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Paving the Way for Recognizing Postpenetration Rape Through the Mistake of Fact Defense

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PAVING THE WAY FOR RECOGNIZING POSTPENETRATION RAPE THROUGH THE MISTAKE OF FACT DEFENSE

Abstract: On February 13, 2019, the Massachusetts Supreme Judicial Court in *Commonwealth v. Sherman* introduced a communication element in rape cases involving withdrawn consent. The prosecutor must prove that the victim communicated the revocation of consent such that a reasonable defendant would understand its withdrawal. In doing so, the court invoked a mistake of fact defense with regard to consent, which Massachusetts historically did not apply in its rape jurisprudence. This Comment notes that Massachusetts is unique in recognizing postpenetration rape as a legal possibility. This Comment compares *Sherman* to the Supreme Judicial Court's decision in 2008 in *Commonwealth v. Blache.* In *Blache*, the court made the mistake of fact defense available to the defendant when the victim was incapacitated and thus could not consent. By comparing *Sherman* to *Blache*, this Comment further argues that the mistake of fact defense in cases of postpenetration rape does not expand Massachusetts' principle that the mistake of fact defense should not apply in most rape cases.

INTRODUCTION

Rape cases are notoriously murky and embroiled with emotion.[1] They become even murkier in cases of postpenetration rape, which present fact patterns in which a purported victim initially consented to sexual activity but re-

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Thank you to Professor R. Michael Cassidy at Boston College Law School for his guidance throughout the writing of this Comment.

[1] *See* Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean?*, 117 HARV. L. REV. 2341, 2341 (2004) [hereinafter "*What Does "Yes" Mean?*"] (explaining how issues of consent are especially confusing in cases of revoked consent); Max Ehrenfreund, *The Scientific Research Shows Reports of Rape Are Often Murky, but Rarely False*, WASH. POST (Dec. 11, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/11/the-scientific-research-shows-reports-of-rape-are-often-murky-but-rarely-false/?noredirect=on [https://perma.cc/XK2R-ERQX] (remarking on the factual inconsistencies of an infamous rape case and exploring how the trauma of rape can affect memory); Vivian Wang, *Yale Rape Verdict Shows How 'Yes Means Yes' Can Be Murkier in Court*, N.Y. TIMES (Mar. 8, 2018), https://www.nytimes.com/2018/03/08/nyregion/yale-rape-verdict-consent-not-guilty-jurors.html [https://perma.cc/DXM6-4YUX] (noting the gap in discourse about rape on college campuses as compared to in courtrooms can lead to different understanding of facts). Massachusetts defines rape as sexual intercourse by means of force and without the victim's consent. Commonwealth v. Lopez, 745 N.E.2d 961, 965 (Mass. 2001); *see infra* notes 16–19 and accompanying text. Although postpenetration rape can also be written as post-penetration rape, this Comment will refer to postpenetration without the hyphen to align with the way the Supreme Judicial Court (SJC) of Massachusetts wrote it in *Commonwealth v. Sherman*. 116 N.E.3d 597, 605 (Mass. 2019); *see also infra* note 13 (explaining the nomenclature for a person subject to rape as victim versus survivor).

voked consent after penetration.[2] Since 1979, when North Carolina addressed the first postpenetration rape case, fewer than ten states have recognized postpenetration rape despite increasing emphasis on the victim's consent or lack thereof.[3] In 2019, in *Commonwealth v. Sherman*, the Massachusetts Supreme Judicial Court (SJC) cemented Massachusetts within the minority of jurisdictions that explicitly recognize victims' ability to withdraw consent and seek criminal prosecution if the defendant does not cease upon such withdrawal.[4] Seeking to delineate when consensual sex transforms into postpenetration rape, the SJC in *Sherman* imposed a requirement for the prosecution to prove that the victim communicate the withdrawal of consent such that a reasonable person would know continued intercourse would be nonconsensual.[5] This element invoked the mistake of fact defense[6] regarding consent in rape cases, which Massachusetts previously did not allow except for in cases where the victim was incapable of consenting.[7] The SJC made the mistake of fact defense avail-

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[2] *See* Amanda O. Davis, Comment, *Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law*, 34 STETSON L. REV. 729, 732 (2005) (explaining how testimonies from the victim and defendant tend to diverge in cases of withdrawn consent); Tiffany Bohn, Comment, *Yes, Then No, Means No: Current Issues, Trends, and Problems in Post-Penetration Rape*, 25 N. ILL. U. L. REV. 151, 164 (2004) (citing juror confusion about consent as the reason state legislatures should define postpenetration rape).

[3] Sarah O. Parker, *No Means No . . . Sometimes; Developments in Postpenetration Rape Law and the Need for Legislative Action*, 78 BROOK. L. REV. 1067, 1068 n.13 (2013); *see* Davis, *supra* note 2, at 744 n.125 (citing Alaska, California, Connecticut, Maine, and Kansas as states that had explicitly addressed postpenetration rape). Prior to rape law reform beginning in the 1970s, courts required the victim to exercise the utmost resistance, resisting until "her dying breath," during the sexual encounter to establish a rape occurred. Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 212 (2017). By separating the elements of force and non-consent, victims who surrendered were not considered raped unless deadly abuse occurred. *Id.* Feminist criticism of these dynamics gave rise to reform efforts, including the elimination of the force requirement in some jurisdictions. *Id.* at 213; *see infra* notes 16–19 and accompanying text (defining rape).

[4] *Sherman*, 116 N.E.3d at 605.

[5] *Id.* at 606. Postpenetration rape occurs when the parties consent to sex initially, but during the intercourse one of the parties withdraws consent, yet the other party forces the continuation of sex against the revoking party's will. Davis, *supra* note 2, at 729–30; *see infra* note 16 (defining consent).

[6] *Mistake-of-Fact Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019). The mistake of fact defense allows the defendant to claim that an error of fact nullifies the intent required for a guilty verdict. *Id.*

[7] *Sherman*, 116 N.E.3d at 605. In *Sherman*, the SJC considered the trial judge's response to a question submitted by the jury regarding whether sex constitutes rape if it began consensually and then the victim revoked consent. *Id.* at 603. This evaluation led the SJC to hold that the prosecution must prove "that the victim reasonably communicate[d] to the defendant his or her withdrawal of consent" as an element in postpenetration rape. *Id.* at 605. The mistake of fact defense accompanied this additional burden of proof because the jury must enter into the state of mind of a reasonable defendant to determine whether "a reasonable person would have known that consent had been withdrawn." *Id.* at 606. Prior to *Sherman*, the mistake of fact defense was only available to defendants in cases of rape where the victim did not have the capacity to consent. Commonwealth v. Blache, 880 N.E.2d 736, 744 (Mass. 2008). In 2008, in *Commonwealth v. Blache*, the SJC explained that the prosecution must prove that the defendant knew of the victim's incapacity and consequently afforded the

able to defendants in cases where the victim is incapable of consenting in 2008 in *Commonwealth v. Blache*.[8] The narrow circumstances in which the mistake of fact defense applies combined with the SJC's recognition of postpenetration rape in Massachusetts aligns with reformers' calls for greater emphasis on consent.[9]

Part I of this Comment gives an overview of the elements the prosecution must prove to establish rape in Massachusetts and proceeds to highlight the facts in *Sherman*.[10] Part II examines and discusses Massachusetts' rape jurisprudence compared to other states.[11] Finally, Part III argues that the similarity between *Sherman* and *Blache* shows that the invocation of the mistake of fact defense in *Sherman* does not diminish the defense's narrow application in Massachusetts' rape jurisprudence.[12]

I. THE ELEMENTS OF RAPE AND THE MISTAKE OF FACT DEFENSE IN MASSACHUSETTS

In 2019, the SJC's decision in *Commonwealth v. Sherman* reflected enduring emphasis on the nuances of consent in the evolution of rape law.[13] Sec-

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defendant the opportunity to argue that he made a reasonable mistake as to the victim's consent as a defense. *Id.*

[8] *Blache*, 880 N.E.2d at 744.

