

A CRITICAL EXERCISE IN EFFECTUATING “NO MEANS NO” RAPE LAW

INTRODUCTION

Suppose a man and woman agree to have consensual intercourse, then ten minutes into the act, the woman regrets her decision. First she tries to push him off but with no success. A few minutes pass and she tries harder to push him off, but he continues to engage in intercourse. A few more minutes elapse, and she says, “I have to leave.” He then says, “Just a few more seconds, I’m almost done.” The woman, however, keeps trying to push the man away from her until thirty seconds later, he climaxes and stops. Did the man just commit rape?

On July 25, 2003, the Governor of Illinois signed the first “no means no” law in the country.¹ The law states: “A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.”² The Illinois legislature passed this law primarily in response to a three-year court battle in California on the issue of whether a person who initially consented to sexual intercourse can withdraw consent after commencing sexual intercourse.³ The Illinois legislature wanted to prevent any similar protracted litigation and to make clear that if one partner says “no” during the sexual act, and the other partner fails to stop, the state may charge that partner with the crime of rape.⁴

Under the new Illinois rape statute, the man in the above hypothetical could arguably be guilty of rape. But, is this the correct decision? Perhaps, but the problem with the current “no means no” statute is that it focuses only on the victim’s withdrawal of consent, and it provides courts with no standard of conduct for the offender’s behavior following withdrawal. Moreover, the statute provides no guidance as to how the victim must withdraw consent. The new statute clarifies that an individual has a right to bodily autonomy throughout the entire sexual act, even after consensual intercourse begins.⁵ Although this is an admirable goal, the statute’s downfall is that it fails to address the significant issues stated above. The

1. Dave McKinney, *Clarification of Rape Law Signed Quietly by Governor*, CHICAGO SUN-TIMES, July 29, 2003, available at 2003 WL 9563160; CNN.com, *Rape Law Permits Changing Mind During Sex Act* (July 30, 2003) at <http://www.cnn.com/2003/LAW/07/30/rape.law>.

2. 720 ILL. COMP. STAT. ANN. 5/12-17(c) (West 2004).

3. S. 93-406, Reg. Sess., at 1 (Ill. 2003).

4. *Id.*

5. 720 ILL. COMP. STAT. ANN. 5/12-17(c) (West 2004).

Illinois legislature created an ambiguous statute which risks the fairness, clarity, and uniformity that existed in Illinois's prior rape statute.

After identifying the statute's shortcomings, this Note proposes a two-part revision to the "no means no" statute. First, the Illinois law fails to define the means by which a person may withdraw consent. This Note submits that the person must "clearly communicate" the withdrawal of consent through "words or actions." Clearly communicating places the other partner on notice, while at the same time reinforcing the victim's⁶ right to bodily autonomy throughout the entire sexual experience. Moreover, juries would consider whether withdrawal of consent was clearly communicated using the objective reasonable person standard. Second, the current Illinois statute fails to address the standard of conduct for the offender after the victim withdraws consent. This Note submits that in order to prosecute the offender for rape, the act must continue by the "use of force or threat of force," a requirement absent from the current Illinois statute. Adding this essential element of force from the Illinois Criminal Code pertaining to sexual offenses⁷ will provide consistency in the law.

Part I provides an overview of rape law reforms, including those in Illinois, to give the reader background in recent trends. Part II examines the evolution of jurisprudence on the issue of withdrawn consent, with particular emphasis on the California case *In re John Z.*, which prompted Illinois to pass the "no means no" law. Part III outlines the new Illinois statute, its legislative history, and proposes a revised statute. This section is especially important in detailing the legislative intent behind the new statute and how this intent helps advocate for the proposed revised statute. Parts IV and V analyze the necessity for the added language of "clearly communicates" and the "use of force or threat of force," and why their absence from the current statute creates significant problems. Part VI poses four hypothetical situations of withdrawn consent and concludes, through a comparative analysis, that the proposed statute provides for greater guidance and consistency in the law. Finally, Part VII outlines important policy issues that are outside the scope of this Note with the hope that other authors will explore them in greater detail.

In short, this Note advocates for greater clarity in the "no means no" statute. Adding the two key provisions stated above will ensure consistency

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6. "Victim," as used throughout this Note, refers to persons who bring the charge of rape against the offender.

7. See 720 ILL. COMP. STAT. ANN. 5/12-13(a)(1) (West 2002) (providing that defendants commit criminal sexual assault if they accomplish sexual penetration "by the use of force or threat of force").

and fairness in the statute’s application while still recognizing that everyone has the right to sexual autonomy.

I. OVERVIEW OF RAPE REFORM

Rape law has evolved considerably since the 1970s. States have repealed or greatly modified traditional rape laws, and all fifty states have enacted evidentiary reforms.⁸ In particular, many states passed gender-neutral laws, no longer regarding the woman as the only victim of rape.⁹ The traditional approach to rape required “proof that the female did not consent to the intercourse *and* that the sexual act was ‘by force’ or ‘against her will.’”¹⁰ The male had to either use force or threaten to use force on the female victim, or in some cases, a third person.¹¹ If strictly nonphysical force was present, such as coercion, then the prosecution could not charge the defendant with forcible rape.¹² Moreover, traditional law merged the “elements of nonconsent and force,” where the defendant’s use of, or threat to use force proved both elements.¹³ The female had to resist the male’s sexual advances, demonstrating a lack of consent, and then had to be overcome by the male’s use of physical force to prove the second element of forcible rape.¹⁴

A. Traditional Rape Law

The traditional approach to rape law was evident in the North Carolina case of *State v. Alston*.¹⁵ The court determined that the state failed to prove the essential element of force—either physical force or threats of bodily harm.¹⁶ The man and woman had dated for approximately six months and had previously engaged in consensual sex.¹⁷ The woman testified that the defendant had resorted to violent acts during their relationship.¹⁸ Until the day of the rape, the man and woman had not had sexual intercourse for

8. CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 17 (1992).

9. *Id.* at 22.

10. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 577 (3d ed. 2001).

11. *Id.* (citing *Fitzpatrick v. State*, 558 P.2d 630, 631 (Nev. 1977)).

12. *Id.*

13. *Id.*

14. *Id.*

15. *State v. Alston*, 312 S.E.2d 470 (N.C. 1984).

16. *Id.* at 476.

17. *Id.* at 471.

18. *Id.*

about one month.¹⁹ On June 15, the man arrived at the woman's school, grabbed her arm, and as they were walking threatened to "'fix' her face."²⁰ Even though the victim testified that she feared the defendant after he grabbed her arm, the court concluded that this fear was "unrelated to the act of sexual intercourse" on June 15.²¹ Rather, the court determined that the victim's fear was a result of the prior acts of violence in their relationship.²² The court concluded that "absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape."²³

B. Modern Reforms

Criticisms of the traditional law approach abounded from "[f]eminists, social scientists, and legal scholars [who] questioned the law's focus on the character and behavior of the victim rather than on the behavior of the offender."²⁴ Some critics proposed statutes that focused on the defendant's criminal conduct rather than on the conduct of the victim.²⁵ State legislatures have responded to criticisms of traditional rape laws through various means. One trend is that modern statutes are gender-neutral and cover not only genital penetration, but also "anal and oral copulation."²⁶ Also, many states changed the crime from rape to "sexual assault, sexual battery, or criminal sexual conduct."²⁷ In addition, statutes include coercive conduct and not strictly the use of, or threat to use, force.²⁸ These statutes criminalize coercive conduct when the defendant is in a position of

19. *Id.*

20. *Id.* at 471–72.

21. *Id.* at 476.

22. *Id.*

23. *Id.*

24. SPOHN & HORNEY, *supra* note 8, at 17; *see also* Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 401 (1988) (suggesting that traditional and even reform rape laws fail to successfully shift the focus away from the victim's nonconsent and rightfully back to the defendant's criminal behavior).

25. *See, e.g.*, Wicktom, *supra* note 24, at 425 (advocating for a Burden-Shifting Criminal Sexual Assault statute, whereby the defendant has the burden of production and persuasion on the issue of the victim's consent); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1797–99 (1992) (suggesting that legislatures should replace rape laws with a series of new statutes such as Sexually Motivated Assault and Sexual Expropriation that more accurately reflect a defendant's culpability in attempting to cause a victim to engage in sexual conduct).

26. WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 629, 632 (2003).

27. SPOHN & HORNEY, *supra* note 8, at 22.

28. LAFAVE, *supra* note 26, at 629; *see, e.g.*, VT. STAT. ANN. tit. 13, § 3252(a)(1)(B) (1998) (defining the crime of sexual assault to include "coercing the other person" to engage in the sexual act).

authority or trust with the victim, including teacher-student and employer-employee relationships.²⁹ States have also removed the physical resistance requirement and allowed verbal resistance to suffice.³⁰

Some commentators have praised Illinois for its strong rape law reforms.³¹ On July 1, 1984, Illinois removed seven offenses—"rape, deviate sexual assault, indecent liberties with a child, aggravated indecent liberties with a child, contributing to the sexual delinquency of a child, aggravated incest, and sexual abuse by a family member"—from its criminal code and added the following four offenses—"aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, and criminal sexual abuse."³² Moreover, Illinois provided for a consent defense and removed the requirement of resistance which "[p]resumably . . . shift[s] the burden of proving consent to the defendant."³³

There is, however, great irony in the reform movement. For example, even though legislatures either removed or lessened the resistance requirement, "proof of resistance may be helpful—or even critical—to the factfinder's determination that a rape has occurred."³⁴ Current Illinois law states that "[l]ack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent."³⁵ On the other hand, Illinois allows the defendant to introduce evidence that the victim consented to the sexual act.³⁶ Noted criminal law scholar Joshua Dressler points out that courts, including those in Illinois, may still require some showing of resistance in order to convict the defendant of rape.³⁷ Further, Illinois courts have been reluctant to conclude that consent is an affirmative defense, which would actually shift the burden of proving nonconsent to the prosecution.³⁸

29. LAFAVE, *supra* note 26, at 646.

30. *Id.* at 629–30.

31. SPOHN & HORNEY, *supra* note 8, at 36.

32. *Id.* at 37.

