IN THE

COURT OF APPEALS OF MARYLAND

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SEPTEMBER TERM, 2007

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NO. 14

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STATE OF MARYLAND,

Petitioner,

v.

MAOULOUD BABY,

Respondent.

_____

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS

_____

BRIEF OF AMICUS CURIAE

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The Maryland Coalition Against Sexual Assault (MCASA), the Women's Law Center of Maryland, Inc., the National Alliance to End Sexual Violence, and National Crime Victim Law Institute, by their undersigned attorneys, file this Brief of *Amicus Curiae* in support of the Petitioner, State of Maryland.

This case involves a woman's right to withdraw her consent and stop a

forcible rape after penetration ("post-penetration rape"). It raises significant public policy issues with implications beyond the intricacies of Maryland's sexual assault law. At issue is whether a woman's fundamental right to control sexual access to her own body is diminished when she is being penetrated by a man's penis. *Amici* believe this is not, and should not, be the law in or of Maryland.

QUESTION PRESENTED

The Petitioner framed the issue[1] as follows:

> If a woman initially consents to vaginal intercourse, withdraws consent after penetration, and then is forced to continue intercourse against her will, is she a victim of rape?

STATEMENTS OF INTEREST

The Maryland Coalition Against Sexual Assault (MCASA) is the statewide collective voice advocating for accessible, compassionate care for survivors of sexual assault and abuse, and accountability for all offenders. Established in 1982 as a private, not-for-profit 501(c)(3) organization, MCASA works closely with local, state, and national organizations to address issues of sexual violence in Maryland. It is a membership organization that includes the State's nineteen rape

[1] Petitioner also raised and was granted certiorari on the question of whether the Court of Special Appeals erred in reversing Baby's convictions for first degree sexual offense and third degree sexual offense, which were unrelated to the subject matter of the jury's questions regarding consent. While Petitioner's argument clearly has merit, *amici* do not address this issue.

crisis centers, health care personnel, attorneys, law enforcement, other allied professionals, concerned individuals, survivors of sexual violence and their loved ones. MCASA includes the Sexual Assault Legal Institute (SALI), which provides legal services for sexual assault and abuse survivors.

The Women's Law Center of Maryland, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, violence against women, workplace issues, and family law. Established in 1971, the Women's Law Center achieves its mission through direct legal services, hotlines, research, policy analysis, legislative initiatives, education and implementation of innovative legal services programs to facilitate systemic change.

The National Alliance To End Sexual Violence, organized in September of 1995, is a national 501(c) 4 not for profit organization which works to end sexual violence and ensure services for victims. The NAESV Board of Directors consists of leaders of state sexual assault coalitions and national law, policy, and tribal experts who promote the organization's mission to advance and strengthen public policy on behalf of state coalitions, individuals, and other entities working to end sexual violence.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the

justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI actively participates as amicus curiae in cases involving crime victims' rights nationwide.

On February 26, 2007, the Maryland Coalition Against Sexual Assault (MCASA) and the Women's Law Center of Maryland filed a motion for permission to file a brief of *amicus curiae* in support of the petition. This Court granted the motion on May 9, 2007. The National Alliance to End Sexual Violence and the National Crime Victim Law Institute filed a motion to join the *amici* simultaneously with this brief.

FACTS AND PROCEDURAL HISTORY

Amici adopt the facts and procedural history set forth by the Petitioner, supplemented by the following amplification and argument.[2]

The experience of the 18 year old victim, "J.L.," deserves emphasis.[3] Like many rape victims, she had some acquaintance – albeit removed – with the two men who sexually assaulted her.[4] J.L. was long-time friends with Lacie, and both

[2] On January 11th, 2007, the Court of Special Appeals ordered that the record of this case be sealed to protect the privacy of the victim. For this reason, *amici* do not cite to the transcript and instead reference the facts in the State's petition for writ of certiorari, *e.g*, Pet. ___.

[3] Many advocates against sexual assault prefer the term "survivor" to "victim," however, J.L. was clearly also a victim at the point in time that is at issue in this case, so *amici* use that term.

[4] *See infra*, U.S. Department of Justice, Bureau of Justice Statistics, n. 13 (Seventy-seven percent of completed rapes are committed by someone known to the victim).

Baby and Wilson were friends of Lacie's brother. (Pet. 3). J.L. recognized Baby from high school. J.L's friend, Lacie, took a ride with the victim and perpetrators on a few occasions and Lacie had given the boys a ride before. J.L. and Lacie traveled in an area they knew well, having attended high school and college there. The perpetrators were high school boys with the bluster that often accompanies this age group, but there is no indication they presented an obvious menace. (Pet. 4).

Petitioner's statement of facts provides ample detail of what happened next in this seemingly benign setting: J.L. was subjected to *multiple* sexual assaults and attempted sexual assaults. These assaults included one perpetrator, Baby, trying to put "his hands between [her] legs" while the other perpetrator, Wilson, "was trying to put [her] hand down his pants." (Pet. 5). This initial assault was committed by both perpetrators at the same time. Surrounded on both sides by assailants in the back of a small vehicle, the victim heard one tell her to "lick it," while the other told her to "flash" him. (Pet. 5). The attacks grew more invasive, with the Respondent pulling off J.L.'s bra and having contact with her breast at the same time that she was trying to remove her hand from the other assailant's pants. (Pet. 5).