[9] *See* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1030 (2008) (showing that reformers seek to diminish the incidences of rape by facilitating conviction of individuals guilty of rape and easing the victim's full participation in subsequent court proceedings); *see also* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 608 (2009) (advocating for the law to reflect women's capability of expressing their desires and choices); Dana Vetterhoffer, Comment, *No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape*, 49 ST. LOUIS U. L.J. 1229, 1231 (2005) (calling for reform in postpenetration rape jurisprudence because it constitutes a "catch-all for sexism in the world of rape").

[10] *See infra* notes 13–62 and accompanying text.

[11] *See infra* notes 63–93 and accompanying text.

[12] *See infra* notes 94–114 and accompanying text.

[13] *See generally Sherman*, 116 N.E.3d at 605 (recognizing the right to withdraw consent during a sexual encounter and requiring the state to prove that the victim communicated withdrawn consent). Although various legal terms may describe unlawful sexual contact, this Comment will use "rape." *See Key Terms and Phrases*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/articles/key-terms-and-phrases [https://perma.cc/UX6A-XQM7] (articulating various terms for unlawful sexual contact). This Comment will identify the individual alleging rape as the "victim" to align with the courts' nomenclature; however, it is worth noting that it is also appropriate to call someone who has experienced sexual violence a "survivor" instead. *Sherman*, 116 N.E.3d at 599; *Key Terms & Phrases*, *supra*.

Capturing the nuances of consent is important for sexual autonomy. *See* Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 5 (2015) (explaining how an emphasis on sexual autonomy elevates the importance of consent); Amanda Foreman, *The Struggle Before #MeToo*, WALL STREET J. (Aug. 23, 2018), https://www.wsj.com/articles/the-struggle-before-metoo-1535038174 [https://perma.cc/D7AM-ZAUM] (noting that the message of the #MeToo digital social movement is that women encounter too many barriers when seeking justice after a sexual assault).

tion A of this Part discusses the elements required to establish rape in Massachusetts and how the withdrawal of consent during intercourse fits into those elements.[14] Section B of this Part examines the factual and procedural history of *Sherman* and details its creation of a communication element.[15]

A. The Elements of Rape and Withdrawal of Consent During Intercourse

Massachusetts has long defined rape as sexual intercourse by means of force and without the victim's consent.[16] Breaking this definition into elements, the prosecution must prove: (1) sex, (2) force or threat of force, and (3) lack of consent.[17] Massachusetts defines force broadly, including both physical force and nonphysical constructive force, such as fear and threats of physical harm.[18] When the victim does not have the capacity to consent, the force necessary for penetration is sufficient to satisfy the force element.[19]

The consent element inquiry evaluates consent in fact—not whether the perpetrator understood consent.[20] The determination of consent in fact only asks whether the victim was willing to engage in sexual intercourse.[21] By removing subjectivity of what the defendant understood from the consent element, Massachusetts ensured that a victim does not need to resist with force to

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[14] *See infra* notes 16–36 and accompanying text.

[15] *See infra* notes 37–62 and accompanying text.

[16] MASS. GEN. LAWS ch. 265, § 22 (2017); *Lopez*, 745 N.E.2d at 965 ("[P]rove beyond a reasonable doubt that the defendant committed (1) sexual intercourse (2) by force or threat of force and against the will of the victim."); *see also Sherman*, 116 N.E.3d at 603 (citing *Lopez*, 745 N.E.2d at 965, to define the elements the prosecution must satisfy). Massachusetts describes the sex element of rape to include sexual intercourse or unnatural sexual intercourse. MASS. GEN. LAWS ch. 265, § 22. Intercourse tends to include penetration. *See infra* note 19 (defining penetration). Consent means the voluntary acceptance or agreement to what another suggests or wants. *Consent*, BLACK'S LAW DICTIONARY, *supra* note 6.

[17] *Lopez*, 745 N.E.2d at 965; *see also Sherman*, 116 N.E.3d at 603–04 (explaining the elements of rape).

[18] *Lopez,* 745 N.E.2d at 965; *see also Sherman*, 116 N.E.3d at 603–04 (defining force inclusively).

[19] *Blache*, 880 N.E.2d at 740 (noting that the prosecution must only prove the amount of force required for penetration). In Massachusetts, penetration means the insertion, no matter the extent, of any object or body part into any bodily orifice. Commonwealth v. Enimpah, 966 N.E.2d 840, 843 (Mass. App. Ct. 2012); *Massachusetts Rape Laws*, FINDLAW (June 20, 2016), https://statelaws.findlaw.com/massachusetts-law/massachusetts-rape-laws.html [https://perma.cc/3CHU-UFSH].

[20] *Lopez*, 745 N.E.2d at 965. The Court also emphasized that not requiring the prosecution to prove knowledge with regard to the consent element does not make rape a strict liability crime. *See id.* at 966 (noting that in Massachusetts, rape requires general intent). The term perpetrator is a moniker for a person who acts illegally or commits a crime. *Perpetrator*, BLACK'S LAW DICTIONARY, *supra* note 6.

[21] *See* Commonwealth v. Burke, 105 Mass. 376, 377 (1870) (demonstrating Massachusetts' longstanding commitment to evaluating consent factually rather than relying on the defendant's subjective understanding).

communicate unwillingness to consent.[22] The factual nature of the consent inquiry minimizes the availability of a mistake of fact defense to defendants in most rape scenarios.[23]

The mistake of fact defense allows the defendant to argue that he or she made a reasonable mistake in thinking that the victim had consented.[24] In the context of rape cases, the SJC made the mistake of fact defense available to defendants for the first time in 2008 in *Commonwealth v. Blache*.[25] The court explained that the defendant's subjective knowledge is only relevant in cases where the victim did not have the capacity to consent.[26] This interpretation of consent falls within the minority of jurisdictions.[27] Such an emphasis on the victim's state of mind without inquiry into the defendant's puts Massachusetts at the forefront of implementing reform efforts.[28] Many of these reform efforts aim to remove obstacles for victims seeking justice for their sexual trauma.[29]

Although it emphasized the limited application of the mistake of fact defense in Massachusetts' rape jurisprudence, the SJC in 2001 in *Lopez* left open

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[22] *Lopez*, 745 N.E.2d at 967; *see also* Commonwealth v. Sherry, 437 N.E.2d 224, 228 (Mass. 1982) (asserting that "any resistance is enough" to convey lack of consent). When relying on a consent in fact analysis, the extent of the victim's resistance became irrelevant. *Lopez*, 745 N.E.2d at 967. The resistance would traditionally indicate that the perpetrator understood the lack of consent, which does not matter when evaluating the consent through a consent in fact analysis. *Id.*

[23] *Lopez*, 745 N.E.2d at 967. The court emphasized that the mistake of fact defense does not align with Massachusetts' rape jurisprudence because the reasonable belief of the defendant does not inform the factual inquiry as to whether the victim consented. *Id.* The mistake of fact defense is available in Massachusetts in cases where the evidence suggests that the victim did not have the capacity to consent. *Blache*, 880 N.E.2d at 745. *Sherman* makes a mistake of fact defense also available to defendants in cases involving the withdrawal of consent after penetration. 116 N.E.3d at 605.