33. *Id.*

34. DRESSLER, *supra* note 10, at 581.

35. 720 ILL. COMP. STAT. ANN. 5/12-17(a) (West 2004).

36. *Id.*

37. DRESSLER, *supra* note 10, at 581; *see also* People v. Kinney, 691 N.E.2d 867, 871 (Ill. App. Ct. 1998) (commenting that the jury found in favor of the defendant on the first count of the charge, where the victim did not say anything during the sexual act and tried to resist by pushing the defendant away, which she conceded the defendant might not have known due to his size); People v. Nelson, 499 N.E.2d 1055, 1061 (Ill. App. Ct. 1986) (explaining that "the lack of resistance by one able to so resist conveys the impression of consent; complainant's lack of consent must be conveyed in some objective manner").

38. People v. Roberts, 537 N.E.2d 1080, 1084 (Ill. App. Ct. 1989).

Some commentators have also advocated that states should “abandon the conjunction of force and nonconsent.”³⁹ The rationale is that women have the right to choose with whom to engage in sexual activity regardless of the presence of force.⁴⁰ In other words, the crime of sexual assault can occur just through nonconsent, rather than nonconsent as a result of force. These commentators propose that courts should only look to the element of force as one means of proving nonconsent.⁴¹ The Model Penal Code presumably influenced Illinois to eliminate the element of nonconsent, although the Code, like Illinois, allows for a general consent defense.⁴²

Nonetheless, Illinois courts still consider both force and nonconsent, even though the element of consent is no longer in the statute. For instance, the Illinois Appellate Court in *People v. Roberts* stated, “Consent is the very antithesis of force. Where the State proves defendant used force, it necessarily proves the victim did not consent.”⁴³ This issue is especially important because the “no means no” law only requires the person to withdraw consent. Consequently, there is a great probability that Illinois courts will rely on other elements to determine whether consent was properly withdrawn and whether the other partner committed sexual assault. For this reason, it is imperative that the “no means no” statute provides clear guidance to the courts regarding how a person must withdraw consent, as well as the offender’s standard of conduct that must follow.

One remaining question is where the new Illinois statute fits into the trend of modern rape reform. The statute does address the issue of sexual autonomy because it makes plain that persons have the right to stop the sexual act at any point.⁴⁴ However, it once again places the focus back on the victim’s conduct of withdrawing consent rather than the defendant’s criminal behavior.⁴⁵ The proposed revised statute, on the other hand, offers a balanced approach because it preserves sexual autonomy and focuses on the conduct of both parties. As Part II of this Note outlines, cases of withdrawn consent are frequently “he said, she said” arguments. Therefore, this Note argues that it is imperative to focus on the conduct of both persons in order to determine the true facts and make the right decision as to guilt or innocence.

39. Dripps, *supra* note 25, at 1806.

40. DRESSLER, *supra* note 10, at 582.

41. *Id.*

42. SUSAN ESTRICH, REAL RAPE 58 (1987).

43. *Roberts*, 537 N.E.2d at 1083.

44. See S. 93-406, Reg. Sess., at 4 (Ill. 2003) (explaining that under the new statute, one person may withdraw consent at any time during the sexual act) (statement of Sen. Rutherford).

45. See 720 ILL. COMP. STAT. ANN. 5/12-17(c) (detailing that a person can withdraw consent, but focusing strictly on the victim’s conduct without also explaining the offender’s standard of conduct).

II. WITHDRAWN CONSENT CASE LAW

Situations involving withdrawn consent have been termed “post-penetration rape”⁴⁶ or, for the purposes of the new Illinois statute, “no means no”⁴⁷ rape. Pre-dating the Illinois legislation was a series of cases beginning in 1979, discussing the withdrawn consent issue. Each case consisted of disputed facts between the victim and defendant, but the common denominator was the issue of whether the alleged victim could withdraw consent during the act of sexual penetration, thus holding the accused liable for criminal sexual assault if the act continued.⁴⁸ This section explores the development of case law across the United States that laid the foundation for Illinois becoming the first state to codify the notion that one can withdraw consent during sexual intercourse.

A. *Early Trends—No Rape After Consent*

The early jurisprudence surrounding withdrawn consent generally rejected charges of rape if the victim initially consented to sexual intercourse. The majority of jurisdictions focused on the issue of consent prior to penetration and largely ignored the issue of consent during the sexual act. Most jurisdictions determined that in cases of withdrawn consent, a defendant was guilty of rape only if there were multiple acts of sexual penetration.

In 1979, the Supreme Court of North Carolina concluded in *State v. Way* that the trial court incorrectly instructed the jury on withdrawn consent.⁴⁹ During deliberations, the jury asked if consent could be withdrawn, and the judge stated that “consent initially given could be withdrawn and if the intercourse continued through use of force or threat of force and that the act at that point was no longer consensual this would constitute the crime of rape.”⁵⁰ The court noted that the issue of withdrawn consent usually arises in cases of multiple sexual acts.⁵¹ For example, if a man and woman are engaged in consensual sexual intercourse, and the woman withdraws consent, there would be no rape unless the man removed

46. Amy McLellan, Note, *Post-Penetration Rape—Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 780 (1991). The author created the term “post-penetration” in order to provide clarity, noting that it is not a legal or medical phrase. *Id.* at 780 n.6.

47. McKinney, *supra* note 1; *see also* S. 93-406, Reg. Sess., at 4 (Ill. 2003) (declaring that the bill makes clear that in Illinois, “no does mean no, even after yes”) (statement of Sen. Rutherford).

48. *See infra* Parts II.A–B.

49. *State v. Way*, 254 S.E.2d 760, 761 (N.C. 1979).

50. *Id.* (quotations omitted).

51. *Id.*

his penis and subsequently re-penetrated the woman's vagina. In *Way*, because there was only one act of penetration, the court determined that under the trial judge's erroneous instructions, the jury could find the defendant guilty of rape even if the woman changed her mind in the middle of the act.⁵² The court concluded that changing one's mind post-penetration did not allow for the charge of rape, although the defendant could still be guilty of other offenses for not ceasing the sexual act.⁵³ Interestingly, the court did not provide a reasoned analysis as to why rape was not present but merely concluded that rape could not occur once consensual intercourse commenced.⁵⁴

One year later, the Court of Appeals of Maryland addressed a similar question submitted by the jury during deliberations in *Battle v. State*: "When a possible consensual sexual relationship becomes non-consensual for some reason, during the course of the action—can the act then be considered rape?"⁵⁵ The trial judge concluded that a situation could begin consensually and then become nonconsensual during the sexual act.⁵⁶ The appellate court acknowledged that if consent is withdrawn prior to penetration, then rape is present if the accused forces the victim to have sexual intercourse.⁵⁷ Conversely, "if she consents prior to penetration and withdraws the consent following penetration, there is no rape."⁵⁸ Like the *Way* court, the *Battle* court concluded that rape does not exist after the start of consensual intercourse.⁵⁹

In contrast, the Supreme Judicial Court of Maine decision in *State v. Robinson* affirmed the trial court's jury instruction that consent prior to penetration does not necessarily carry throughout the entire sexual act.⁶⁰ The court refused to follow *State v. Way* and criticized the Supreme Court of North Carolina for citing no authority in reaching its conclusion.⁶¹ The Maine court conceded, as in *Way*, that "a mere change of the woman's mind in the midst of sexual intercourse does not turn the man's subsequent

52. *Id.* at 761–62.

53. *Id.* at 762.

54. *See State v. Robinson*, 496 A.2d 1067, 1070 (Me. 1985) (commenting on the lack of analysis of the *Way* court on the issue of withdrawn consent); *see also Way*, 254 S.E.2d at 762 (highlighting that the court simply concluded that a defendant could not commit rape if the woman initially consents to intercourse).

55. *Battle v. State*, 414 A.2d 1266, 1268 (Md. 1980).

56. *Id.*

57. *Id.* at 1270.

58. *Id.*

59. *Id.*

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

61. *Id.* at 1070.

participation into rape."⁶² However, the *Robinson* court concluded that *Way* ignored a critical component in the jury instruction—that the sexual conduct continue “through use of force or threat of force.”⁶³ Since there was a lack of precedent, the court had to use its best judgment, as well as attempt to discern the legislative intent of Maine’s rape statute.⁶⁴ The court concluded that the crime of rape is present in withdrawn consent cases “only if it found *as a fact* that defendant compelled the woman to submit to his continued intercourse with her for a period after she had revoked her original consent.”⁶⁵

Just one month later, a California court of appeals made a stunning departure from *Robinson* in *People v. Vela*.⁶⁶ The court followed the reasoning of *Battle* and *Way* and concluded that no rape occurs if the female initially consents to penetration but thereafter revokes consent.⁶⁷ As in *Battle* and *Way*, the *Vela* court determined that the crime of rape should focus on the moment of penetration.⁶⁸ The *Vela* court noted that although a female “may certainly feel outrage” if she withdraws consent and the male continues, such outrage is not comparable to the outrage experienced had consent been withdrawn prior to initial penetration.⁶⁹ The *Vela* court agreed with *Way* that the defendant could be charged with other crimes for his subsequent acts following the female withdrawing consent—just not rape.⁷⁰ The court also returned to the reasoning in *Way* that a defendant is guilty of rape in cases of withdrawn consent only if there are subsequent acts of sexual penetration.⁷¹

62. *Id.*

63. *Id.* (emphasis omitted).

64. *Id.* At the time *Robinson* was decided, the Maine rape statute provided that “[a] person is guilty of rape if he engages in sexual intercourse . . . [w]ith any person, not his spouse, and the person submits as a result of compulsion. . . .” ME. REV. STAT. ANN. tit. 17-A, § 252(1) (West 1983) (repealed 1989). “Compulsion” was defined as “physical force, a threat to use physical force or a combination thereof that makes a person unable to physically repel the actor or produces in that person a reasonable fear that death, serious bodily injury or kidnapping might be imminently inflicted upon that person or another human being.” *Id.* § 251(1)(E).

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

66. *People v. Vela*, 218 Cal. Rptr. 161 (Cal. Ct. App. 1985).

67. *Id.* at 164; *Battle v. State*, 414 A.2d 1266, 1270 (Md. 1980); *State v. Way*, 254 S.E.2d 760, 762 (N.C. 1979).