Matters became only more serious: Wilson sat on J.L.'s chest with his penis inches from her face while trying to force her to open her mouth so he could insert between her lips. While Wilson's penis was in her face and she was confronted with the dilemma of how to protest forced fellatio while keeping her

teeth clenched to prevent the act, Baby tried to remove her pants (as Wilson was on her chest). (Pet. 5).

The assailants switched places and Baby held the victim's arms while her upper body (including, one can assume, her face) was in his lap. Then Wilson anally raped her from behind. (Pet. 6). Baby was found guilty by the jury of first degree sexual offense for his role in helping Wilson anally rape J.L. (Pet. 1).

The sexual assaults continued: Wilson attempted to vaginally rape her; Baby forced his fingers inside her vagina; Wilson forced his penis and fingers inside of her. J.L. cried out in pain as she was anally raped and vaginally penetrated. (Pet. 6).

Only after all of this – an incident that can be accurately described as gang rape – did the circumstances giving rise to the issue of "post-penetration rape" occur. Baby left the car and Wilson sexually assaulted J.L; when Wilson was done, he left and Baby entered the car. After sitting silently, Baby asked the just-raped victim, "[S]o are you going to let me hit it[?]," following this up with "…I don't want to rape you." (Pet. 6). There is no indication of whether the tone of voice Baby used was threatening. The victim testified that she did not "really" feel like she had a choice about whether to consent to sexual intercourse or not, and that the men who were sexually assaulting her told her that she could not leave until she had finished "whatever they told me to do." (Pet. 6). At the trial level, the State argued that she did not ever consent to sex.

The victim felt that "[s]omething just clicked off," and submitted to Baby –

the man who had just helped Wilson anally rape her – "as long as he stops when I tell him to." (Pet. 7). When Baby penetrated J.L.'s vagina with his penis, he caused her pain and she "yelled stop, that it hurt" and tried to push him off, but he continued to force his penis into J.L's body for as long as 10 seconds. (Pet. 7). At least some members of the jury apparently theorized that J.L. consented and then withdrew consent to intercourse, sending the judge questions that prompted this litigation. At issue is whether it was rape when Baby forced his penis to continue to be inside J.L.'s vagina or, as the Court of Special Appeals found, it was not rape because J.L. told Baby to stop after his penis had penetrated her.

DECISION OF THE COURT OF SPECIAL APPEALS

The Court of Special Appeals found the deciding factor for whether Baby's rape conviction could be sustained was the timing of penetration in relation to the victim's consent. The Court of Special Appeals held that this Court's prior ruling compels them to conclude that a woman cannot be raped if the forcible vaginal intercourse and withdrawing of consent occurred after penetration. *Baby v. State of Maryland*, 172 Md.App. 588, 604 (2007), citing *Battle v. State*, 287 Md. 675 (1980).

The Court of Special Appeals reasoned that,

> "The concept, undergirding the *Battle* holding, rooted in ancient laws and adopted by English common law, views the initial 'deflowering' of a woman as the real harm or insult which must be redressed by compensating, in legal contemplation, the injured party – the father or husband. … [I]t was the act of penetration that was the essence of the

> crime of rape; after this initial infringement upon the responsible male's interest in a woman's sexual and reproductive functions, any further injury was considered to be less consequential. The damage was done. It was this view that the moment of penetration was the point in time, after which a woman could never be 're-flowered,' that gave rise to the principle that, if a woman consents prior to penetration and withdraws consent following penetration, there is no rape." *Baby*, 172 Md. App. at 616-617.

This is a shocking and offensive analysis upon which to base a public policy. Rape is not an issue of "deflowering" and "re-flowering" virginal women and compensating injured fathers or husbands. Rape is personal to the woman (or man) who is raped and an affront to their bodily integrity and personal autonomy.

BACKGROUND ON SEXUAL ASSAULT

Rape is the least reported, least indicted, and least convicted felony in the United States,[5] yet one of every eight adult women in Maryland are victims of forcible rape in their lifetime.[6] Rape can be perpetrated against either gender, but women are far more frequently victims.[7] In 2005, 1,266 forcible rapes were

[5] *See, e.g.*, Bonnie S. Fisher *et al*., U.S. Department of Justice, *The Sexual Victimization of College Women* 16 (2000), available at http://www.ncjrs.gov/pdffiles1/nij/182369.pdf (last visited June 27, 2007); U.S. Department of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey* (1994); D.G. Kilpatrick, C.N. Edmunds & A.K. Seymour, *Rape in America: A Report to the Nation*, Arlington, VA, National Center for Victims of Crime; Charleston SC, Medical University of South Carolina (April 1992).

[6] Kilpatrick, D.G. & Ruggiero, K.J., *Maryland: A Report to the State*, Charleston, SC, National Violence Against Women Prevention Research Center, Medical University of South Carolina (2003).

[7] U.S. Bureau of Justice Statistics, *Special Report: Violence Against Women: Estimates from the Redesigned Survey* (NCJ-154348), August 1995.

reported to police in Maryland,[8] and the State's rape crisis and recovery centers served over 3,200 sexual assault survivors in 2006.[9] However, only 16% to 32% of rape victims report the crime to law enforcement,[10] and out of these reports, only approximately 25% result in an indictment and 12.5% in a conviction.[11] This means an estimated 75% of reported rapes are never prosecuted.