[24] *Blache*, 880 N.E.2d at 745.

[25] *Id.*

[26] *Id.* at 744.

[27] *Lopez*, 745 N.E.2d at 967 (listing Alaska, Colorado, Oregon, New Jersey, California, Texas, and Missouri as examples of the majority of jurisdictions that recognize mistake of fact with regard to consent generally); *see* COLO. REV. STAT. § 18-3-402(1) (2016) (requiring that the actor knowingly penetrate the victim sexually to constitute rape); OR. REV. STAT. § 161.115(2) (2017) (requiring a "culpable mental state," thus implicating a knowledge requirement); *In re* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992) (placing the defendant's state of mind at issue when evaluating whether the defendant reasonably believed the victim gave affirmative permission); Reynolds v. State, 664 P.2d 621, 625 (Alaska 1983) (explaining that the state must prove the defendant acted recklessly with regard to consent and providing protection for defendants where the conditions surrounding consent are ambiguous); People v. Mayberry, 542 P.2d 1337, 1347 (Cal. 1975) (holding that the lower court's refusal to give the jury mistake of fact instructions was reversible error).

[28] *See supra* note 9 and accompanying text (describing efforts to emphasize the victim's consent instead of the defendant's understanding of the victim's consent as rape jurisprudence reform).

[29] *See* Matthew R. Lyon, *No Means No: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape*, 95 J. CRIM. L. & CRIMINOLOGY 277, 291 (2004) (explaining that the majority of states have not addressed withdrawn consent); Foreman, *supra* note 13 (explaining the outcry before and throughout the #MeToo movement for better recourse for sexual violence).

the possibility for the defense to be available in unique rape scenarios.[30] The SJC addressed this possibility in 2008 in *Blache*, allowing the mistake of fact defense for defendants when the victim is incapable of consenting due to intoxication.[31] The opening identified in *Lopez* was necessary for the court's holding in *Commonwealth v. Sherman*, which addressed a jury question regarding the withdrawal of consent after the sexual intercourse began.[32] The Commonwealth already empowered victims who withdrew consent with the ability to seek recourse for sexual trauma resulting from an encounter where the victim initially consented and then revoked consent during intercourse.[33] Before the decision in *Sherman*, Massachusetts courts instructed juries to evaluate cases where the evidence presented an issue of withdrawn consent in the same manner as in a rape case without withdrawn consent.[34] After *Sherman*, to establish postpenetration rape, the prosecution must prove that the victim communicated the withdrawn consent such that a reasonable person would understand.[35] Although this new element reintroduced the mistake of fact defense in Massachusetts' rape jurisprudence, the court continued to only apply the mistake of fact defense narrowly in rape cases.[36]

B. Sherman*'s Factual and Procedural History*

The SJC further enhanced its jurisprudence on rape cases involving withdrawn consent in *Sherman*.[37] The victim and defendant, Richard Sherman, met

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[30] *Lopez*, 745 N.E.2d at 969.

[31] *Blache*, 880 N.E.2d at 744. The court identified a circumstance where the mistake of fact defense is available to defendants in *Commonwealth v. Blache*. *See id.* (explaining that although Massachusetts does not usually allow the mistake of fact defense in rape cases, where the victim does not have the capacity to consent, the court should require the prosecution to prove the defendant knew of the victim's incapacity). This analysis came after the court established that the prosecution must also show that the complainant was so intoxicated that she was "wholly insensible" and thus could not consent. *Id.* at 740. After proving intoxication to this extent, the prosecution must then only prove the amount of force necessary for penetration. *Id.*

[32] *Sherman*, 116 N.E.3d at 604; *see infra* note 47 (discussing details of the jury question); *see also Lopez*, 745 N.E.2d at 969 (noting that the court may consider the mistake of fact defense in some circumstances); *supra* note 31 and accompanying text (providing an example of a circumstance where the mistake of fact defense applies).

[33] *Enimpah*, 966 N.E.2d at 843–844.

[34] *See Sherman*, 116 N.E.3d at 605 (explaining the need for clarifying the line between consensual sex and postpenetration rape).

[35] *Id.* at 606.

[36] *Id.*; *see* Lyon, *supra* note 29, at 280 (explaining that progressive rape jurisprudence emphasizes consent). This Comment defines progressive rape jurisprudence to mean jurisprudence that prioritizes the victim's nonconsent rather than the defendant's force or state of mind. *See* Lyon, *supra* note 29, at 280. Massachusetts maintained its progressive position by limiting the mistake of fact defense to a narrow application. *See Lopez*, 745 N.E.2d at 967 (noting the incompatibility of the mistake of fact defense with the Commonwealth's rape jurisprudence).

[37] *See Sherman*, 116 N.E.3d at 605 (adding a new element for the prosecution to prove, namely, that the victim communicated the withdrawal of consent such that a reasonable person would have

on October 13, 2014 at a pub through a mutual acquaintance.[38] The defendant and victim did not know each other prior to that night.[39] When the defendant asked the victim to "hang out" after the pub closed, the victim accepted.[40] Throughout their conversations the victim reiterated that she identified as homosexual in response to the defendant's implicit desire to engage in sex.[41] The parties exchanged text messages and eventually agreed for the victim to meet the defendant at his home shortly before 2:00 A.M.[42] After arriving at his home, the parties' testimonies drastically diverged.[43] The defendant asserted that he and the victim engaged in consensual sex and the victim testified that she never gave consent to any sexual contact and suffered violent sexual trauma.[44]

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understood the sexual intercourse was no longer consensual). The new element paralleled decisions from other state supreme courts. *See In re* John Z., 60 P.3d 183, 186 (Cal. 2003) (noting that a victim's expression of objection during initially consensual intercourse combined with the defendant's forced continuation disregarding the objection constitutes forcible rape). *In re John Z.* overruled *People v. Vela*, which held that the trial court prejudiced the defendant by answering a jury question asking whether continued penetration after the victim withdraws consent constitutes rape affirmatively rather than in the negative. *In re John Z.*, 60 P.3d at 186; People v. Vela, 218 Cal. Rptr. 161 (Ct. App. 1985); *see also* State v. Robinson, 496 A.2d 1067, 1071 (Me. 1985) (affirming a conviction under the trial judge's instruction that deemed compelled sexual intercourse after one party communicated its revocation of consent as rape).

[38] *Sherman*, N.E.3d at 599. Both parties consumed alcohol, but the capacity to consent was not at issue. *See id.* at 599, 602 (noting the victim consumed two drinks at the pub, where she met the defendant, and the defendant consumed up to four and a half beers throughout the night).

[39] *Id.* at 599.