68. *Vela*, 218 Cal. Rptr. at 164; *Battle*, 414 A.2d at 1270 (noting that consent must be given prior to penetration); *Way*, 254 S.E.2d at 762 (explaining that consent is determined prior to penetration).

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

70. *See id.* (noting that the state could charge the defendant with other crimes such as assault or battery).

71. *Id.*

B. Modern Trends—Consent Is Not Absolute

Beginning in 1994 and continuing to today, courts have consistently denounced the reasoning in *Way*, *Battle*, and *Vela* and instead followed the reasoning of *Robinson*. For instance, in *State v. Siering* the Appellate Court of Connecticut declared the idea absurd that a defendant could only be charged with rape in cases of withdrawn consent if there were multiple acts of sexual intercourse.⁷² As the *Siering* and *Robinson* courts both noted, this standard presents serious evidentiary issues.⁷³ For example, there may be problems of proving that the victim displaced the defendant's penis and that the defendant subsequently re-penetrated the victim. This standard also protects a defendant who overpowers the victim with such physical force that would make it impossible to displace the penis in the first place.⁷⁴ Accordingly, the *Siering* court used its best judgment—and “the common sense of the situation before” it—and agreed with *Robinson* that continued penetration by force after consent is withdrawn equals sexual assault.⁷⁵

In addition, the Supreme Court of South Dakota, in *State v. Jones*, flatly rejected the defendant's proposed jury instruction modeled after the *Vela* decision.⁷⁶ The proposed instruction attempted to alleviate the evidentiary concerns noted in *Robinson* and *Siering*: “An act of sexual intercourse does not constitute rape, where the female initially consents to the act, but after penetration, withdraws her consent, and the male, *without interruption of penetration*, continues the act against the will of the female and by means of force.”⁷⁷ In this case, the court negated the *Way* court's reasoning that withdrawn consent can occur only if there are multiple sexual acts of penetration. Moreover, it declined to follow *Vela* and concluded that “[t]his court has never held that initial consent forecloses a rape prosecution.”⁷⁸

In 2000, the State of California revisited the *Vela* decision in *People v. Roundtree*.⁷⁹ During deliberations, the jury asked: “If, after penetration, the female changes her mind and says ‘stop’ and the male continues, is this still

72. *State v. Siering*, 644 A.2d 958, 963 (Conn. App. Ct. 1994); *see also* *State v. Robinson*, 496 A.2d 1067, 1071 (Me. 1985) (explaining that the first sexual encounter would have to result in the victim “at least momentarily . . . displacing the male sex organ”).

73. *Siering*, 644 A.2d at 963; *see also Robinson*, 496 A.2d at 1071 (declaring that these situations present very difficult evidentiary problems for the state).

74. *Siering*, 644 A.2d at 963.

75. *Id.*

76. *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1994).

77. *Id.* (emphasis added).

78. *Id.*; *see also State v. Crims*, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995) (holding that forcible continuation of sexual conduct after consent is withdrawn constitutes rape).

79. *People v. Roundtree*, 91 Cal. Rptr. 2d 921, 923 (Cal. Ct. App. 2000).

rape[?]"⁸⁰ The defendant relied on the court's prior holding in *Vela*.⁸¹ This time, however, the court determined that "[t]he *Vela* court's conclusion [was] unsound."⁸² The court looked at the statutory definition of rape and concluded that the crime "is necessarily committed when a victim withdraws her consent during an act of sexual intercourse but is forced to complete the act. The statutory requirements of the offense are met as the act of sexual intercourse is forcibly accomplished against the victim's will."⁸³ The court declined to follow *Vela* and instead chose to follow *Robinson*, holding that rape is committed if the sexual act is continued by force after consent is withdrawn.⁸⁴

In 2003, the Supreme Court of California's decision in the juvenile case of *In re John Z.* settled the conflict between the *Vela* and *Roundtree* decisions regarding the issue of withdrawn consent.⁸⁵ This is the decision that greatly influenced the Illinois legislature to adopt the "no means no" law.⁸⁶ The supreme court assumed, *arguendo*, that the victim initially consented to sexual intercourse, ostensibly to provide some level of finality on the matter.⁸⁷ However, as with all the withdrawn consent cases previously discussed, the scenarios tend to be "he said, she said," and there remains serious doubt whether the victim in the case even consented prior to penetration.

For example, in *John Z.*, Laura, the seventeen-year-old female victim, testified that she was in the defendant John's bedroom, along with another male acquaintance Juan.⁸⁸ Both John and Juan started to kiss and undress Laura, even though she continually told them to stop.⁸⁹ The males then began touching her breasts and genital area.⁹⁰ Laura stated that she enjoyed this activity at first, but then protested when Juan started to put on a condom.⁹¹ Juan then forcefully penetrated her vagina but stopped when the condom fell off.⁹² John, who had momentarily left the room, returned and

80. *Id.*

81. *Id.*

82. *Id.* at 924.

83. *Id.* California defines rape "[w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." CAL. PENAL CODE § 261(a)(2) (West 1999).

84. *Roundtree*, 91 Cal. Rptr. 2d at 924-25; *see also* McGill v. State, 18 P.3d 77, 82 (Alaska Ct. App. 2001) (concluding that one partner may withdraw consent after initial penetration).

85. *In re John Z.*, 60 P.3d 183, 184 (Cal. 2003).

86. *See infra* Part III.A.

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

88. *Id.* at 184.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 185.

began kissing Laura, telling her “she had a really beautiful body.”⁹³ The defendant then positioned himself on top of Laura, penetrated her vagina, and rolled her over so she was on top of him.⁹⁴ Laura claimed that she consistently attempted to remove herself, but John “grabbed my hips and pushed me back down and then he rolled me back over so I was on my back.”⁹⁵ Laura added that she tried to resist, and after approximately ten minutes, the defendant stopped.⁹⁶ During cross-examination, Laura claimed that the defendant stated, “just give me a minute, and she said, no, I need to go home.”⁹⁷ This exchange occurred a second time until the defendant stopped about sixty to ninety seconds later.⁹⁸ The defendant claimed that the sexual act was totally consensual and that he stopped after Laura stated that she had to go home.⁹⁹

The court agreed with the *Roundtree* court’s reasoning that rape was present once a defendant forced the sexual act to continue against the other person’s will, regardless of what point the person withdrew consent.¹⁰⁰ Moreover, the court observed that “substantial evidence show[ed] that she withdrew her consent and, through her actions and words, communicated that fact to defendant.”¹⁰¹ Furthermore, the court added that “no reasonable person in [the] defendant’s position would have believed that [the victim] continued to consent to the act.”¹⁰² The court rejected *Vela*’s reasoning that rape cannot occur unless the victim objects or the defendant uses or threatens force prior to initial penetration.¹⁰³ The defendant asserted that he should be given a “reasonable amount of time” to withdraw after the female expressed a desire to stop.¹⁰⁴ The court observed that nowhere in its sexual assault statutes or case law is a defendant “entitled to persist in intercourse once his victim withdraws her consent.”¹⁰⁵ The court further stated that even if it agreed with the defendant’s argument, he was given plenty of time to withdraw, but he did not.¹⁰⁶ According to Laura’s testimony, the

93. *Id.* (quotations omitted).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* (quotations omitted).

98. *Id.*

99. *Id.*

100. *Id.* at 186.

101. *Id.* at 186–87.

102. *Id.* at 187.

103. *Id.*

104. *Id.* (quotations omitted); see also *State v. Bunyard*, 75 P.3d 750, 756 (Kan. Ct. App. 2003) (noting that the defendant asserted that the victim should give him a “reasonable time” to stop after consent is withdrawn).

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

106. *Id.*; see also *Bunyard*, 75 P.3d at 756 (relying upon the victim’s testimony, in which she

defendant persisted for at least four or five minutes after the first time she informed him that she had to go home.¹⁰⁷

The court declined, however, to provide clear guidance for future cases because the case was an appeal from juvenile court.¹⁰⁸ Therefore, the court elected "not [to] explore or recommend instructional language governing such matters as the defendant's knowledge of the victim's withdrawal of consent, the possibly equivocal nature of that withdrawal, or the point in time at which [the] defendant must cease intercourse once consent is withdrawn."¹⁰⁹ Nevertheless, the court agreed with *Roundtree* that one can be charged with forcible rape if initial consent is withdrawn and the other person continues the sexual conduct.¹¹⁰

This brief jurisprudential profile suggests that many courts have moved away from the narrow rulings of *Way*, *Battle*, and *Vela* to embrace the view that rape can include instances where the victim withdraws consent post-penetration and the defendant continues the sexual intercourse through force. Against this background, this Note turns to Illinois' engagement with the issue of post-penetration rape charges.

III. "NO MEANS NO"

Illinois prosecutes rape under its Criminal Sexual Assault statute.¹¹¹ The "no means no" provision is codified under Defenses, subsection (c): "A

stated that the defendant continued penetration for five to ten minutes and concluding that amount of time was not "reasonable").

107. *In re John Z.*, 60 P.3d at 185.

108. *Id.* at 187-88.

109. *Id.*; see also *Bunyard*, 75 P.3d at 757 (stating that sufficient evidence existed to convict the defendant of forcible rape, yet nowhere in the opinion does the court provide explanatory language that might be used within jury instructions in future cases). However, it seems implicit that the court of appeals did adopt the "reasonable time" standard espoused in *In re John Z.* *In re John Z.*, 60 P.3d at 187.

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

111. Section 5/12-13 outlines Criminal Sexual Assault as:

- (a) The accused commits criminal sexual assault if he or she:
 - (1) commits an act of sexual penetration by the use of force or threat of force;
 - or
 - (2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
 - (3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
 - (4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.

720 ILL. COMP. STAT. ANN. 5/12-13(a) (West 2002).

person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.”¹¹² This statute augments Article 12 of the Criminal Code, since the legislature included it under defenses instead of under criminal sexual assault.¹¹³ The statute does not limit the issue of withdrawn consent to instances involving strictly penetration but also includes “touching” or “fondling.”¹¹⁴ For purposes of this Note, the issue of withdrawn consent focuses on situations involving penetration; however, the proposed revised statutory language also applies to sexual abuse.¹¹⁵ This section explores the legislative history of the newly adopted statute and then outlines the proposed revised statute.