Seventy-seven percent of completed rapes are committed by someone known to the victim.[12] Rapists who attack acquaintances are able to manipulate their victims into a position of vulnerability (such as alone in a room, a car, or a secluded area)[13] because there is already a relationship, no matter how tenuous. Therefore acquaintance rapists do not generally use excessive force or weapons, but will use only use as much violence as is necessary to subdue the victim.[14] Acquaintance rapists escalate threat as needed, using their body weight and arms to pin down their victims to instill a sense of helplessness and terrify them into

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[8] *Crime in Maryland*, 2005 Uniform Crime Report, 2.
[9] Maryland Department of Human Resources Office, Victims Statistical Services Data, 2006.
[10] Fisher *et al*., *supra* at 16, U.S. Department of Justice, Bureau of Justice Statistics, *College Women, supra,* Kilpatrick *et al., Rape in America, supra*.
[11] Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact* 73 (1992).
[12] U.S. Department of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997).
[13] David Lisak, *Sex Offenders: Dynamics and Interview Techniques*, 3 (2001) in Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement, authored by the National Center for Women & Policing, Office of Justice Programs, Violence Against Women Office & the U.S. Dept. of Justice.
[14] Lisak, *supra* at 4.

submission.[15] Although most victims of sexual assault (70%) do not sustain physical injuries one might expect from a violent assault;[16] however, many women who are not physically injured still report they feared "being seriously injured or killed during the rape."[17] While acquaintance rapes account for the majority of sexual assaults, 90% of sexual assault victims who knew their attacker did not report the attack to the police.[18]

Sexual assault takes its toll mentally and physically on a victim. A victim may have to make medical decisions regarding unwanted pregnancy, sexually transmitted diseases including HIV, gonorrhea, chlamydia, and syphilis, medical complications due to "date rape drugs" and possible fertility complications such as pelvic inflammatory disease. Mental health concerns include increased risk for post traumatic stress disorder (PTSD), depression, increased substance use, and suicide.[19] Almost 31% of rape survivors develop PTSD sometime during their lifetime;[20] they are the largest single group of PTSD sufferers when compared to

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[15] *Id.*
[16] Kilpatrick *et al.*, *Rape in America*, *supra*.
[17] *Id.*
[18] Bohmer, C., & A. Parrot, *Sexual Assault on Campus* 31 (1993).
[19] See Kilpatrick, D. G. *et al.*, *Violence and Risk Of PTSD, Major Depression, Substance Abuse/Dependence, and Comorbidity: Results from the National Survey of Adolescents*, 71 Journal of Consulting & Clinical Psychology 692-700 (2003); G. Steketee & E. B. Foa, *Rape Victims: Post-Traumatic Stress Responses And Their Treatment: A Review Of The Literature*, 1 Journal Of Anxiety Disorders 69-86 (1987).
[20] Kilpatrick *et al.*, *Rape in America*, *supra*.

other types of traumatic events.[21] Rape survivors are more likely to have substance abuse problems than people who have not been a victim of sexual assault. They are 5.3 times more likely to use prescriptions drugs for non-medical purposes and 6.4 times more likely to use cocaine, and ten times more likely to use other hard drugs.[22] A study drawing from a national sample of women with a history of sexual assault found that 58.4% of respondents met the criteria for having major depression,[23] and in 1992, the National Victim Crime Center conducted a study entitled *Rape in America,* which found that 33% of sexual assault victims admitted they had considered suicide. This number is four times greater than for those people who had not been victimized by crime.[24]

Sexual assault also affects victims in numerous other aspects of their lives. The medical and emotional harm caused by a sexual assault may result in significant economic consequences, such as hospital and medical bills, lost wages, lost school tuition, psychotherapy bills and housing relocation costs. Victims may find it difficult to continue working, and may need to take time off, transfer to a different location, or change jobs. Absenteeism may sky-rocket, and productivity often plummets.[25] In some workplaces, such changes can result in loss of

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[21] E. B. Foa *et al.*, *The Treatment of Rape Victims* (1987) (Paper presented at the conference State-of- the-Art in Sexual Assault, Charleston, S.C.).
[22] Kilpatrick *et al.*, *Rape in America*, *supra*.
[23] S. E. Ullman & L. R.Brecklin, *Sexual Assault History and Suicidal Behavior in a National Sample of Women,* 32 Suicide & Life-Threatening Behavior 117-130 (2002).
[24] Kilpatrick *et al.*, *Rape in America*, *supra*.
[25] *See generally* Rebecca Smith *et al.*, *Unemployment Insurance and Domestic*

employment all together. Education is also effected by sexual assault, which is rampant on college campuses. The U.S. Department of Justice estimates that thirty-five out of every 1,000 undergraduate females are sexually assaulted every year.[26] A victim may need to leave school permanently or temporarily; in addition they may need to deal with any school disciplinary proceedings, housing issues, and tuition issues that may arise.

The decision in this case is made in this context. It concerns an under-reported and under-prosecuted crime, committed primarily against women, who suffer serious harm as a result.

ARGUMENT

I.

POST-PENETRATION RAPE SHOULD BE RECOGNIZED BY THE COURT BECAUSE ITS PROHIBITION IS NECESSARY TO PROTECT PERSONAL AUTONOMY AND BODILY INTEGRITY.

Excluding post-penetration rape from criminal rape laws denigrates the dignity and autonomy of women who experience having a penis inside their bodies against their will, without consent, and with force. It suggests that their bodies are not their own – at least not from the time they are penetrated until the penis is withdrawn.[27] One law review persuasively describes the issue: "feminist scholars,

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Violence: Learning From Our Experiences, 1 Seattle Journal For Social Justice 503 (Fall/Winter 2002).