[40] *Id.*

[41] *Id.* at 599–600. The victim reminded the defendant of her homosexuality after he asked her to get condoms. *Id.*

[42] *Id.* at 600. The victim again reiterated that she did not wish to engage in a sexual relationship with the defendant by informing him she was on her period in the text messages. *Id.*

[43] *Id.* at 599, 600–02.

[44] Brief for Defendant at 2, *Sherman*, 116 N.E.3d 597 (No. SJC-12530). The victim testified that after arriving at the defendant's apartment, the defendant invited her to his bedroom to show her a music record. *Sherman*, 116 N.E.3d at 600. After sitting on the foot of the defendant's bed to look at the record, the defendant sat behind the victim and tried to kiss her cheek. *Id.* The victim testified to rejecting this contact by "putting her hand" out and reiterating that she identified as gay. *Id.* The defendant tried to kiss the victim again and "[b]efore she could tell him to stop, the defendant got on top of the victim, put his knees on her thighs and put his hands on her shoulders." *Id.* According to the victim's testimony, she continued to protest the defendant's sexual advances by saying "stop" and "get the fuck off me." *Id.* The victim testified that despite these protests, the defendant then proceeded to vaginally rape her, insert his penis in her mouth, digitally rape her, and then vaginally rape her a second time. *Id.* At no point did the victim testify to consensual sexual contact. *Id.* at 607.

Conversely, the defendant testified to consensual sex. *Id.* The defendant testified that upon the victim's arrival at his apartment, he kissed her cheek and invited her inside. *Id.* at 601. The defendant testified to kissing the victim on the lips for several minutes with the victim's reciprocation. *Id.* He then testified that the victim entered the defendant's bedroom with him following. *Id.* at 602. The defendant explained that they continued kissing on the edge of his bed and engaged in "touching each other's genitals." *Id.* The defendant then testified to receiving consensual oral sex from the victim before she removed her clothes and laid in the bed, at which point she asked him to "put it in her" before they proceeded to have consensual vaginal sex. *Id.*

A grand jury indicted Richard Sherman on three counts of rape on December 11, 2014.[45] At the subsequent trial, the jury convicted him of penile-vaginal and digital-vaginal rape and acquitted him on the third charge of oral rape.[46] The defendant appealed, alleging that the judge erred by failing to provide a jury instruction requiring the prosecution to prove that the victim communicated her withdrawn consent such that a reasonable person would understand that consent was withdrawn.[47]

After hearing the evidence, the judge provided the jury with instructions on the rape indictments.[48] While deliberating, the jury submitted a question to the judge concerning postpenetration withdrawn consent.[49] The trial judge answered the question affirmatively, explaining that lawful sex may become unlawful as long as the prosecution proved both lack of consent and force.[50] On appeal, the defendant claimed that the trial judge committed reversible error by failing to instruct the jury that the victim must communicate the withdrawn consent.[51]

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[45] Brief for Commonwealth at 1–2, *Sherman*, 116 N.E.3d 597 (No. SJC-12530).

[46] Brief for Defendant, *supra* note 44, at 1. The SJC noted the possibility that the jury's acquittal of the oral rape charge meant the fact finders accepted the defendant's testimony that the oral intercourse was consensual. *Sherman*, 116 N.E.3d at 607.

[47] *Sherman*, 116 N.E.3d at 599. The issue of how the court will consider postpenetration rape arose when the jury submitted a written question to the judge asking whether sexual intercourse that begins consensually but where a party changes his or her mind during the duration of the sexual act is rape. *Id.* at 603. The issue of postpenetration withdrawn consent arose for the first time in response to a jury question addressing withdrawn consent after initial consensual penetration. *Vela*, 218 Cal. Rptr. at 162 (Ct. App. 1985) (holding that the trial court was incorrect in its affirmative instruction to the jury after the jury asked whether forced sex after withdrawn consent constitutes rape), *overruled by In re John Z.*, 60 P.3d at 184; Battle v. State, 414 A.2d 1266, 1270–71 (Md. 1980) (remanding for a new trial after determining that the trial judge incorrectly answered the jury's question regarding whether consensual sex can become nonconsensual because consent prior to penetration is the determining factor when evaluating whether a rape occurred).

Because the defendant did not object to the instruction at trial, the court must consider whether the judge's instruction "created a substantial risk of miscarriage of justice." *Sherman*, 116 N.E.3d at 603; *see* Commonwealth v. Pires 899 N.E.2d 787, 793 (Mass. 2009) (explaining the required judicial review when the defendant does not object to a jury question).

[48] *Sherman*, 116 N.E.3d 597, 602; *see infra* note 50 and accompanying text (describing the instruction).

[49] *Sherman*, 116 N.E.3d at 603. The jury's question was the following: "[I]s it rape if it started consensual and she changed her mind?" *Id.*

[50] *Id.* The instruction included the following language: "Lawful sexual intercourse can become unlawful sexual intercourse, but remember that the Commonwealth has to prove . . . both portions of the second element: lack of consent and use of force or constructive force." *Id.* During the trial, neither the prosecution nor the defense objected to the instruction. *Id.*

[51] *Id.* The defendant's claim of reversible error asserted that the judge's failure impacted the case's outcome, thus creating grounds for reversal had the defendant objected to the failure at trial. *Error*, BLACK'S LAW DICTIONARY, *supra* note 6. The SJC heard the defendant's case after the defendant applied for direct appellate review. *Sherman*, 116 N.E.3d at 603. In Massachusetts, where the Appeals Court already docketed a party's appeal and a party applied for direct appellate review, the SJC may grant the application and hear the case instead of the Appeals Court. *Direct Appellate Re-*

The appeal of the instruction required the SJC to evaluate for the first time whether an additional element proving the victim communicated his or her withdrawn consent was necessary for a rape conviction.[52] Although Massachusetts already recognized that consensual sex may become unlawful when the victim revokes consent postpenetration, jury instructions to this effect are rarely provided.[53] In *Sherman*, the SJC sought to impose a "clear line" distinguishing consensual intercourse from postpenetration rape.[54] This line required the prosecution to prove that the victim communicated his or her revoked consent such that a reasonable person would have understood the consent was withdrawn.[55] After satisfying this communication element, the prosecution does not need to prove an additional force element because compelling continued intercourse after withdrawn consent is sufficient.[56]

In *Sherman*, because the victim testified to entirely nonconsensual intercourse and the defendant testified to entirely consensual intercourse, there was no evidence presented at trial that the victim withdrew consent postpenetra-

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view, MASS.GOV, https://www.mass.gov/service-details/direct-appellate-review [https://perma.cc/9GC8-R4QG].

[52] *Sherman*, 116 N.E.3d at 604 (noting that a requirement that the victim communicate withdrawn consent). The court in *Sherman* also examined its mistake of fact jurisprudence in other rape cases. *Id.* Massachusetts does not allow a defendant to argue that he or she mistakenly interpreted the victim's consent because the "mistake of fact defense would tend to eviscerate the long-standing rule in this Commonwealth that victims need not use any force to resist an attack." *Lopez*, 745 N.E.2d at 967. Conversely, in cases where the victim's capacity to consent is at issue, Massachusetts allows for a mistake of fact defense. *Blache*, 880 N.E.2d at 736, 745. Because satisfaction of the force element when a victim lacks the capacity to consent is reduced to the force necessary for penetration, the prosecution has to meet a higher standard of proof for the consent element. *See id.* at 741–42 (describing how imposing a subjective element for consent balances the lower threshold required to prove force when the victim cannot consent due to incapacity). Consequently, the SJC imposed a subjective standard in *Blache*, requiring the prosecution to prove that the defendant "knew or reasonably should have known" that the victim was incapable of consenting to sexual contact. *Id.* at 745 n.17.