A. Legislative History

Senate Bill 406 unanimously passed both the Illinois Senate and the Illinois House of Representatives.¹¹⁶ The Illinois legislature enacted the new statute to “clarify specifically that no does mean no, even after yes.”¹¹⁷ Senator Rutherford noted that the California case of *In re John Z.* “took approximately three years of litigation before the California Supreme Court finally ruled that one of the partners does have the opportunity and right to

112. 720 ILL. COMP. STAT. ANN. 5/12-17(c) (West 2004). The other subsections under Section 12-17 of Defenses include:

(a) It shall be a defense to any offense under Section 12-13 through 12-16 of this Code where force or threat of force is an element of the offense that the victim consented. “Consent” means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent.

(b) It shall be a defense under subsection (b) and subsection (c) of section 12-15 and subsection (d) of Section 12-16 of this Code that the accused reasonably believed the person to be 17 years of age or over.

720 ILL. COMP. STAT. ANN. 5/12-17 (West 2004).

113. See §§ 5/12-13 to 12-16 (outlining the four sexually-related offenses within Article 12).

114. Compare § 5/12-12(e) “Sexual conduct” (defining sexual conduct as “intentional or knowing touching or fondling . . . directly or through clothing, of the sex organs, anus or breast”) with § 5/12-12(f) “Sexual penetration” (defining sexual penetration as “any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person, or any intrusion, however slight”).

115. See § 5/12-15(a)(1) (outlining the elements of Criminal Sexual Abuse, including the element of force, which is also part of the Criminal Sexual Assault statute).

116. S. 93-406, Reg. Sess., at 4 (Ill. 2003); H.R. 93-406, Reg. Sess. (Ill. 2003). On the day of passage in the House, State Representative Rosemary Mulligan introduced the bill with time for debate; however, no further discussion took place on the proposed statute. *Id.*

117. Ill. S. 93-406, at 1 (statement of Sen. Rutherford).

withdraw their consent."¹¹⁸ Senator Rutherford added that two states, Maryland and North Carolina, have case law that one cannot withdraw consent during consensual intercourse.¹¹⁹ The new statute, according to Senator Rutherford, "would clarify Illinois law so that we would not have to go through, potentially, a long legal situation like they had in California."¹²⁰

The Senate debate raised some significant questions. For example, Senator Jacobs voiced concern during the session that "[w]henver the consent is withdrawn—I don't even know how to word this . . . and the mind has changed and they say no, what, then, is the response?"¹²¹ To which Senator Rutherford replied, "This law does nothing to change . . . the facts that need to be clarified in a court of law. . . . This does nothing whatsoever to the laws of Illinois . . . the presentation must be made before a judge and jury and those facts of the case must be determined."¹²² In other words, fact-finders retain the same role in resolving the issue of withdrawn consent as with the issue of lack of consent before penetration.

Another significant question posed during the debate concerned input from Illinois State's Attorneys on the new law. Senator Shadid asked, "Where are the State's Attorneys on this, Senator?"¹²³ Senator Rutherford responded, "[T]hey did not file any type of a witness slip and I've not heard a pro, nor con, from them with that regard."¹²⁴ Interestingly, the Illinois legislature had absolutely no substantive feedback from the primary law enforcement officers who will be applying this new law on a daily basis. One would think that questions concerning burden of proof, the constitutionality of the statute, and/or the existence of any problems associated with enforceability of the statute should invoke some response by the State's Attorneys. According to Vermont State's Attorney Robert L. Sand, the lack of response could be attributed to the fact that the statute is not "hugely controversial."¹²⁵ Vermont criminal defense attorney Kevin W. Griffin echoed the same sentiment, stating, "Prosecutors probably thought it was obvious" that one can withdraw consent any time after initial consent is given.¹²⁶

118. *Id.*

119. *Id.*; see *supra* text accompanying notes 49–59.

120. Ill. S. 93-406, at 1 (statement of Sen. Rutherford).

121. *Id.* at 2 (statement of Sen. Jacobs).

122. *Id.* at 3 (statement of Sen. Rutherford).

123. *Id.* at 2 (statement of Sen. Shadid).

124. *Id.* (statement of Sen. Rutherford).

125. Interview with Robert L. Sand, Windsor County State's Attorney, in White River Junction, Vt. (Oct. 13, 2003).

126. Interview with Kevin W. Griffin, Criminal Defense Attorney, in White River Junction, Vt. (Oct. 14, 2003).

In short, the Illinois legislature had very little debate on this statute with no substantive input from the State's Attorneys. Apparently, the statute raised no substantive concerns for legislators, prosecutors, criminal defense attorneys, or the public. However, this may change if and when a crime of post-penetration rape is brought against a defendant and a court must actually interpret and apply the new statute. These same individuals might then voice their opinions if courts inconsistently or unfairly interpret the law. This Note advocates for the Illinois legislature not to wait until courts are forced to interpret the "no means no" law, but instead to incorporate the proposed revisions and provide courts with clarity and guidance now.

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B. Proposed Revised Illinois Statute

This Note proposes the following revision to section 12-17(c):

Under Section 12-13 through 12-16 of this Code where force or threat of force is an element of the offense that the victim consented, [a] person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she ~~withdraws consent~~ clearly communicates a withdrawal of consent and the other continues by the use of force or threat of force during the course of that sexual penetration or sexual conduct.¹²⁷

The element of force retains the same definition as provided in section 12-12(d),¹²⁸ and the defendant's use of force or threat of force is determined by the objective standard of a reasonable person.¹²⁹ The objective standard also applies when the victim withdraws consent by "clearly

127. This statute adds the element of "clearly communicates," as well as incorporates the element of force from section 12-13(a)(1). See *supra* note 111 (outlining the elements of Criminal Sexual Assault).

128. "Force or threat of force" means the use of force or violence, or the threat of force or violence, including but not limited to the following situations:

- (1) when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat; or
- (2) when the accused has overcome the victim by use of superior strength or size, physical restraint or physical confinement.

720 ILL. COMP. STAT. ANN. 5/12-12(d) (West 2002).

129. See, e.g., *People v. Kinney*, 691 N.E.2d 867, 870-71 (Ill. App. Ct. 1998) (explaining that the defendant's use of force or threat of force be such that a reasonable person would believe a threat of harm is present).

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communicating" the withdrawal to the defendant.¹³⁰ Specifically, the reasonable person standard is such that a "person of ordinary intelligence . . . [would] know the victim did not consent to have sexual relations, and he or she was committing sexual penetration by force, as defined by statute."¹³¹ Furthermore, this Note proposes that section 12-12 should include a definition of "clearly communicates," as follows: "words or actions such that a reasonable person would have the requisite awareness that consent has been withdrawn." The elements of clearly communicating a withdrawal of consent, as well as force, would be left to the determination of the trier of fact.¹³² As previously stated, this revision seeks to ameliorate rape reformists' concerns of sexual assault statutes that focus only on the victim's conduct.¹³³ Instead, the proposed statute offers a balanced approach by concentrating on both the victim's conduct and the defendant's criminal behavior. The simple fact is that cases of withdrawn consent have to focus on the conduct of both parties because, in order for the defendant to know the act is no longer consensual, the victim must somehow notify the defendant. The proposed statute accomplishes this task, but more significantly, it provides needed clarity and instills fairness in the process of determining guilt or innocence.

IV. CLEARLY COMMUNICATES

This section describes the necessity for the language of "clearly communicates" within section 17(c). First, Illinois failed to define the means by which one withdraws consent, which creates ambiguity and lack of uniformity in the law. Second, this Note addresses, and attempts to resolve, potential concerns that rape reformists might have with the proposed statute. This Note concludes that "clearly communicates" is essential in order to provide clarity and ultimately to make the statute effective.

130. *See id.* at 871 (discussing that the trial court could have instructed the jury that consent was present "if a reasonable person in defendant's position would have believed he had the victim's approval to engage in sexual intercourse"); *see also* *People v. Nelson*, 499 N.E.2d 1055, 1061 (Ill. App. Ct. 1986) (noting that "complainant's lack of consent must be conveyed in some objective manner").

131. *People v. Bowen*, 609 N.E.2d 346, 355 (Ill. App. Ct. 1993).

132. *See* S. 93-406, Reg. Sess., at 3 (Ill. 2003) (explaining that the court must still determine the facts of each particular case) (statement of Sen. Rutherford).

133. *See supra* notes 24-25 and accompanying text.

A. Defining How to Withdraw Consent

The “no means no” law apparently settles the debate that individuals have the right to withdraw consent at any point, thus ensuring that defendants will not litigate the specific issue of whether initial consent carries throughout the entire sexual act.¹³⁴ Nevertheless, simply because Illinois has codified this statement does not mean that it will reduce the length of litigation because sexual assault cases are so fact-specific.¹³⁵ Moreover, this is evidenced because the “no means no” statute fails to define how persons must withdraw consent. As stated above, the legislative history makes clear that the person simply has to say “no,” and the other person must stop. However, the trier of fact must still determine whether the victim *sufficiently communicated* “no” to the other person, and difficult questions will arise when a victim’s “no” is *not* clear and persistent.¹³⁶ By adding “clearly communicates” to section 12-17(c) and by providing a definition to this element, judges and juries will have better guidance as to what constitutes an effective withdrawal of consent.

The proposed definition of “clearly communicates” also comports with prior withdrawn consent case law. Although the court in *In re John Z.* did not recommend clear instructional language, it determined that “substantial evidence shows that [the victim] withdrew her consent and, through her actions and words communicated that fact to defendant.”¹³⁷ Moreover, the words or actions must be such that “no reasonable person in defendant’s position would have believed that [the victim] continued to consent to the act.”¹³⁸ In short, all parties are placed on notice as to the requirements of how to withdraw consent, which will ensure greater efficiency and clarity in the law.

B. Addressing the Critics

The proposed revised statute will not be without its critics amongst rape law reformists. This section addresses the notions of a masculine communication code in our society and the concern that the focus on direct interaction does not comport with how most women sexually communicate. This section also discusses how a feminist reform movement that expects

134. Interview with Robert L. Sand, *supra* note 125.

135. *Id.*

136. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 71 (1998).