[26] Fisher *et al.*, *supra* at 16.

[27] While it is difficult to divorce this case and the Court of Special Appeals

medical practitioners, and victims have observed, the harm of rape is about more than penetration – it is about the loss of autonomy, dignity, and control that arises from being a target of intimate violence, power, and rage." Erin G. Palmer, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should Be a Crime in North Carolina*, 82 N.C.L.Rev. 1258, 1268 (2004). Catharine MacKinnon, one of the feminist scholars referred to in Palmer's article, describes the harm that rape causes:

> [Rape is an] attack on the self, which can be shattered; the degradation of human dignity; the violation of trust and destruction of spirit. … Rape can destroy one's sense of safety, belief in integrity and worth, belief in and enjoyment of intimate relationships, and faith in one's place of respect in family or community. … Dread and terror of rape and anticipation of its possibility can set limits on women's freedom of action and access to a full life. Catharine A. MacKinnon, Sex Equality: Rape Law, 778 (2001).

The loss of personal autonomy and violation of bodily integrity that post-penetration rape causes are the most important principles presented by this case. Indeed, they have constitutional implications.

The U.S. Supreme Court made in clear in *Lawrence v. Texas* that "individual decisions … concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause." 539 U.S. 558, 578 (2003), citing *Bowers v. Hardwick*, 478

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opinion from gender and the historical treatment of women in rape prosecutions, it should be acknowledged that the principle that an individual should be able to withdraw consent after penetration has occurred is actually a gender neutral one. Men and women should both have this right, and Maryland's rape statutes are not gender-specific.

U.S. 186, 216, (Stevens, J. dissenting), *overruled by Lawrence v. Texas*.[28] While a specific right to reject sexual intercourse has not been articulated, due process has been found to protect "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). The Supreme Court explains, "these matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Ibid.*

The decision in *Lawrence* involves protecting the rights of individual adults to have sexual relations *with consent*. Surely, the reverse falls under the same constellation of due process rights, and an individual is protected from being forced to have sexual relations *without consent*. There is no rational justification for the State to instead elevate the decision of one person to continue sexual intercourse over the decision of another to reject those acts. One person should have no "right to finish" sexual relations at the expense of the personal autonomy and bodily integrity of another.[29]

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[28] Although this Court has not yet addressed these issues, in construing the Due Process Clause of the Maryland's Declaration of Rights, Art. 24, the decisions of the U.S. Supreme Court on the 14th Amendment to the U.S. Constitution are practically direct authorities. *Home Util. Co. v. Revere Copper & Brass, Inc.*, 209 Md. 610 (1956) and progeny.

[29] One of Maryland's rape crisis & recovery centers, a member-agency of MCASA, reported that middle school boys have told community educators that there is a new law creating "a man's right to finish." This harsh phrase appears to

II.

PRACTICAL AND SITUATIONAL FACTORS SUPPORT INCLUSION OF POST PENETRATION RAPE IN RAPE PROHIBITIONS.

A. Reasons to Withdraw Consent After Penetration

In many respects, it is irrelevant why an individual might withdraw her or his consent to sexual intercourse. The law should not permit another to forcibly override this intimate and personal decision. However, some understanding of the reasons that consent might be withdrawn post-penetration may be helpful.

Victims have reported to sexual assault service providers and sex crimes prosecutors that they were informed by a perpetrator that he was HIV+ only after he had penetrated her. In one of these cases, the perpetrator was not actually HIV+ but merely trying to terrify the victim.

Women (or men) might withdraw consent because a sexual partner failed to use a condom as promised. One MCASA program reports that a victim requested that her boyfriend use a condom because he had been unfaithful in the past and had once given her a sexually transmitted infection. The boyfriend complied with the request once, but then changed his mind and forcibly penetrated her without a condom, telling her she could not treat him "like a germ."

Sexual activity may cause physical pain that leads to withdrawal of consent.

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have been coined after press reports of the Court of Special Appeals' *Baby* decision.

Some of these may be the result of physiological issues.[30] Other pain may be caused by malicious or sadistic acts by one party or another. Indeed in this case, the victim, J.L., testified that Baby "got on top of me and he tried to put it in and it hurt." She then said "stop, that it hurt" and tried to push the Respondent out of her by pushing his legs.

In any of these situations, under the Court of Special Appeals rationale, if a man's organ slipped out of the woman's vagina even for a moment, the law would support a rape prosecution if "re-penetration" occurred with force and without consent. Yet, a woman could be in severe pain, bleeding, punching and pushing the man to get him out of her for many minutes – even an hour – and a rape prosecution could not be pursued. The court in *State v. Siering*, 35 Conn. App. 173, 644 A.2d 958, 962-963 (Conn. App. 1994), cited this problem when upholding a conviction for post-penetration rape in Connecticut, calling it "absurd" to construct the law so that it protects a defendant whose physical force is great enough that he can avoid temporary displacement of the male organ. *See also, State v. Robinson*, 496 A.2d 1067, 1071 (Me. 1985).[31] This not only defies

[30] The American College of Obstetricians and Gynecologists lists numerous possible reasons for pain during intercourse, including scars, irritations, infections, vaginitis, vaginismus, pelvic inflammatory disease, problems with the uterus, endometriosis, a pelvic mass, bowel or bladder disease, and ovarian cysts. The American College of Obstetricians and Gynecologists, Pamphlet AP020, *Pain During Intercourse* (1999).