[53] *See Sherman*, 116 N.E.3d at 605 (emphasizing the court's recognition of postpenetration rape); M.G. v. G.A., 112 N.E.3d 837, 843 (Mass. 2018) (noting the ability to withdraw consent prior to or during a sexual act); *Enimpah*, 966 N.E.2d at 844 (explaining that a defendant may be found guilty of rape in cases where initial penetration was consensual, but the defendant continued intercourse after the victim revoked consent). The SJC envisioned that these withdrawn consent instructions would rarely apply. *Sherman*, 116 N.E.3d at 606. Their instructions only apply when the evidence at trial demonstrates that the victim consented initially and then revoked consent or when the jury submits a question to the court about withdrawn consent. *Id.*

[54] *Sherman*, 116 N.E.2d at 607.

[55] *Id.* The court emphasized that a victim does not need to use physical force or even words to communicate his or her withdrawn consent. *Id.* at 606. For example, attempting to push away the defendant or moving in a way to make penetration difficult can serve to convey the revocation of consent. *Id.* Critics argue that an element requiring the communication of revoked consent does not offer clarity unless the courts also define a reasonable time in which the defendant must respond to the withdrawn consent. Lyon, *supra* note 29, at 308. Courts regularly use a reasonableness standard without explaining specifics of time considerations to a jury. *Id.*

[56] *Sherman*, 116 N.E.3d at 606.

tion.[57] Consequently, a jury instruction imposing the burden on the prosecution to prove the communication of withdrawn consent was not necessary for the jury to evaluate the facts.[58] The SJC determined that the jury would still have convicted the defendant if the judge provided the revised instructions.[59] Thus, the SJC upheld the defendant's convictions.[60] Although the SJC's decision did not impact the outcome of the case in *Sherman*, the court's affirmation of its recognition of postpenetration rape was significant.[61] The acknowledgment of postpenetration rape combined with the court's clarification of the prosecution's burden of proof in postpenetration rape cases, arguably preserved the victims' right to claim withdrawn consent and opened the door for defendants to assert a new mistake of fact defense.[62]

II. MASSACHUSETTS' COMMUNICATION REQUIREMENT PAVED THE WAY FOR RECOGNIZING POSTPENETRATION RAPE

In 2019, in *Commonwealth v. Sherman*, the SJC added a new element of proof the prosecution must meet to establish that a postpenetration rape occurred.[63] In doing so, the SJC reiterated that postpenetration rape constitutes a criminal offense in Massachusetts.[64] Only seven states have explicitly criminalized postpenetration rape through their courts.[65] Although the facts in *Sherman* did not allow for the SJC to hold that a postpenetration rape occurred, the new element requiring communication of withdrawn consent enhanced the

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[57] *Id.* at 607.

[58] *Id.* (explaining that without evidence that the victim initially consented and then withdrew her consent, the absence of the element requiring the communication of withdrawn consent did not influence the jury's decision).

[59] *Id.*

[60] *Id.* at 609. On a second issue regarding admission of evidence related to the defendant's cocaine use, the court concluded that no substantial miscarriage of justice occurred. *Id.* at 608.

[61] *See id.* at 606 (requiring proof of a communication of withdrawn consent). The new communication requirement inherently recognizes the ability to withdraw consent. *See id.* (suggesting where the victim can prove communication of withdrawn consent, they can successfully allege postpenetration rape).

[62] *See generally id.* (allowing a mistake of fact defense where the victim has withdrawn consent by imposing a requirement that the victim communicate withdrawn consent).

[63] *See* Commonwealth v. Sherman, 116 N.E.3d 597, 605 (Mass. 2019) (citing Commonwealth v. Enimpah, 966 N.E.2d 840 (Mass. App. Ct. 2012)) (noting that a defendant could be guilty of rape after forcibly continuing sex despite withdrawn consent).

[64] *Id.*

[65] *See* Parker, *supra* note 3, at 1068 n.13 (noting other courts seem to agree on the validity of postpenetration rape without explicitly holding postpenetration rape can occur). Illinois remains the only state to criminalize postpenetration rape statutorily. 720 ILL. COMP. STAT. 5/11-170(c) (2012); Parker, *supra* note 3, at 1068.

Commonwealth's jurisprudence so a victim can more confidently seek recourse for a rape in which he or she initially consented.[66]

Section A of this Part uses North Carolina as an example of antiquated rape law.[67] Section B of this Part situates Massachusetts among the minority of states that recognizes postpenetration rape by comparing Massachusetts to Maine.[68]

A. North Carolina Fails to Recognize Revoked Consent

North Carolina's jurisprudence regarding withdrawn consent epitomizes the view that Massachusetts and trending conversations about rape seek to leave behind.[69] Legislation recognizing the ability of participants to rescind consent during sex has repeatedly failed to pass in North Carolina.[70] The conversation surrounding these legislative failures helps to identify North Carolina's attitude towards withdrawn consent.[71] The discourse identifies the signifi-

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[66] *See generally Sherman*, 116 N.E.3d 597 (explaining how neither the state nor the defendant presented evidence suggesting withdrawn consent and instilling confidence in victims by institutionalizing how their communication of revoked consent creates a line between consensual sex and rape).

[67] *See infra* notes 69–80 and accompanying text.

[68] *See infra* notes 81–93 and accompanying text.

[69] *See* Sarah Delia, *Revoking Consent Bill Dies Again in N.C.*, WFAE (Aug. 12, 2019), https://www.wfae.org/post/revoking-consent-bill-dies-again-nc#stream/0 [https://perma.cc/UCE7-K9WQ]; AJ Willingham, *North Carolina's the Only State with a Law That Says Once a Sexual Act Begins, You Can't Withdraw Consent*, CNN, (June 2, 2019), https://www.cnn.com/2019/06/02/health/north-carolina-rape-consent-bill-563-trnd/index.html [https://perma.cc/829F-REDN] (noting that North Carolina remains the only state that explicitly does not allow revoked consent, whereas other states have not explicitly addressed this issue); *see also* State v. Way, 254 S.E.2d 760, 762 (N.C. 1979) (requiring proof of consent only for initial penetration); Parker, *supra* note 3, at 1068 (explaining that victims of postpenetration rape in North Carolina do not have any recourse available). The view reform efforts seek to leave behind is the misallocated emphasis on the defendant's understanding of consent instead of whether the victim consented in fact. *See supra* note 9 and accompanying text.

Maryland overcame its shared position with North Carolina when the Maryland Supreme Court overturned *Battle v. State* in 2008. State v. Baby, 946 A.2d 463, 472 (Md. 2008). *See generally* Battle v. State, 414 A.2d 1266 (Md. 1980) (explaining that only initial penetration requires consent). The court in *Battle* noted that consent is only revocable before initial penetration. *Battle*, 414 A.2d at 1270. In 2008, the Maryland Supreme Court in *State v. Baby* identified its emphasis on consent prior to penetration as dicta and held that jury instructions on the withdrawal of consent after penetration should apply. 946 A.2d at 472.