137. *In re John Z.*, 60 P.3d 183, 186–87 (Cal. 2003).

138. *Id.* at 187.

women to be more assertive and to take action might agree with the proposed revision. This Note gives serious consideration to all of these issues and attempts to incorporate some of their underlying policies into the statute.

1. Gender Differences in Sexual Communication

Susan Ehrlich noted in a case study that "complainants' signals of resistance were evaluated . . . against a masculine communicative code whereby signals of resistance are expressed strongly and forcefully."¹³⁹ Her concern is that "women are blamed or held responsible for failing to signal their lack of consent clearly and unambiguously. Crucially, such an interpretative frame functions to deflect men's responsibility for rape; instead victims are held responsible for being deficient in their attempts to communicate."¹⁴⁰ Ehrlich especially pointed to "no means no" acquaintance rape scenarios and concluded "that the indirectness of refusals . . . by women refusing men's sexual advances is exacerbated in situations of physical and sexual violence where fear inflects 'refusals' with a different character."¹⁴¹ Ehrlich believes that such indirect reaction, as opposed to direct communication by women could allow authorities to "conceivably characterize the complainants' refusals as deficient."¹⁴²

The proposed statute attempts to address many of these issues. First, the statute defines "clearly communicates" as "words or actions." Therefore, indirect reaction may very well meet this standard depending upon the facts and circumstances. The key point is that the proposed statute is broad in order to encompass innumerable means of communication and not only direct, assertive conduct. Second, such communication is not subjectively measured by what the offender understood the reaction to be, but rather by what a reasonable person would have understood. This construction is gender-neutral and attempts to address Ehrlich's concerns of a masculine communication code. According to the U.S. Department of Justice, women are most often the victims of rapes and sexual assaults.¹⁴³

139. SUSAN EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT 150 (2001).

140. *Id.* at 133.

141. *Id.* at 145.

142. *Id.* at 146.

143. See, e.g., CALLIE MARIE RENNISON, PH.D., U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 1 (Aug. 2002) (detailing that "[f]emale victims accounted for 94% of all completed rapes, 91% of all attempted rapes, and 89% of all

Thus, a subjective standard would almost always require juries to perceive the withdrawal of consent from a masculine perspective. By instituting an objective standard, the proposed statute attempts to diminish the possibility that juries will interpret the victim's actions only from a masculine standard of communication.

Finally, adding "clearly communicates" will not resurrect traditional rape law norms. Illinois courts have made clear that "physical resistance or demonstrative protestations are not necessary to demonstrate that a woman [or man] was forced to have sexual intercourse. Moreover, the absence of physical resistance or demonstrative protestations does not establish or demonstrate consent if the woman is threatened or in fear of being harmed."¹⁴⁴ In other words, "clearly communicates" does not change the standard that applies prior to penetration; it focuses only on the method of *withdrawing* consent after penetration.

Another potential criticism of the proposed statute, as well as the revised Illinois statute, is the difficulty of deciding what "no" really means. Similar to Ehrlich's concerns mentioned above, Stephen Schulhofer asserts that there is a "gender gap in sexual communication."¹⁴⁵ He argues that men sometimes believe a "no" to really mean "not yet, but don't stop."¹⁴⁶ Schulhofer also states that the reasonableness requirement fails to resolve the issue of "ambiguous sexual communication"¹⁴⁷ because if juries are made up of men and women who hold the antiquated view that no can sometimes mean yes, "they might well decide that the man's mistake [of believing the woman consented] could be considered reasonable."¹⁴⁸ Therefore, Schulhofer advocates for the legal standard of a "verbal-yes rule," which would "move away from the demand for unambiguous evidence of her protests and insist instead that the man have affirmative indications that she *chose* to participate."¹⁴⁹

Schulhofer focuses on obtaining affirmative consent prior to commencing sexual activity, whereas the new Illinois statute and the

completed and attempted sexual assaults, 1992-2000"), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf>.

144. *People v. Leonhardt*, 527 N.E.2d 562, 566 (Ill. App. Ct. 1988); accord *People v. Gramc*, 537 N.E.2d 447, 451 (Ill. App. Ct. 1989); *People v. Nelson*, 499 N.E.2d 1055, 1061 (Ill. App. Ct. 1986).

145. SCHULHOFER, *supra* note 136, at 256.

146. *Id.* (quotations omitted); see also JOHN M. MACDONALD, RAPE: CONTROVERSIAL ISSUES 65 (1995) (discussing a study of undergraduate women, where 39.3% admitted to saying no but really meaning yes).

147. SHULHOFER, *supra* note 136, at 260.

148. *Id.* at 259 (quotations omitted).

149. *Id.* at 272. But see MACDONALD, *supra* note 146, at 62 (mentioning that critics are concerned that date rape laws "would practically require a man to obtain a signed affidavit from a woman before having sex with her").

proposed statute pertain to withdrawing that consent during the sexual act. Regardless, the proposed statute addresses Schulhofer's issue of ambiguous sexual communication and gender issues. As stated above, the statute allows for a broad interpretation of both how persons may withdraw consent, and how juries should determine this from a gender-neutral perspective. The fact remains that juries are composed of men and women with diverse backgrounds, and the criminal justice system expects that they will think and rationalize clearly without any preconceived and antiquated notion that no means yes.¹⁵⁰ Assume, arguendo, that the man received affirmative permission from the woman. In this case, the proposed statute of "clearly communicating" a withdrawal of consent addresses Schulhofer's concerns that "sexual intimacy must be chosen freely[,]""¹⁵¹ unlike the Illinois statute which is ambiguous as to how one must actually withdraw consent.¹⁵² Moreover, the proposed definition of "clearly communicates" is nearly identical to Schulhofer's notion of a verbal-yes rule: "So long as a person's choice is clearly expressed, by words or conduct, her right to control her sexuality is respected."¹⁵³

2. Tell Men What You Want

Even though the proposed statute will have its share of dissenters, it may also gain support amongst certain reformists who advocate for women "taking responsibility."¹⁵⁴ The "taking responsibility" philosophies of Elizabeth Fox-Genovese, Katie Roiphe, and Naomi Wolf espouse that women must be clear about their sexual boundaries and must speak up to protect their sexual autonomy.¹⁵⁵ Women should know what they want in a sexual encounter and be ready to clearly express their desires.¹⁵⁶ Women who "take responsibility" are acting as adults and will no longer be treated as infants looking for protection.¹⁵⁷

150. *But see* SCHULHOFER, *supra* note 136, at 259 (exclaiming that "[o]ur folklore has it that [a] jury trial achieves commonsense results and social consensus").

151. *Id.* at 272.

152. *See* 720 ILL. COMP. STAT. ANN. 5/12-17(c) (West 2004) (outlining the "no means no" law but failing to define how to withdraw consent).

153. SCHULHOFER, *supra* note 136, at 272-73.

154. *Id.* at 261.

155. *Id.*; *see also* ELIZABETH FOX-GENOVESE, FEMINISM IS NOT THE STORY OF MY LIFE 164 (1996) (explaining that women "realize independence by taking responsibility for oneself"); KATIE ROIPHE, THE MORNING AFTER xiv (1994) (noting that women must take responsibility for their sexual autonomy and interests); NAOMI WOLF, FIRE WITH FIRE 193 (1994) (emphasizing that there is a "feminist responsibility for women to learn to speak").

156. SCHULHOFER, *supra* note 136, at 261.

157. *Id.*

The proposed statute certainly speaks to the axiom of “taking responsibility” in the sense of clearly communicating one’s right to sexual autonomy. Women are empowered to tell their partners what they want and do not want in the sexual relationship. Women are respectfully treated as adults who can protect themselves against unwanted sexual advances. But at the same time, the proposed statute does not completely place the onus on the victim to withdraw consent by expressly saying “no.” Instead, victims may communicate through words or actions, thereby taking notice of “gender gap” concerns, as well as the fact that not all women sexually express themselves in the same manner.¹⁵⁸ This also takes into account that oftentimes, the circumstances surrounding the sexual activity will not allow for victims to be quite that assertive.

In sum, all sexual assault cases pose a vast array of difficult questions. In withdrawn consent cases, those questions are multiplied. The lack of answers to these questions is exacerbated because the current Illinois statute fails to address the critical issue of how persons must withdraw consent. The proposed statute attempts to attain greater clarity and to provide necessary guidance to both parties, as well as those who prosecute, defend, and ultimately pass judgment on them.

V. THE ELEMENT OF FORCE

The second provision the Illinois legislature should include in the statute is the element of force. The beginning of the proposed statute inserts language from section 12-17(a), as well as includes the element of force as defined in section 12-12(d):

Under Section 12-13 through 12-16 of this Code where force or threat of force is an element of the offense that the victim consented,¹⁵⁹ [a] person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she ~~withdraws consent~~ clearly communicates a withdrawal of consent and the other continues by the use of force or threat of force¹⁶⁰ during the course of that sexual penetration or sexual conduct.

The current Illinois statute omits this crucial language concerning force

158. See *supra* notes 141–42, 145–46 and accompanying text.

159. 720 ILL. COMP. STAT. ANN. 5/12-17(a) (West 2004).

160. See § 5/12-12(d) (defining “[f]orce or threat of force” as used within Article 12 of the Criminal Code pertaining to Title III, Specific Offences, Part B, Offenses Directed Against the Person); see also *supra* text accompanying note 126 (outlining the definition of the element of force).

that is necessary in order to prosecute the defendant under any of the four sexually related offenses outlined in the Illinois Criminal Code.¹⁶¹ The rationale behind including this language is that the "no means no" statute pertains only to those offenses where the victim gives initial consent and then withdraws it, unlike the other sections of these offenses where initial consent is irrelevant.¹⁶²

In order to give effect to the "no means no" statute, the element of force is thus required. For example, if prosecutors charge defendants with criminal sexual assault because they fail to stop engaging in initially consensual sexual intercourse, then prosecutors must file those charges under section 12-13(a)(1), which contains the element of force.¹⁶³ Stated differently, the "no means no" law is not an enforcement provision but instead augments the criminal code as a defense. Prosecutors will not charge defendants under section 12-17(c) but will charge them under a specific sexual assault statute such as section 12-13(a)(1).¹⁶⁴ The problem, however, is that this language is absent from the statute. The critical question is whether courts must read in the element of force. This Note submits that Illinois courts are required to read in the element of force based upon the rules of statutory construction. This conclusion is supported by Illinois case law and the legislative history of the revised statute.¹⁶⁵ Since courts must read in the element of force, the Illinois legislature should include this language in order to provide greater clarity and guidance to all affected parties.