[31] The Maine Court also noted this would cause significant evidentiary problems as "the question of rape or not rape … would turn on whether the prosecutrix, on revoking her consent and struggling against the defendant's forcible attempt to continue intercourse, succeeds at least momentarily displacing the male sex organ.

logic, it would result in rape law providing greater protection to those victims who are strong or agile enough to dislodge a penis after withdrawing consent, while giving diminished protection to those who could not. Diminished protection for the weaker or more vulnerable members of society would be antithetical to the principles contained in the many Maryland laws that protect those individuals. *See, e.g.*, Md. Code Ann., Crim. Law Art. § 3-602 (Supp. 2006) (prohibiting sexual abuse of a minor); §§ 3-604-605 (2002) (prohibiting abuse, including sexual abuse, of vulnerable adults); § 3-314 (Supp. 2006) (prohibiting correctional or Department of Juvenile Justice employees from having sexual relations with inmates or a confined child).

1. Negotiation Towards Safety

The dynamics of sexual assault are complex. Victims of sexual assault often react in ways that are not intuitively sensible to others. The process of negotiating towards safety is a classic example of this. Sexual assault survivors may humor their assailant, treating him nicely or bargaining, all in an attempt to end or minimize the assault. One survivor reported that she negotiated with her rapist and persuaded him to wear a condom. *Rapist Who Agreed to Use Condom Gets 40 Years*, N.Y. Times, May 15, 1993 (reporting that the jury rejected a rapist's argument that the victim consented to sex when she asked him to use a condom). Another survivor might agree to a less intrusive sexual act, such as

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That makes for a close evidentiary call." *State v. Robinson*, 496 A.2d 1067, 1071 (Me. 1985).

fondling, in an attempt to avoid a more intrusive or violent act. Others may agree to one act only to find that they cannot bring themselves to continue. *Cf.*, Linda A. Fairstein, Sexual Violence: Our War Against Rape, 110-111 (Wm. Morrow & Co., 1993)(observing that rape victims are expected to resist assailants, while other crime victims are permitted to respond with "I'll do anything you want, just don't hurt me.")

Seen in this light, J.L.'s decision to tell the Respondent he could "hit it" as long as he "stops when I tell him to" is a classic example of negotiating to get to safety as soon as possible. She had just been held down, anally penetrated, raped vaginally, and been digitally penetrated – all against her will, mostly with two men acting in concert. Telling Baby, in essence, to get it over with, was her way of trying to end a horrifying situation. To suggest the law will not protect her because she told the Respondent to stop moments after he inserted his penis inside her instead of moments before completely disregards the dynamics of sexual assault.

2. Human Ability to Pause and Stop

In the national and local press that the *Baby* case has stimulated, some have suggested that a rule against "post-penetration rape" is a necessary accommodation to male biology. Jeninne Lee-St. John, A Time Limit on Rape, Time Magazine, Feb. 2007, at 59 (quoting the director of the National Center for Men, "At a certain point during arousal, we don't have complete control over our ability to stop.") Defense Counsel in the *John Z.* case in California made a similar

"primal urge" argument, suggesting that men have only limited self-control once sexually aroused and that even if a woman withdraws her consent, men can do little to respond quickly enough to avoid rape. 29 Cal.4th 756, 762, 60 P.3d 183, 187 (Cal. 2003). It is notable that this argument does not explain why penetration, *per se*, defines the moment after which self control is allegedly lost and rape must be accomplished. Sexual arousal generally is evident prior to penetration. Yet the law is clear that consent may be withdrawn prior to penetration, and that vaginal intercourse with force or threat of force after that withdrawal of consent constitutes rape. MD. Code Ann., Crim. Law Art. §3-304; *see also*, *Hazel v. State*, 221 Md. 464, 469 (1960); *Battle v. State*, 287 Md. 675, 683 (1980) (reciting other authorities).

There appears to be no proven basis for this "primal urge" theory aside from insulting stereotypes of men. *See, People v. John Z.*, 29 Cal.4th 756, 762, 60 P.3d 183, 187 (Cal. 2003) (rejecting the primal urge argument as unsupported). Others note that in addition to being offensive, these hypotheses are contrary to typical responses to experiences such as having a toddler walk into a room during his or her parents' love-making, or the reaction of sexually active teenagers caught in the act. Lee-St. John, A Time Limit on Rape, at 59. As one commentator noted,

> "The act of penetration does not transform the male into an animal, incapable of self control, any more than it changes the female's status from an equal and willing partner to one who exists solely to 'quell' the man's urges." 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, 310 (2004) (citations omitted).

III.

THE HISTORICAL JUSTIFICATIONS FOR CRIMINALIZING RAPE ARE NO LONGER VALID AND ARE BEING REPLACED BY PRINCIPLES WHICH RECOGNIZE AND RESPECT THE EXPERIENCE OF WOMEN AND SEXUAL ASSAULT SURVIVORS.

