sexual intercourse. This lack of compulsion differentiates case one from case two.

3. Case 3

The facts of case three were intermediate to cases one and two. Case three involved a situation where the woman clearly communicated her withdrawal of consent and was forced by the defendant to continue the sexual intercourse. The proposed statute would result in a decision different than that reached under the current law. The current law did not find a rape in this situation. The proposed statute would result in defendant being charged with post-penetration rape because the woman clearly communicated her withdrawal of consent to her partner.

V. CONCLUSION

The purpose of this comment was to propose a statutory alternative to the decision the court reached in *People v. Vela*.¹⁴¹ Although the law of rape has advanced, the *Vela* court's refusal to recognize post-penetration rape as rape illustrates that it has not come far enough.

The California Penal Code specifically states that "the guilt of the crime of rape is the outrage to the person and the feel-

141. 172 Cal. App. 3d 237, 218 Cal. Rptr. 161 (1985).

ings of the victim."¹⁴² This focus was overlooked in the *Vela* decision. By holding that post-penetration rape is not rape but merely an assault or battery, the *Vela* court counteracts the purpose of focusing on the outrage to the feelings of the victim in a rape case. The proposed statute attempts to rectify the *Vela* decision by punishing post-penetration rape as rape and not as an assault or battery. Furthermore, this comment also recommended allowing the use of Rape Trauma Syndrome as evidence in post-penetration rape cases in order to give the jury an additional piece of evidence for purposes of determining whether to believe the defendant or the victim.

Amy McLellan

142. CAL. PENAL CODE § 263 (West 1988).