This section applies the rules of statutory construction utilized by the courts of Illinois and the United States Supreme Court to explain why courts must read the element of force into the "no means no" statute. If courts must include the element of force, it is also imperative to determine the sufficiency of force necessary to fall within the statutory definition. In addition, this Note advocates that courts should apply the totality-of-the-circumstances standard to assist in deciding these problematic cases.

161. §§ 5/12-13(a)(1), 12-14, 12-15(a)(1), 12-16.

162. See § 12-13(a)(2) (charging the defendant with criminal sexual assault when he or she "commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent").

163. Interview with Robert L. Sand, *supra* note 125. Prosecutors might also charge defendants under section 12-14, Aggravated Criminal Sexual Assault, depending upon the facts of the case.

164. *Id.*

165. See *infra* Parts V.A–B.

A. Canons of Statutory Construction

According to the Supreme Court of Illinois, “[t]he cardinal rule of statutory construction, to which all other canons and rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature.”¹⁶⁶ To determine legislative intent, “the court may properly consider not only the language of the statute, but also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved.”¹⁶⁷ Moreover, it is imperative to analyze “the entire Criminal Code and each of its sections.”¹⁶⁸ This canon of construction is often termed the *whole act rule*; courts utilize the rule when a statute by itself appears ambiguous yet is clarified by other parts of the statutory scheme.¹⁶⁹ The rationale behind the whole act rule is that legislatures do not add provisions to statutes “in ways that undercut other provisions.”¹⁷⁰ Similarly, Illinois courts have stated that “statutes which relate to one subject are governed by one spirit and a single policy, and the legislature intended the enactments to be consistent and harmonious.”¹⁷¹

For these reasons, Illinois courts must read in the element of force in cases of withdrawn consent, and for clarity, the legislature should include this language in the statute. In the legislative history of the “no means no” provision, Senator Rutherford stated that “this bill does not change our law with regards to any of the penalties, anything whatsoever. What this . . . specifically says [is] that if one partner says no, no means no.”¹⁷² In fact, when Illinois introduced its initial reforms in 1984, the legislative history reflected “that the central purpose of the bill was to recodify the sexual offenses into a comprehensive statute with uniform statutory elements that would criminalize all sexual assaults without distinguishing between the sex of the offender or the victim and the type of sexual act proscribed.”¹⁷³ In other words, Illinois was addressing the specific issue of withdrawing consent during the sexual act, but it was not attempting to reformulate the statutory requirements of the four offenses outlined in the

166. *People v. Frieberg*, 589 N.E.2d 508, 517 (Ill. 1992) (quoting *People ex rel. Hanrahan v. White*, 285 N.E.2d 129, 130 (Ill. 1972)); see also LAFAVE, *supra* note 26, at 69 (explaining that a court will look to legislative intent to interpret an ambiguous statute).

167. *Frieberg*, 589 N.E.2d at 517.

168. *Id.*

169. WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 263 (2000).

170. *Id.*

171. *People v. Watters*, 595 N.E.2d 1369, 1376 (Ill. App. Ct. 1992).

172. S. 93-406, Reg. Sess., at 3 (Ill. 2003) (statement of Sen. Rutherford).

173. *People v. Haywood*, 515 N.E.2d 45, 49 (Ill. 1987).

criminal code. Assuredly, Illinois could not have intended to criminalize conduct that it would not criminalize in the first place—i.e., where the element of force is absent.

In analyzing the sections of the criminal code pursuant to the whole act rule, all four offenses contain the element of force.¹⁷⁴ Likewise, section 12-17, which includes the “no means no” provision, refers to the element of force in conjunction with a victim’s consent.¹⁷⁵ Utilizing this rule to resolve the ambiguities of the Illinois statute “might be the most objective basis to use in determining what the rule of law requires.”¹⁷⁶ In short, applying the canons of statutory construction exercised by the courts of Illinois proves that the element of force is necessary in the “no means no” statute.

Illinois courts may look for guidance from the highest court in the United States. This Note therefore asserts that it is important to look at various canons of statutory construction as used by the Supreme Court that specifically address how to interpret one statute within the context of an entire statutory scheme. For instance, the Textual Canons include the whole act rule, as well as “[a]void interpreting a provision in a way that is inconsistent with the structure of the statute.”¹⁷⁷ If Illinois courts were to give the statute a “plain reading”¹⁷⁸ without including the element of force, then the state could not charge the defendant with an offense in that section of the criminal code, because doing so would violate another canon of statutory construction—“[a]void interpreting a provision in a way that would render other provisions of the Act superfluous or unnecessary.”¹⁷⁹ Further, the Court employs Extrinsic Source Canons that look beyond the four corners of the text and incorporate outside sources, including legislative history and case law to clarify ambiguous language.¹⁸⁰ Taken together, the canons of statutory construction exercised by Illinois courts and the Supreme Court prove that the element of force must be read into the “no means no” statute. In order for prosecutors to charge offenders with

174. 720 ILL. COMP. STAT. ANN. 5/12-13 to 12-16 (West 2002).

175. § 12-17(a).

176. ESKRIDGE ET AL., *supra* note 169, at 264. The whole act rule is most effective in “intratextual arguments (the preferred meaning of a provision is the one consistent with the rest of the statute and statutory scheme)” which is exactly the case regarding the Illinois statute. *Id.*

177. *Id.* at app. at 376.

178. See LAFAYE, *supra* note 26, at 70 (discussing the plain meaning rule, where courts give effect to the language of the statute if it is clear and contains only one interpretation).

179. ESKRIDGE ET AL., *supra* note 169, at app. at 376. See *supra* notes 163–64 and accompanying text (explaining that since the “no means no” law lacks the element of force, prosecutors cannot charge defendants simply under that provision but must instead charge them under a specific sexual assault statute that contains the element of force).

180. *Id.* at 287, app. at 377–78.

sexual assault after the victim withdraws consent, prosecutors must bring charges under one of the sexual assault statutes which requires the element of force.

B. Sufficiency of Force

If Illinois courts must read in the element of force, they must also determine how much force is required to rise to the level of sexual assault. Illinois courts have determined that “[w]here the State proves [the] defendant used force, it necessarily proves the victim did not consent.”¹⁸¹ This addresses the aforementioned sexual crimes within the code that require force but exclude the element of consent. Nevertheless, courts still infer that the presence of force also demonstrates nonconsent. The “no means no” statute, however, expressly includes consent but excludes force, thus leaving the question of whether Illinois courts will make the same inference that withdrawing consent alone also proves the element of force. The proposed statute requires that both the elements of clearly communicating a withdrawal of consent and the presence of force or the threat of force be proven by the state beyond a reasonable doubt.¹⁸² As the withdrawn consent cases reflect, the crime of sexual assault in these instances is proven only if there is a withdrawal of consent “during an act of sexual intercourse but [the victim] is *forced* to complete the act.”¹⁸³ Consequently, the state must establish that the victim both withdrew consent and that the defendant continued the sexual act through force as defined by the Illinois statute.¹⁸⁴

Despite the requirement that the state must prove both elements, this does not suggest that each element is mutually exclusive. Instead, the state may successfully prove that the victim clearly communicated a withdrawal of consent by words or actions, which may also support the finding that the defendant continued by the use of force. For instance, the court in *People v. Bowen* concluded that the defendant committed “sexual penetration by force” when the female victim “push[ed] the defendant away and continually told him no, leave, and stop.”¹⁸⁵ Therefore, a court could also

181. *People v. Roberts*, 537 N.E.2d 1080, 1083 (Ill. App. Ct. 1989).

182. *See People v. Haywood*, 515 N.E.2d 45, 50 (Ill. 1987) (determining that if a defendant claims the victim consented to the sexual act, the state must prove the issue of consent and the presence of force beyond a reasonable doubt).

183. *In re John Z.*, 60 P.3d 183, 190 (Cal. 2003); *accord State v. Siering*, 644 A.2d 958, 963 (Conn. App. Ct. 1994); *State v. Robinson*, 496 A.2d 1067, 1071 (Me. 1985); *State v. Crims*, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995).

184. *See supra* notes 128–29.

185. *People v. Bowen*, 609 N.E.2d 346, 355 (Ill. App. Ct. 1993) (quotations omitted).

conclude under the proposed statute that a defendant committed sexual assault where the victim clearly communicated a withdrawal of consent during the act yet the defendant refused to stop. Although the state must prove both elements, it does not mean that certain facts and circumstances will not overlap. What the proposed statute makes plain is that "sexual intercourse is not transformed into rape merely because a woman changes her mind."¹⁸⁶ In other words, the victim must overtly withdraw consent by words or actions, and the defendant must consciously disregard these demands.

Furthermore, the goal of the proposed statute is to help clarify some significant questions that were not addressed in *In re John Z.* or other withdrawn consent cases.¹⁸⁷ According to Stephen Schulhofer, the difficulty with a "no means no" law is that it fails to "clarify the standards of behavior that apply *after* the woman says 'no.'"¹⁸⁸ As one example, should defendants be charged with sexual assault if they do not immediately stop after consent is withdrawn or if they do not stop within a reasonable amount of time?¹⁸⁹ Critics might suggest adding the following definition of force within the subsection: when the accused fails to stop the sexual penetration or sexual conduct within a reasonable amount of time after the victim has clearly communicated a withdrawal of consent. This would certainly settle the above question, but this Note submits it would further complicate matters. First, the legislature passed the "no means no" provision to augment, not restructure, the criminal code.¹⁹⁰ Second, to include this subsection would be an attempt to legislate the facts of every case, which is unfair to all parties, not to mention impossible.