The Court of Special Appeals opinion includes ancient historical underpinnings of rape law. 172 Md. App. 588, 617 (2007). This review is fascinating and provides insight into the role that criminal laws played in the subjugation of women.[32] Rape was initially criminalized as an affront not to the woman who was raped, but to the man she was associated with (husband, father, *etc*.). The Court of Special Appeals was incorrect, however, when it found that laws have not changed. While Maryland has far to go in efforts to end sexual violence and respond to the experiences of victims, it clearly has progressed beyond the archaic laws that were controlling in 1776 when Article 5 of the Maryland Declaration of Rights incorporated English common law. *See Baby v. State of Maryland*, 172 Md. App. 588, 617 n. 7 (2007), citing *Baltimore Sun Co. v. Mayor and City Council of Baltimore,* 359 Md. 653, 661-662 (2000). Even if the

[32] The Court of Special Appeals, to be absolutely clear, did not advocate the subjugation of women and stated it felt compelled to make its ruling because of the decision in *Battle v. State*, 287 Md. 675 (1980). *See* 172 Md. App. 588, 617-618. It provided a historical analysis because it found the *Battle* decision was rooted in "Biblical and Middle, Assyrian Laws." *Baby*, Md. App. at 617, n. 6.

history cited by the Court of Special Appeals is accurate, it erred when it found it was binding.

The 1976 and 1977 sessions of the General Assembly included comprehensive reforms of Maryland's sexual assault law, some of which are relevant to the post-penetration rape issue. In order to codify rape law, the legislature examined common and existing statutory law. At the time "courts differed upon the essential elements of the crime, and in how they were to be proved." J. William Pitcher, *Legislation: Rape and Other Sexual Offense Law Reform in Maryland, 1976-1977*, 7 Balt.L.Rev. 151, 152 (1977). Prior to the reforms, Maryland's rape statute stated that "penetration shall be evidence of rape" but failed to provide any specificity about other required elements such as lack of consent. *Id.* citing Md. Code Ann., Art. 27 § 461 (1951). Various cases referred to unlawful carnal knowledge, as well as force, absence of the victim's consent, and penetration. *See Coward v. State,* 10 Md. App. 127 (1970); *Craig v. State*, 214 Md. 546 (1957); *Edmundson v. State*, 230 Md. 66 (1962); *Frank v. State*, 6 Md. App. 332 (1969); *Hazel v. State*, 221 Md. 464 (1960); *McEntire v. State*, 2 Md. App. 449 (1967); *Scott v. State*, 2 Md. App 709 (1968); *State v. Merchant*, 10 Md. App. 546 (1970); *Robert v. State*, 220 Md. 159 (1959). Two aspects of this reform are especially pertinent: the language enacted into the new statute and the respect for the victim's perspective illustrated by the statutory reforms.

A. Statutory language supports inclusion of post-penetration rape in Maryland's rape statute.

The General Assembly chose the term "vaginal intercourse" to define the sexual conduct involved in rape. *See* Md. Code Ann., Crim. Law Art. §§3-303 & 3-304 (2002, 2005 Supp.).[33] "Vaginal intercourse" is further defined in §3-301(g):

(1) "Vaginal intercourse" means genital copulation whether or not semen is emitted.

(2) "Vaginal intercourse" includes penetration, however slight, of the vagina.

The statutory language is significant because it clarifies that penetration is not the defining element of rape – vaginal intercourse is. Moreover, §3-301(g) contains two definitions of the same term. Section 3-301(g)(1) defines what vaginal intercourse "means" (*i.e.*, genital copulation). Section 3-301(g)(2) adds that this "includes" penetration. This clarifies that the phrase "genital copulation" should not be interpreted to require something more. It does not, however, limit "genital copulation" to the moment of penetration, but rather illustrates the minimum amount of evidence necessary to prove vaginal intercourse. Statutory construction rules support this further: according to Maryland Code, Art. 1, § 30, the term "includes" is not exhaustive, but means "includes but is not limited to."[34] The

[33] Originally Md.Code Ann., Art. 27, §§ 462 and 463; reenacted in 2002 into current statutes without substantive change.

[34] MD Code, Art. 1, § 30. "The words 'includes' or 'including' means, unless the context requires otherwise, includes or including by way of illustration and not by

language of §3-301(g)(2), that "'vaginal intercourse' includes penetration" does not mean that intercourse *ends* with penetration, but rather provides one example of what would would be sufficient to constitute the act. Other states with similar statutes have used this reasoning when finding that post-penetration rape was prohibited by their statutes. *See State v. Bunyard*, 281 Kan. 392, 133 P.3d 14, 28 (Kan. 2006) (Kansas rape statute does not state that sexual intercourse begins and ends with penetration, but instead establishes the threshold of evidence necessary to prove that intercourse has occurred.); *State v. Siering*, 35 Conn. App. 173, 644 A.2d. 958, 962 (Conn. App. 1994) (construing Conn. Gen. Statutes §53a-65(2), and "the statutory reference to penetration as establishing the minimum amount of evidence necessary to prove that intercourse has taken place.") The Court of Special Appeals was in error when it found that rape does not include non-consensual and forcible genital copulation which occurred after the moment of penetration.

B. Statutory reforms and case law reflect a shift in the public policy justifications underlying Maryland's sexual assault law.