[70] Delia, *supra* note 69. In 1979, in *State v. Way*, North Carolina's Supreme Court held that consent was only required for the initial penetration. 254 S.E.2d 760, 762 (N.C. 1979). The holding in *Way* thus requires legislative action to acknowledge and provide recourse for victims of postpenetration rape. Delia, *supra* note 69. Reformers must call for legislative action to acknowledge and provide recourse for victims of postpenetration rape. *Id.*

[71] *See* Janet Burns, *North Carolina May Finally Let Women Revoke Consent During Sex*, FORBES (Apr. 22, 2019), https://www.forbes.com/sites/janetwburns/2019/04/22/north-carolina-may-finally-let-women-revoke-consent-during-sex/#204391c32d2e [https://perma.cc/3DEE-BRZS] (describing the ability for perpetrators to have rape charges against them dismissed because the victim initially consented as a loophole); Molly Redden, *'No Doesn't Really Mean No': North Carolina Law Means Women Can't Revoke Consent for Sex*, THE GUARDIAN (June 24, 2017), https://www.theguardian.com/us-news/2017/jun/24/north-carolina-rape-legal-loophole-consent-state-v-way [https://perma.cc/E7XJ-

cant ramifications of refusing to recognize the revocation of consent by referring to the state's failure to recognize rape in cases of withdrawn consent as a loophole.[72]

The loophole originated in 1979, when the North Carolina Supreme Court affirmatively limited withdrawn consent to apply only in between sexual encounters.[73] If the perpetrator received consent for the initial penetration, then he or she did not commit rape.[74] This approach construed the nature of sex to only include one act of penetration.[75]

FM7K] (explaining how the Supreme Court's ruling in *State v. Way* distressed victims and prosecutors).

[72] *See* Erik Ortiz, *'It's Disgusting': Loopholes Remain in North Carolina's Sexual Assault Laws. Advocates Ask Why.*, NBC NEWS (May 11, 2019), https://www.nbcnews.com/news/us-news/it-s-disgusting-loopholes-remain-north-carolina-s-sexual-assault-n1004436 [https://perma.cc/4Y9F-TVVE] (identifying the victim's lack of recourse for her alleged rape after she revoked consent as a loophole); Willingham, *supra* note 69 (referring to legislation elucidating the definition of consent as having potential to close the "legal loophole"). This loophole refers to a defendant's ability to secure dismissal of their rape charges, even in cases with facts demonstrating the victim withdrew consent after the penetration commenced. *See* Burns, *supra* note 71 (explaining how victims in North Carolina do not have recourse for rape where the victim initially consented and subsequently withdrew consent after penetration).

[73] *See Way*, 254 S.E.2d at 761 (granting the defendant a new trial after holding that the trial court's instruction affirming the ability to withdraw consent was erroneous). According to *Way*, parties only have the ability to withdraw consent before or after a sexual encounter. *Id.* In *Way*, the victim testified that after closing the bedroom door, the defendant began to beat her and threaten her verbally before forcing her on to the bed and compelling her to have anal, oral, and vaginal intercourse. *Id.* at 760. The defendant's testimony introduced withdrawn consent by introducing facts that the victim exclaimed about stomach pains, thus revoking consent, such that the defendant sought assistance from a female friend. *Id.* at 761.

After a question from the jury asking if consent can be withdrawn, the judge instructed the jury 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.* The jury found the defendant guilty of second degree rape. *Id.*

[74] *Id.* at 762. The court in *Way* appeared to recognize the poor taste of this outcome, leaving open the possibility that the perpetrator who does not stop engaging in sexual intercourse after a party revokes consent may have committed another crime. *See id.* ("[A]lthough he may be guilty of another crime because of his subsequent actions.").

[75] *Compare Enimpah*, 966 N.E.2d at 843 (explaining how even slight penetration is sufficient to establish intercourse and that penetration includes not only initial penetration, but also subsequent penetration and intercourse thereafter), *and* State v. Robinson, 496 A.2d 1067, 1070 (Me. 1985) (critiquing North Carolina's analysis that the victim's consent only matters upon initial penetration), *with Way*, 254 S.E.2d at 761 (explaining that withdrawal of consent only occurs between sexual encounters).

The Supreme Court of Maine went as far as suggesting that the logic in *Way* defies common sense by theoretically allowing a victim whose struggles caused the disengagement of the male organ to qualify for rape, but not recognizing a victim for whom withdrawal of the male organ was not possible. *See Robinson*, 496 A.2d at 1070–71 (critiquing *Way* as erroneous and instead relying on common sense to interpret the situation).

The Massachusetts Appeals Court recognized the weakness of North Carolina's interpretation, in 2012, in *Commonwealth v. Enimpah*.[76] The trial judge in *Enimpah* instructed that even slight initial penetration satisfies the element requiring the state to prove intercourse.[77] The court emphasized that this instruction does not limit penetration's definition to only initial penetration.[78] By allowing for the time of penetration to include any time during sexual intercourse, the court implicitly interpreted the Commonwealth's rape statute to include cases in which a party revokes consent.[79] The court cited similar interpretations from other states, including Alaska, Connecticut, Kansas, Maine and Maryland, pointedly leaving North Carolina alone as the representative of antiquated rape jurisprudence.[80]

B. Comparing Massachusetts' Recognition of Withdrawn Consent to Maine

Prior to *Sherman*, the Commonwealth recognized the existence of postpenetration rape but had not affirmatively required the communication element.[81] The new element requiring the victim to reasonably communicate the revocation of his or her consent aligned Massachusetts' jurisprudence with Maine.[82]

The courts in Maine and Massachusetts evaluated the force and consent elements of rape slightly differently.[83] In 1985, in *State v. Robinson*, Maine became the first state to recognize rape after withdrawn consent.[84] In response

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[76] 966 N.E.2d at 843 (contrasting its understanding of consent and other states' interpretation to that of *Way,* 254 S.E.2d at 760).

[77] *Id.*

[78] *Id.*

[79] *See id.* at 843–44 (explaining that the rape elements cannot reasonably be interpreted to exclude cases in which the victim withdrew consent after initial penetration, but the perpetrator continued with force).

[80] *See id.* at 843 (citing *Baby*, 946 A.2d at 486); State v. Bunyard, 133 P.3d 14, 28 (Kan. 2006); *Robinson*, 496 A.2d at 1069; McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001); State v. Siering, 644 A.2d 958, 962 (Conn. App. Ct. 1994) and contrasting *Way*, 254 S.E.2d at 762).

[81] *Id.* at 843–44 (recognizing postpenetration rape hypothetically, but not explicitly affirming a postpenetration rape conviction); s*ee Sherman*, 116 N.E.3d at 605 (noting the need for a clear line to identify when consensual sex becomes postpenetration rape as a reason for imposing the communication requirement).

[82] *See Robinson*, 496 A.2d at 1069 (requiring the communication of withdrawn consent); *see also In re* John Z., 60 P.3d at 185 (Cal. 2003) (requiring the victim to express his or her objection). Alaska's jurisprudence represents another approach to withdrawn consent, which parallels Massachusetts' methodology prior to *Sherman*. *Compare McGill*, 18 P.3d at 82 (Alaska Ct. App. 2001) (upholding a jury instruction that consent to sex is revocable and may constitute rape as long as the state proves all elements), *with Sherman*, 116 N.E.3d at 605 (rejecting the prosecution's argument that if the jury finds the state proved the force element, then that is the "equivalent" to proving that the victim expressed the revocation of his or her consent).