To cite but one example, suppose a man and woman are engaged in consensual intercourse with the woman positioned on top. The woman then clearly communicates a withdrawal of consent, yet the man continues the act. Without more—for instance, the woman attempting to remove herself—can it be fairly stated that the man has committed sexual assault? Of course, the man should stop and respect the woman's sexual autonomy. Nevertheless, if there is no additional evidence of force, it is highly unlikely that the state would even bring charges. Vermont State's Attorney Robert Sand claimed that given this fact scenario, it is doubtful he would charge

186. *In re John Z.*, 60 P.3d at 190 (citing *People v. Roundtree*, 91 Cal. Rptr. 2d 921 (Cal. Ct. App. 2000); *State v. Robinson*, 496 A.2d 1067, 1070 (Me. 1985)).

187. See *supra* notes 108–09 and accompanying text.

188. SCHULHOFER, *supra* note 136, at 74.

189. See *supra* notes 106, 109 and accompanying text.

190. See S. 93-406, Reg. Sess., at 3 (Ill. 2003) (explaining that "this bill does not change our law with regards to any of the penalties, anything whatsoever") (statement of Sen. Rutherford).

the man if the presence of force were absent.¹⁹¹ He added that “issues of withdrawn consent are very, very challenging because the evidence might not show it.”¹⁹² Moreover, he stated that jurors are skeptical and not receptive to cases of withdrawn consent.¹⁹³

As a result, this Note advocates that Illinois courts should apply the legal standard of totality-of-the-circumstances.¹⁹⁴ This avoids the futile task of trying to legislate facts and more importantly provides courts with needed flexibility. Indeed, section 12-12(d) does not limit the definition of force since it contains the language “including but not limited to,” which presumably allows courts to consider an array of case-specific facts.¹⁹⁵ Moreover, under the proposed statute, force is based upon an objective standard, where “[a] person of common intelligence and experience can distinguish . . . between sexual acts accomplished by force and, for example, sexual activity between consenting adults.”¹⁹⁶ Assuredly, Illinois courts have made plain that there is no “absolute standard setting the amount of force required necessary to establish a rape.”¹⁹⁷ Also, medical evidence showing physical injury is not needed in order for the state to prove that the accused forced the victim to engage in the sexual act.¹⁹⁸ In other words, courts do not strictly limit the element of force to that which is defined by statute.

The proposed statute attempts to mitigate concerns of rape reformists who advocate that courts and legislatures should not consider force and consent together.¹⁹⁹ Professor Dripps states that modern rape statutes “superimpose[] the requirement of force on nonconsensual cases to identify cases of rape.”²⁰⁰ Dripps argues that “violent constraints” should be

191. Interview with Robert L. Sand, *supra* note 125.

192. *Id.*

193. *Id.*; see also Interview by Kelly O'Donnell with Roy Black, Defense Attorney and Polly Poskin, Illinois Coalition Against Sexual Assault, New York, N.Y. (Aug. 2, 2003) (noting that Mr. Black stated that “jurors are highly skeptical of women who originally agree to sex and then later claim they withdrew that consent sometime during the sexual activity”), available at 2003 WL 7238802.

194. See *People v. Gramc*, 537 N.E.2d 447, 451 (Ill. App. Ct. 1989) (explaining that the “victim’s failure to escape or seek assistance depends on the totality of facts and circumstances of the case”); *People v. Nelson*, 499 N.E.2d 1055, 1061 (Ill. App. Ct. 1986) (noting that there is no absolute standard of force required in rape and that each case depends on its own facts and circumstances).

195. 720 ILL. COMP. STAT. ANN. 5/12-12(d) (West 2002).

196. *People v. Kinney*, 691 N.E.2d 867, 871 (Ill. App. Ct. 1998) (quoting *People v. Haywood*, 515 N.E.2d 45, 50 (Ill. 1987) (alteration in original)).

197. *Nelson*, 499 N.E.2d at 1061 (citing *People v. Barbour*, 436 N.E.2d 865 (Ill. App. Ct. 1982)).

198. *People v. Bowen*, 609 N.E.2d 346, 356 (Ill. App. Ct. 1993).

199. See *supra* note 39 and accompanying text.

200. Dripps, *supra* note 25, at 1788. As examples of nonviolent constraints, Dripps discusses a man having intercourse with a woman who is passed out due to intoxication, as well as the complex

criminal, but so too should "nonviolent constraints."²⁰¹ Schulhofer argues that a woman may be a victim of rape even though she remained silent during the act due either to fear or due to unconsciousness because of intoxication.²⁰² Although the proposed statute incorporates both the elements of consent and force, it leaves open for prosecution nonviolent acts. For instance, courts may still convict a defendant who turns a deaf ear to a victim's protests, even though the defendant did not violently restrain the victim, if this action meets the definitional requirement of force. Again, courts must examine each case on the totality-of-the-circumstances, and because Illinois does not have a set standard for sufficiency of force, it allows for greater flexibility in determining whether "nonviolent constraints" indeed are rape.

VI. COMPARATIVE STATUTORY ANALYSIS

This section applies the current Illinois "no means no" law and the proposed revision to four hypothetical cases.²⁰³ The purpose of this analysis is to delineate important distinctions between the current Illinois law and the proposed statute. Specifically, this section notes the ambiguities of the current Illinois law and how the proposed statute provides needed clarity. For the sake of this exercise, the Illinois statute is given a "plain reading;" i.e., the element of force is not implied since there is no established Illinois case law or legislative history resolving this question. In addition, under the proposed statute, the elements of clearly communicating and the presence of force are determined under a reasonable person standard.²⁰⁴ Consider each of the following four vignettes:²⁰⁵

situation of a woman who gives in to sexual pressures from her husband out of either obligation or the fear that he will leave her. *Id.* at 1789–90.

201. *Id.* at 1788–90.

202. SCHULHOFER, *supra* note 136, at 268–69.

203. See *supra* notes 111–12, 127–32 and accompanying text (outlining the Criminal Sexual Assault statute, the current Illinois "no means no" statute, and the proposed revised statute).

204. See *supra* notes 127–29 and accompanying text.

205. McLellan, *supra* note 46, at 803–04. The vignettes incorporate some similar hypothetical facts as those presented in McLellan's article.

Case 1

A man and woman have dated on several occasions. They return to her apartment and begin to have consensual intercourse for the first time in their relationship. During the sexual act, the woman changes her mind and expresses a desire to stop. The man protests and attempts to persuade her to continue. After a few minutes, she acquiesces to his wishes.

Under the current statute, it is not entirely clear whether the man's conduct constituted sexual assault. Even though the current law does not define how one withdraws consent, it is clear that she did so verbally. However, since the current statute does not address the offender's standard of conduct following withdrawal, one could claim that the man's failure to stop the sexual act technically violated the statute. Rape reformists would likely applaud such a decision, arguing that the woman exercised the right to control her sexual autonomy.²⁰⁶ Reformists would also pronounce that her lack of consent was enough, and no force by the man was necessary.²⁰⁷ The irony, though, is that the Illinois statute focuses solely on the victim's conduct, which runs contrary to reformists' efforts to focus on the offender's behavior.²⁰⁸

This Note submits that the proposed statute provides greater clarity and fairness, as well as offers a more balanced approach to reformists' concerns. Under the proposed statute, the woman has clearly communicated a withdrawal of consent through words. However, the man's use of persuasion—without more—does not appear to rise to the level of force as defined by statute.²⁰⁹ Unlike the current law, the proposed statute provides courts with a standard of conduct following withdrawal, thus providing needed clarity. Reformists might take issue, as noted above, but this Note submits that in order to obtain a more accurate account of the facts, it is imperative to focus on the offender's conduct as well. Analyzing his conduct comports with reformists' efforts to move away from focusing on the victim.

The proposed statute also advocates that the standard of totality-of-the-circumstances should apply to discern whether the offender utilized the

206. See *supra* note 40 and accompanying text.

207. See *supra* notes 39–41 and accompanying text.

208. See *supra* notes 24–25 and accompanying text.

209. See *supra* note 128. This would be quite different had the man physically restrained or threatened the woman with bodily harm, which would rise to the standard of force as defined by statute.

requisite force as defined by Illinois statute. Reformists might disagree with analyzing consent and force, but as previously stated, both elements are not mutually exclusive.²¹⁰ The key point is that the proposed statute allows courts the needed flexibility to help resolve close cases. A totality-of-the-circumstances standard would allow juries to weigh important facts, such as the time of the incident, the moments leading up to the sexual act, the woman's words and/or body language, and the man's exact response to her desire to stop. Moreover, this standard would allow juries to consider past sexual conduct between the man and woman that might indicate a pattern of physical or verbal coercion.²¹¹ The bottom line is that this standard provides juries with the tools necessary to render a fair decision based upon all of the facts and circumstances regarding the relationship.

In conclusion, based strictly on the facts presented above, the man has not violated the proposed statute, since his conduct did not rise to the level of force as defined by Illinois statute.²¹² However, the man technically violated the current "no means no" law, since he failed to immediately stop the sexual act once the woman withdrew consent. This Note argues that such a decision is grossly unfair under these facts and circumstances. As noted above, if there was a history of physical or mental coercion, the result might be justified. For these reasons, it is imperative for the legislature to provide clear guidance in defining how to withdraw consent and the offender's standard of conduct after withdrawal. The proposed statute specifically addresses these significant issues, whereas the current law creates the possibility for injustice.

210. See *supra* notes 199–202 and accompanying text.

211. See 725 ILL. COMP. STAT. ANN. 5/115-7 (West 2002) (detailing Illinois' Rape Shield statute that places strict guidelines on introducing evidence of the victim's past sexual conduct). Under this statute, the defendant may introduce evidence of the victim's past sexual conduct as it relates to *their* relationship when the issue of consent surrounding the alleged sexual assault is in dispute. *Id.* The defendant is therefore prohibited from introducing evidence of the victim's sexual history with other persons. *Id.*

212. See *supra* note 128.

Case 2

A man and woman are on their first date. They return to his apartment and begin to have consensual intercourse. The woman does not say anything, yet she attempts to push the man off of her with no success. She tries thirty seconds later, again with no success. She tries for a third time thirty seconds later, again with no success. The man does not threaten the woman, nor does he physically restrain her, but he continues the act.