It is also important to examine the shift in philosophy that occurred when the 1976-1977 reforms were enacted. For the first time, respect for sexual assault victims started to be incorporated into Maryland's statutory scheme. The 1976-1977 reforms were made after extensive public hearings which included testimony from rape victims, their parents, rape crisis centers, and advocates for women such

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way of limitation."

as the Women's Law Center and the National Organization for Women. Pitcher, *Legislation*, at 151 and n.3. Statutory changes included important provisions that began to assure that rape law responded more adequately to victims and provided some support for them when they came forward. Prior to 1976, sexual offenses not involving vaginal intercourse (*e.g.*, forced oral or anal sex) were subject to significantly lower penalties. Forced anal intercourse, for instance, was charged as sodomy subject to a ten year penalty, while vaginal rape was subject to a penalty of life imprisonment. *See* Md. Code Ann., Art. 27 §§ 553 and 462 (1951). The Governor's Commission to Study Implementation of the Equal Rights Amendment issued a report on "Rape Law Reform in Maryland" and recommended equal sanctions for all forcible sexual acts based on recognition that most people viewed these acts as equally heinous. Pitcher, *Legislation*, at 154. As a result, the statutes also began to better reflect victims' experiences of sex crimes as opposed to the ancient focus rooted in, as the Court of Special Appeals described it, "deflowering" and "reflowering."

The shift away from traditional justifications for rape law and towards a victim's perspective was further reflected by enactment of Maryland's rape shield statute. *See e.g.*, Md. Code Ann., Crim Law Art. §3-319; *Smith v. State*, 71 Md. App. 165, 188 (1987) (stating that the "Rape Shield Statute is designed to encourage women to report and prosecute sexual assaults by limiting the admissibility of evidence of the victim's chastity or unchastity"). Granted, the early reforms were prior to the decision in *Battle* relied upon by the court below.

The *Battle* court, however, did not analyze the statutory changes and, in any event, additional legislative reforms have continued over time. In 1987, the General Assembly forbid courts from using "Lord Hale's instructions."[35] Md.Code, Crim.Law Art. §3-320. In 2003, the rape shield statute was expanded to protect male victims, victims of child sexual abuse, and victims of all sex crimes. *See* Md. Code Ann., Crim Law Art. §3-319. In 2004, marriage as a defense to rape accomplished by "threat of force" was eliminated. *See* Md. Code Ann., Crim Law Art. §3-318.

The Legislature has not usurped the courts in this area of law. Judicial decisions regarding sexual assault have also made progress into the modern era. For instance, while Maryland has not yet recognized rape as intercourse without consent (*i.e.*, force or threat of force, or other elements are still required), *Robinson v. State*, 67 Md. App. 445 (1986), clarified that all that is required to prove "force" or "threat of force" is that "in the mind of the victim" she was placed in reasonable apprehension of imminent bodily injury of such a nature as to impair or overcome his or her will to resist. *Id.* at 165. The courts have also taken the lead in recognizing that corroboration is not necessary to support a rape conviction. *E.g.*, *Green v. State*, 243 Md. 75, 80 (1966); *Johnson v. State*, 238

[35] Lord Hale was a 18th century jurist who developed jury instructions stating, in summary, that "rape is…. an accusation easily made and hard to be proved and harder to be defended by the party accused through never so innocent." The jury instructions reflected a fundamental suspicion of women (who comprised all rape victims in Lord Hales' time) and the rejection of this philosophy was a major victory for rape victims.

Md. 528, 536 (1965).

Revisions to the jury instructions on rape and sexual offenses, while adopted after the trial in this case, also reflect a shift towards examining the defendant's actions and away from victim-blaming. *See* Maryland State Bar Ass'n, Inc., *Maryland Criminal Pattern Jury Instructions* 4:29 (2005). The new jury instructions, among other changes, removed the emphasis on finding that the victim resisted "to the extent of her ability at the time" and added language to clarify that a "defendant's actions under the circumstances" must be examined.

C. Legal reforms to protect and acknowledge rape victims have occurred nationwide.

Maryland is not alone in making progressive reforms to its sexual assault laws. Throughout the nation, states have eliminated the often sexist presumptions that traditional sexual assault laws contained and moved towards public policies that incorporate protections for rape victims. Like Maryland, other states have partially eliminated marital rape exemptions. *See, e.g.,* S.C. Code Ann. § 16-3-658 (Supp. 1999) ("A person cannot be guilty of criminal sexual conduct ... if the victim is the legal spouse *unless* the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree...") (emphasis added). Others have eliminated marriage as defense to sexual assault altogether, either through state statutes or on constitutional grounds. *See, eg.*, Nev. Rev. Stat. § 200.373 (1997) ("It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if

the assault was committed by force or by the threat of force"); *People v. Liberta*, 64 N.Y.2d 152, 167, 474 N.E.2d 567, 575, (N.Y. 1984) (stating that the martial rape exemption lacked rational basis and therefore violated the equal protection clause of the U.S. and New York constitutions). *See also,* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape,* 88 Cal.L.Rev. 1373 (2000).

Rape shield laws have also been strengthened across the country. *See, e.g.,* M.G.L.c.233 § 21B (Massachusetts), Fed.R.Ev. 412; *State v. Holcomb,* 73 Wash. 652, 657-658, 132 P. 416, 418 (Wash. 1913) (stating that prior acts of intercourse with men besides the defendant cannot be used to discredit a witness); *see also,* Jane H. Aiken, *Protecting Plaintiff's Sexual Pasts: Coping with Preconceptions Through Discretion,* 51 Emory L.J. 559 (2002). Changes to jury instructions, elimination of resistance and corroboration requirements, penalty reforms, and application of sexual assault laws to both genders are also common modifications. Deborah L. Rhode, Justice and Gender , 251 (Harvard, 1989). These reforms are part of the recognition of women as deserving of the same rights and protections as men and "reflect[] a new view of women as 'responsible, autonomous beings who possess the right to personal, sexual, and bodily determination.'" *In re: John Z.,* 29 Cal.4th 756, 764, 60 P.3d 183, 188 (Cal. 2003), citing Berger, *et al., The Dimensions of Rape Reform Legislation*, 22 L. & Soc'y 329, 330 (1988); *see also, e.g.*, Deborah L. Rhode, Justice and Gender , 244-253 (Harvard, 1989).