[83] *See infra* note 86 and accompanying text (describing how Maine emphasizes force more than Massachusetts, which emphasizes communication of withdrawn consent).

[84] Lyon, *supra* note 29, at 296; *see Robinson*, 496 A.2d at 1071 (affirming a trial judge's answer to a question submitted by the jury).

to a jury question, the trial judge instructed the jury that rape includes circumstances in which one party communicates that he or she revoked consent and the other party disregards this communication and compels the sexual intercourse to continue.[85] Although this instruction parallels the new element required by *Sherman*, Maine's trial judge and the appellate court emphasized a different element in their analysis.[86] The analysis in *Robinson* emphasized that the defendant must continue the sexual intercourse by means of compulsion after the withdrawal of consent.[87] By focusing on the force element, the Supreme Judicial Court of Maine ensured that the state must prove at least the same level of force as required for rape in which the victim never consented.[88]

Meanwhile, in 2019, in *Sherman*, the SJC weakened the trial judge's reiteration of the force element.[89] After addressing the new element requiring the victim to communicate his or her withdrawn consent, the court noted that only the force "necessary to compel continued intercourse" after the revocation of consent satisfies the force element.[90] Although this instruction reads similarly to the instructions in *Robinson*, the court in *Sherman* explained that the prosecution did not need to prove any further threat or use of force in cases of withdrawn consent.[91] Moreover, although Maine appears to require the state to prove force to the same extent as it would in cases of entirely nonconsensual sex, Massachusetts leaves open the potential for a successful argument that continuing intercourse after the victim clearly communicated his or her withdrawn consent inherently satisfies the criteria of compelling continued sexual intercourse.[92] The SJC's analysis aligned with the SJC's logic in *Common-*

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[85] *Robinson*, 496 A.2d at 1069 (noting the jury's question concerned whether the continuation of sex after one party withdraws consent constitutes rape).

[86] *Compare id.* at 1070 ("[t]he critical element there is the continuation under compulsion"), *with Sherman*, 116 N.E.3d at 605 (discussing at length the need for a reasonable mistake of fact defense in cases involving withdrawn consent, but not addressing whether the prosecution needed to prove additional force after the revoked consent).

[87] *Robinson*, 496 A.2d at 1070. In Maine, compulsion means include physical force, threat of force, or both, resulting in the victim becoming unable to resist the perpetrator or fearing reasonably serious bodily injury or death. *Id.* at 1069 n.1.

[88] *See id.* at 1069 (repeating the instructions for what amount of force is necessary for a rape conviction).

[89] *Compare Sherman*, 116 N.E.3d at 603, 606 (instructing the jury on the force element in response to the jury's question about withdrawn consent), *with Robinson* 496 A.2d at 1070 (emphasizing that the state must prove not just nonconsent, but also that the penetration continued as a result of compulsion).

[90] *Sherman*, 116 N.E.3d at 606.

[91] *Id.*; *see also Robinson*, 496 A.2d at 1070 (emphasizing force in the instruction to the jury); *What Does "Yes" Mean?*, *supra* note 1, at 2362 ("The vagueness of the persistence element of postpenetration rape illustrates the uneasiness with which it sits as a proxy for force.").

[92] *See Sherman*, 116 N.E.3d at 606 (noting the rare circumstances in which the court will need to provide instructions on the revocation of consent); *What Does "Yes" Mean?*, *supra* note 1, at 2363 (observing how recognizing withdrawn consent shifts the analysis from penetrative acts to acts after penetration and critiquing the risk of a victim alleging withdrawn consent so that he or she only must

wealth v. Blache, which invoked the mistake of fact defense to balance the defendant's interests with the prosecution's lower proof requirement for the force element.[93]

III. IDENTIFYING A MIDDLE GROUND THROUGH THE MISTAKE OF FACT DEFENSE

In *Commonwealth v. Sherman*, the SJC positioned the Commonwealth in the progressive minority of jurisdictions that recognize postpenetration rape.[94] In doing so, the SJC held that the prosecution must prove a new element—that the victim reasonably communicated the revocation of consent—making the mistake of fact defense available to defendants.[95] Victim advocates traditionally critique the mistake of fact defense for its disregard of the victim's nonconsent.[96] Nevertheless, invoking the mistake of fact defense does not diminish Massachusetts' progress in rape jurisprudence because the circumstances where it applies remain narrow.[97]

The SJC in *Sherman* offered reasoning that paralleled its analysis in 2008 in *Commonwealth v. Blache*, limiting the expansion of the mistake of fact defense. [98] In 2008, in *Blache*, the SJC held that in cases where the victim was incapable of consenting due to intoxication, a defendant may assert a mistake

prove persistence rather than force). California also appeared to leave open the possibility that continued intercourse after withdrawn consent sufficiently satisfies the force element. *See In re John Z.*, 60 P.3d at 187 (emphasizing that no statutory language or case law support the defendant's argument that perpetrators are entitled to continue sex after the withdrawal of consent).

[93] *Blache*, 880 N.E.2d at 744–45 (noting the prosecution only needed to prove the amount of force necessary for penetration to meet the force element, thus necessitating a mistake of fact defense available to the defendant to mitigate potential injustice).

[94] *See* Commonwealth v. Sherman, 116 N.E.3d 597, 605 (Mass. 2019) (identifying the need to differentiate consensual sex from postpenetration rape); Lyon, *supra* note 29, at 285–86 (noting reformers' increased emphasis on the victim's evidence regarding his or her consent or lack thereof); *see also supra* note 9 and accompanying text (explaining how reformers envision rape jurisprudence emphasizing whether the victim in fact consented as opposed to what the defendant understood).

[95] *Sherman*, 116 N.E.3d at 605–06.

[96] *See* Lyon, *supra* note 29, at 285–86 (explaining how a reliance on resistance to define nonconsent worked against victims as opposed to a legal definition that emphasized the victim's testimony about consent).