Under the current Illinois statute, it is unclear whether the man committed sexual assault. First, the Illinois statute is ambiguous on how to withdraw consent. There is uncertainty as to whether the woman's attempts to push the man constituted withdrawing consent. Second, the Illinois statute does not provide a standard of conduct following withdrawal. The issue is how a court should interpret the man's refusal to stop even though the woman kept trying to push him away. This does not mean that courts would not find the man guilty. Nonetheless, the real problem is the statute offers courts no guidance on these two very important issues, which could lead to disparities in judicial interpretation and application. Reformists would likely argue that the man committed sexual assault since it seems apparent she tried to push the man away. Even so, the current statute is ambiguous and thus offers no assistance in resolving this case.

The proposed statute, on the other hand, does address these two issues. First, the woman can withdraw consent through words *or* actions, which is arguably satisfied in this case. Second, the proposed statute provides a standard of conduct after withdrawal of consent. In this case, it is not certain whether the man used the requisite force, yet the statute requires that the fact-finder considers the totality-of-the-circumstances. For instance, juries might look at the number of attempts by the woman to push the man away, or the man's response, or lack thereof, to her attempts. Further, juries might examine the particular facts of the date itself, such as alcohol consumption, flirtatious behavior by either person, or express or implied sexual expectations during the date. Taken together, these surrounding circumstances might lead a jury to conclude that sufficient force was, or was not, present to constitute sexual assault. The point is that the proposed statute makes it far more possible for courts to sort out all of the facts and to render a fair verdict.

In conclusion, neither the current Illinois statute nor the proposed statute provides a clear answer as to whether the man committed sexual

assault in this case. Nevertheless, the proposed statute offers courts flexibility and an equitable framework for resolving these very complex situations. Rape reformists should agree with the proposed statute because it allows for indirect action to satisfy the withdrawn consent element and not merely direct, verbal assertions.²¹³ Moreover, the statute preserves the woman's right to control her sexual autonomy. In short, the proposed statute provides a clear and concise framework, unlike the Illinois statute, which offers courts little to no guidance.

Case 3

A man and woman meet at a party of a mutual friend. They go to an upstairs bedroom and begin to have consensual intercourse. The woman states, "I need to go home." The man does not threaten her, nor does he physically restrain her. The man says, "Just give me another minute. I'm almost finished."

In this case, the Illinois statute raises all of the same questions previously mentioned. In particular, how should courts analyze the statement, "I need to go home." The current law seemingly leaves it to the discretion of the courts to define how the woman must withdraw consent. Secondly, the current statute does not offer any assistance with how to analyze the man's conduct and specifically his request to "finish." Rape reformists should be especially concerned here since the statute focuses strictly on the woman's conduct and expressly excludes the man's response.²¹⁴ Assuredly, courts would look at both parties, but the point is that the current law lacks the necessary clarity in *how* courts should analyze the conduct of both parties.

The proposed statute once again addresses both issues. Granted, the standard of "clearly communicates" does not definitively answer whether the woman's comment constituted withdrawing consent, but at the very least, the standard makes it possible. Secondly, the proposed statute forces courts to analyze the man's conduct in response to the woman's statement. The statute imposes an objective standard on juries that are interpreting whether the woman's statement meant a withdrawal of consent. Rape reformists should concede that this allows for indirect sexual communication, instead of requiring the woman to directly say "stop" or

213. See *supra* notes 139–42 and accompanying text.

214. See *supra* notes 24–25 and accompanying text.

“no.”²¹⁵ Moreover, the objective standard is gender-neutral and attempts to avoid consistently placing juries in the role of interpreting victims’ responses from a masculine perspective.²¹⁶

Courts may still determine that the man’s conduct violated the statute if a reasonable person would know that the woman withdrew consent, but the man continued by the use of force when he failed to stop. There is no clear-cut resolution here, which is why the proposed statute utilizes the totality-of-the-circumstances to provide additional support. Juries might scrutinize the events that occurred prior to going to the bedroom that led both parties to agree to the encounter. Juries will undoubtedly examine other integral facts, such as how far into the sexual intercourse the person made the statement withdrawing consent and what, if any, other body language or statements were made by both individuals. The proposed statute better enables courts to make these very difficult decisions by providing clearly defined terms and a methodical process to render a fair verdict.

This Note argues that courts must retain flexibility to determine whether the offender’s conduct met the requirement of force. Suppose the man in the above hypothetical had finished ten seconds after she withdrew consent, or twenty seconds, or thirty seconds, or even one minute. The Supreme Court of California in *In re John Z.* rejected the defendant’s argument that he should be given a “reasonable amount of time” to stop.²¹⁷ The court added that even if they agreed with this argument, the defendant continued for at least four or five minutes.²¹⁸ Every case of post-penetration rape should be considered and weighed on all of the facts and circumstances. Perhaps juries will determine that in a particular case that thirty seconds is too long. Moreover, under the proposed statute, a jury might conclude that given all of the facts in this hypothetical, the man did not commit sexual assault. The jury might determine that the woman’s words were not clearly communicated or that the man’s persistence did not constitute force. The point is that the proposed statute better assists courts with making these very difficult choices by giving a clear framework.

In short, the proposed statute focuses on addressing the numerous ambiguities of the current Illinois statute—specifically, how consent must be withdrawn and the standard of conduct following withdrawal. Just as importantly, the proposed statute places greater emphasis on uniformity with a goal of consistency in its application by Illinois courts.

215. See *supra* notes 139–42 and accompanying text.

216. See *supra* note 143 and accompanying text.

217. *In re John Z.*, 60 P.3d 183, 187 (Cal. 2003).

218. *Id.* at 187.

Case 4

Same facts as above, but this time the woman is on top of the man. Approximately five minutes into intercourse, she changes her mind and tries to remove herself from that position. However, the man has his hands on her waist, which were there from the start, making it difficult for her to move. Another minute passes, and the woman says, "Let me get off." The man continues the act, interpreting her protest to be a desire for sexual gratification. Another minute passes, and the woman tries to push herself off, while at the same time exclaiming, "Stop! I told you to stop." The man immediately stops.

For the reasons previously asserted, the current Illinois law simply provides little to no guidance. First, the question remains as to how courts should go about interpreting the woman's conduct. This may ultimately lead to vast inconsistencies if some Illinois courts look to both actions and words, while other courts look only to words or actions. Second, the question exists whether, and by what framework, courts should analyze the man's behavior. Arguably, the man in this instance has violated the Illinois law, if courts determine that the woman did withdraw consent by either trying to push away or through her first statement. Rape reformists might agree for the reasons outlined above in case one. The problem, however, is a lack of clarity and ultimately a substantial risk of gross unfairness.

The proposed statute, on the other hand, gives courts the tools to properly analyze this case. Without exception, there is no easy answer here, but this Note details a reasoned process for courts to resolve these tough questions. The objective standard places juries in a gender-neutral position, not overwhelmingly requiring them to consider actions from a man's perspective—a standard rape reformists are likely to support.²¹⁹ Further, considering this case from a totality-of-the-circumstances standard enables courts to get a "big picture" look, while at the same time, analyzing both persons' actions and words. For example, juries will likely scrutinize how the woman first tried to remove herself from the sexual position in order to determine if that alone clearly communicated a withdrawal of consent. Juries will interpret whether her statement was such that a reasonable person would have concluded she withdrew her consent. Further, juries will take note of the woman's final statement and the fact that the man immediately stopped. In short, juries will not simply look at the facts from

219. See *supra* notes 139–42 and accompanying text.

one party's perspective but will instead analyze and weigh all of the circumstances in making their final decision as to which facts are the most credible.

This Note submits that the proposed statute offers courts a practical approach in settling close cases such as this hypothetical. Based solely on the facts above, courts would likely find, under the proposed statute, that the man did not commit sexual assault. The woman did not initially clearly communicate a withdrawal of consent, and once she made plain that consent no longer existed, the man immediately stopped. The bottom line is that unlike the current Illinois law, the proposed statute provides greater clarity and increases the chances of uniform application by Illinois courts.

VII. REMAINING POLICY ISSUES

This section briefly outlines important issues related to the "no means no" law that are outside the scope of this Note but ones to which practitioners, legal scholars, and concerned citizens should closely observe.²²⁰ These include, but are certainly not limited to: (1) whether the new law will encourage false reporting; (2) whether the law will provide a disincentive to report rape, causing overall reports to decrease; (3) whether Illinois State's Attorneys will consistently prosecute victims' claims of post-penetration rape; (4) whether the new law will force a change in Illinois' rape shield statute;²²¹ (5) whether the legislature will amend the law, as this Note strongly argues; and (6) whether the legislature can and will extend the concept of withdrawing consent to other crimes.

Over time, the answers to these questions will likely shape the future of rape law and the next movement of rape law reform.

CONCLUSION

The "no means no" statute is not a bad law, even though some critics claim that it is unnecessary.²²² The point of this Note, however, is to highlight that because Illinois has chosen to adopt the law, the legislature desperately needs to provide clarity in order to best protect all parties and to better ensure uniform application. "Clearly communicates" provides a standard for how one partner must withdraw consent, which is absent in the current statute. Furthermore, including the element of force comports with the other sexually related sections of the Illinois Criminal Code. The

220. These issues will take shape over time as prosecutors put the new law into practice.

221. See *supra* note 211 and accompanying text.

222. CNN.com, *supra* note 1.

element of force provides a standard for addressing the defendant's conduct after consent is withdrawn, which is also absent in the current statute. One of the stated purposes for the new statute is to avoid ambiguities that lead to drawn-out litigation.²²³ However, adding more ambiguous language and legal standards does little to clear up the existing confusion.

It will be interesting to observe whether other state legislatures will follow Illinois' lead and adopt their own versions of a "no means no" rape statute. If states do determine that similar legislation is a necessity, it would greatly behoove them to take note of, and improve upon, the shortcomings of the Illinois statute. States should settle for nothing less than clarity, uniformity, and fairness, goals to which Illinois may have aspired, but ultimately failed, to achieve.

Joel Emlen

223. See S. 93-406, Reg. Sess., at 4 (Ill. 2003) (explaining that the new statute's goal is to "clarify specifically that no does means no, even after yes") (statement of Sen. Rutherford).