The issue of post-penetration rape has also been considered by other jurisdictions. The decisions of others states has been thoroughly briefed by the State and discussed in the Court of Special Appeals decision, so are not detailed here, but *amici* note that the majority of states which have considered this issue have concluded that sexual intercourse which continues with force and after consent is withdrawn is rape. Five of the seven states which have held that post-penetration rape is rape under their criminal laws have engaged in statutory analysis of the meaning of sexual intercourse. California's *In re John Z.* decision responded to the opinion of its lower court, rejecting the argument that a woman felt more "outrage" at initial penetration. 29 Cal.4th 756, 760-761, 60 P.3d 183, 186 (Cal. 2003).[36] By contrast, the decisions finding that rape statutes do not encompass post-penetration rape are devoid of analysis, *Battle v. State*, 287 Md. 675, 684 (1980); *State v. Way*, 297 N.C. 293, 254 S.E.2d 760, 761-762 (N.C. 1979) and have been roundly criticized for this. *State v. Bunyard*, 281 Kan. 392, 411-412, 133 P.3d 14, 28 (Kansas 2006) and *McGill v. State*, 18 P.3d 77, 83 (Alaska App. 2001) (noting that Maryland's decision in *Battle* contains neither analysis or citation for the proposition that rape may not be prosecuted if consent is withdrawn post-penetration.).[37] Maryland should join the states that have

[36] The South Dakota court declined to follow a California decision which refused to recognize post--penetration rape. *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1994) (declining to follow *People v. Vela*, 172 Cal. App.3d 237 (1985)).

[37] The *Baby* decision below, of course, does present extensive historical analysis, but it relies primarily on the *Battle* decision, 287 Md. 675 (1980), and *Battle's* discussion of post-penetration rape is both *dicta* and unsupported by analysis.

recognized post-penetration rape and should continue its progress towards public policy that respects sexual assault victims.

IV.

THE COURT OF APPEALS HAS THE AUTHORITY AND RESPONSIBILITY TO ASSURE THAT OUR COMMON LAW REFLECTS CONTEMPORARY VIEWS OF WOMEN AND THEIR ABILITY TO EXERCISE CONTROL OVER THEIR OWN BODIES AND SEXUAL ACTIVITIES.

Even assuming the lower court were correct, this Court should find that the common law *should* change. This Court has clearly stated that common law is dynamic and "subject to judicial modification in light of modern circumstances or increased knowledge." *Ireland v. State*, 310 Md. 328, 331 (1987). The role of women is and should be recognized by the Court as a modern circumstance which must influence how the common law is shaped. The case *v. Das*, 133 Md. App. 1 (2000), provides an example where the Maryland courts have recognized changing views of women and violence against women. *Das* involved an absolute divorce based on "cruelty of treatment" and "excessively vicious conduct" – terms that describe what is commonly referred to as domestic violence. *Id.* at 10. Like rape, domestic violence can be perpetrated against either gender, but women are far more frequently victims.[38]

[38] U.S. Bureau of Justice Statistics, *supra* note 7.

At the time *Das* was decided, the Court of Special Appeals observed, "we are now left holding a stack of cases—all 'good law' … that no longer square with our modern understanding of appropriate family interaction. Verbal and physical abuse may have been tolerated in another era, and our predecessors may have placed the continuity of the marital bond above the well-being of individual participants, but our values are different today." *Das* 133 Md. App. at 37. The Court went on to modify common law and uphold the circuit court's judgment of absolute divorce based on cruelty using the modern view that domestic violence should not be tolerated. This case provides the Court with a similar situation: the historical views of post-penetration rape law as described by the Court of Special Appeals are archaic and outrageous. They have no place in Maryland's modern common law and the Respondent's conviction by a jury should be upheld.

CONCLUSION

A Connecticut court rejected the arguments against post-penetration rape, noting that "[i]t is axiomatic that statutes are not be be interpreted to arrive at bizarre or absurd results." *State v. Siering*, 35 Conn.App. 173, 644 A.2d 958, 962 (Conn. App. 1994) (citations omitted). Maine's court viewed the attempt to exclude post-penetration rape from its statute as contrary to "common sense." *State v. Robinson*, 496 A.2d 1067, 1069 (1985). Without doubt, these courts are correct. And without doubt, the statutory interpretation and practical considerations discussed above support overturning the decision below. However,

the more important underlying policy issue this case presents is whether victims of sexual assault will be recognized and respected under Maryland's rape law. Without question, a victim who is forced to have sexual intercourse without her consent *is* sexually assaulted. Her personal autonomy and bodily integrity *are* harmed. This Court should confirm that Maryland's rape law recognizes and protects these victims. And this recognition and protection should apply whether a penis is inside a victim or not.

For the reasons above, *amici* urge this Court to reverse the decision of the Court of Special Appeals and uphold the conviction of the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 2007, three copies of the foregoing Brief were served by first class mail, postage prepaid, on:

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