[97] *See Sherman*, 116 N.E.3d at 604, 605 (citing Commonwealth v. Lopez, 745 N.E.2d 961 (Mass. 2001), to explain the incompatibility of mistake of fact defense in the Commonwealth's general rape jurisprudence). In 2001, in *Lopez*, the SJC upheld the rape and indecent assault convictions of the defendant. 745 N.E.2d at 962. The defendant claimed the trial court's failure to provide an instruction on mistake of fact constituted error. *Id.* at 964. The SJC affirmed that the defendant was not entitled to the mistake of fact defense. *Id.*

[98] *Compare Sherman*, 116 N.E.3d at 606 (explaining that the communication requirement protects defendants), *with* Commonwealth v. Blache, 880 N.E.2d 736, 745 (Mass. 2008) (noting the mistake of fact defense is necessary due to the lower force requirement).

of fact defense.[99] The court reasoned that proof of the victim's incapacity to consent lowered the threshold needed for the prosecution to prove the force element to only requiring the force necessary for penetration.[100] Accordingly, the court recognized that lowering the requirements to prove force risked injustice, unless the defendant had the opportunity to present evidence of his or her reasonable mistake about the victim's capacity to consent.[101] This reasoning protected the defendant by balancing the proof requirements such that the scale did not tip in favor of the prosecution: when the required proof for the force element of the crime decreased, the consent element required more.[102]

In 2019, in *Sherman*, the SJC employed the same balancing analysis as in *Blache* to determine that a mistake of fact defense should be available to defendants in cases of postpenetration rape.[103] The court noted that unlike in typical rape cases, where the proof of force precludes any possibility of mistake, proving force during continued penetration posed a more difficult evaluation process.[104] Citing principles of fairness and clarity, the SJC imposed a requirement that the victim reasonably convey his or her revocation of consent.[105]

Thus, the SJC held that the requirement of the communication of withdrawn consent introduces the mistake of fact defense.[106] Specifically, the defendant may argue that the communication was not in a manner such that a

[99] 880 N.E.2d at 741–42. The SJC relied on premises outlined by the SJC in 1870 in *Commonwealth v. Burke*, emphasizing the implicit premise that the prosecution must also prove the defendant's knowledge of the victim's incapacity when the prosecution uses proof that intoxication rendered the victim unable to consent. *Id.* (citing Commonwealth v. Burke, 105 Mass. 376, 380 (1870)).

In *Blache*, the defendant was convicted of rape by a jury in the Superior Court. *Id.* at 738. The intermediate court upheld the conviction. *Id.* On August 17, 2000, the victim went to a bar after smoking marijuana and taking antianxiety medication. *Id.* The victim drank substantially throughout her visits to two bars. *Id.* The defendant joined the victim around 11:30 p.m. *Id.* When the group departed from the bar, the victim was intoxicated such that she struggled walking and stumbled twice. *Id.* After an altercation at a friend's house, where the police were dispatched to address the victim's belligerence, the victim and defendant's testimonies diverged. *Id.* at 739.

The victim testified that the defendant drove her home from the friend's house and stopped by a dumpster, where he vaginally raped her despite her physical and verbal protests. *Id.* Conversely, the defendant testified that he and the victim had consensual intercourse after he drove her home. *Id.*

[100] *Id.* at 744 (noting the prosecution could satisfy the force element by only proving penetration).

[101] *Id.* at 744–45.

[102] *See id.* The court in *Blache* was careful to note, however, that this defense is only available in a narrow class of rape cases where the prosecution need not prove force. *Id.* at 744 (citing *Lopez*, 745 N.E.2d 961, which rationalized that the force element negated any mistake as to consent because compulsion sufficiently showed the defendant's culpability).

[103] *See Sherman*, 116 N.E.3d at 605.

[104] *Id.* ("[I]t is far easier to evaluate whether force or the threat of force compelled a victim to submit to a defendant's initial penetration of a victim's vagina, anus, or mouth than it is to evaluate whether force or the threat of force compelled a victim to submit to a defendant's continued penetration.").

[105] *Id.*

[106] *Id.* at 606.

reasonable person would have understood the consent was revoked.[107] The objective nature of this standard differentiates *Sherman* from *Blache* because under *Sherman*, a jury must only consider the state of mind of a reasonable defendant, rather than the defendant's subjective knowledge as required by *Blache*.[108] Consequently, the communication inquiry required by *Sherman* does not go beyond *Blache*, but offers a narrower defense that similarly balances the burdens of proof to secure the defendant from injustice.[109]

The narrower nature of the mistake of fact defense in *Sherman*, established through reasoning logically consistent with *Blache*, served to retain the Commonwealth's leadership in rape jurisprudence.[110] Although the SJC made the mistake of fact defense available in another circumstance of rape cases, the analysis did not risk applying the mistake of fact defense in rape jurisprudence generally.[111] The shared reasoning in *Sherman* and *Blache* implies that a mistake of fact defense only applies when the risk for injustice necessitates rebalancing the burdens faced by the prosecution and defense, respectively.[112]

The SJC's analysis identified a middle ground in Massachusetts' rape jurisprudence by making a mistake of fact defense available without diminishing the courts' desire not to allow for the defense more generally.[113] The communi-

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[107] *Id.*

[108] *Compare id.* (allowing for an inquiry into a reasonable defendant's state of mind), *with Blache*, 880 N.E.2d at 741–42 (allowing the defendant to argue that he did not subjectively know the victim did not have the capacity to consent). The reasonableness standard is sufficient to assess the communication of withdrawn consent without the SJC supplying further description for what constitutes a reasonable defendant. *See* Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 859 (1996) (noting that a reasonable belief as to consent adequately protects the victim and defendant's interests).

[109] *See Sherman*, 116 N.E.3d at 606 (using the reasonableness standard to create an objective test for whether the victim communicated his or her revocation of consent sufficiently); *Blache*, 880 N.E.2d at 741–42 (discussing the prosecution's responsibility to prove the defendant knew of the victim's incapacitation).

[110] *See* Lyon, *supra* note 29, at 285 (explaining how advocates for reforming rape law prioritize the victim's consent with minimal consideration of the defendant's subjective intent).

[111] *See Sherman*, 116 N.E.3d at 604, 606 (making the mistake of fact defense available through an objective standard and noting the limited application of the mistake of fact defense in the Commonwealth's rape jurisprudence more generally).

[112] *Compare id.* at 606 (balancing the force element with the consent element for the sake of protecting the defendant), *with Blache*, 880 N.E.2d at 745 (explaining how the lowered requirement of proof of force when the victim cannot consent necessitated higher protections for the defendant). The relationship between *Sherman* and *Blache* also enhanced the argument that the prosecution must only prove force required for continued penetration. *See Sherman*, 116 N.E.3d at 606 (imposing an additional requirement on the victim); *Blache*, 880 N.E.2d at 741 (lowering the force requirement such that only force necessary for penetration satisfies the element). The mistake of fact defense may have balanced the elements in a way that allows the SJC to impose the same force requirements as in *Blache*, which only required proof of force necessary for initial penetration. *See Sherman*, 116 N.E.3d at 606; *Blache*, 880 N.E.2d at 741.

[113] *See Sherman*, 116 N.E.3d at 604, 606 (limiting the mistake of fact defense inquiry through a reasonableness standard and noting the incompatibility of the mistake of fact defenses in most rape cases).

cation element manifests a way for rape jurisprudence to serve victims and defendants, demanding the prosecution find clarity in a fact pattern susceptible to uncertainty while also maintaining a focus on the victim's nonconsent instead of the defendant's state of mind.[114]

CONCLUSION

The nationwide conversation about consent and rape has brought the nuances of consent to the forefront of rape jurisprudence. As this discourse continues in the media, juries will likely continue to question instructions provided to them, forcing jurisdictions to choose between aligning with the states that recognize postpenetration rape or those that do not. By imposing a clear line separating consensual sex from postpenetration rape, while also making a mistake of fact defense available to defendants, Massachusetts has set an example of a balanced approach that more states should follow. By balancing the elements required to prove rape to fit the realities of the circumstances, Massachusetts simultaneously protects the victim while also acknowledging the nuances of consent.

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[114] *See id.* at 605–06 (empowering victims to allege withdrawn consent while also creating a mechanism for identifying when the sex became nonconsensual and thus constituted postpenetration rape).