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## Initial Consent Rape: Inherent and Statutory Problems

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“INITIAL CONSENT” RAPE: INHERENT AND  
STATUTORY PROBLEMS

I.	INTRODUCTION .....	161
II.	BACKGROUND.....	163
	A. <i>Origin of Illinois Senate Bill 406</i> .....	163
	B. <i>Effect of Senate Bill 406 on Illinois’ Sexual         Assault Law</i> .....	167
III.	ANALYSIS .....	168
	A. <i>Inherent Problems in Recognizing the Crime of         “Initial Consent” Rape</i> .....	168
	1. Limitations on Evidence.....	168
	2. Potential for False Accusations and Wrongful Convictions .....	171
	a. <i>Feminist Rape Reform</i> .....	172
	b. <i>“Initial Consent” Rape in Light of                 Feminist Rape Reform</i> .....	173
	c. <i>Procedural and Societal Safeguards</i> .....	174
	B. <i>Problems With the Crime of “Initial Consent”         Rape Within the Context of the Illinois Statutory         Code</i> .....	176
	1. Ambiguous Language.....	176
	2. Absence of Graduated Rape Law .....	177
	a. <i>Moral Concerns</i> .....	177
	b. <i>Practical Concerns</i> .....	179
	C. <i>Effect of Rape on the Victim</i> .....	181
IV.	CONCLUSION.....	184

I. INTRODUCTION

On July 18, 2003, twenty-four-year-old Los Angeles Lakers star Kobe Bryant was charged with the sexual assault of a nineteen-year-old hotel concierge.<sup>1</sup> Under a gag order, both Bryant and his accuser declined to discuss the facts of the case.<sup>2</sup> However, sources close to Bryant disclosed one side of the story.<sup>3</sup> According to these sources, the accuser initially consented to sexual intercourse.<sup>4</sup> During sexual

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<sup>1</sup>*Kobe Bryant Charged with Sexual Assault* (Dec. 16, 2003), at <http://www.cnn.com/2003/LAW/07/18/kobe.bryant/index.html>.

<sup>2</sup>Allison Samuels, *Kobe Off the Court*, NEWSWEEK, Oct. 13, 2003, at 51.

<sup>3</sup>*Id.* at 52.

<sup>4</sup>*Id.*

intercourse, Bryant expressed concern that he was not using a condom.<sup>5</sup> Shortly thereafter, the accuser expressed her desire to cease sexual intercourse.<sup>6</sup> On September 1, 2004, less than one week before opening statements were slated to begin, charges against Bryant were dismissed with prejudice.<sup>7</sup> Had the charges not been dropped, Bryant's future may have hinged on a single question: Does a revocation of consent during sexual intercourse nullify prior consent?

Approximately one week after the charges against Bryant were filed, Illinois Governor Rod Blagojevich signed Senate Bill 406 into law.<sup>8</sup> Pursuant to Senate Bill 406, "[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."<sup>9</sup> Senate Bill 406 effectively recognizes the right of a person to withdraw consent at any point after the commencement of sexual intercourse.<sup>10</sup> In accordance with Senate Bill 406, a person may be charged with rape despite initial consent on the part of his or her sexual partner.<sup>11</sup>

Since its inception, Senate Bill 406 has been the subject of national debate. In enacting Senate Bill 406, Illinois became the first state to formally recognize the crime of "initial consent" rape in its statutory code.<sup>12</sup> Moreover, Senate Bill 406 has obvious implications in the outcome of cases with similar fact situations to that of the prosecution of Kobe Bryant.

First, this Note will examine the impetus behind the introduction of Senate Bill 406. Second, this Note will examine the legal effect of Senate Bill 406 on Illinois' sexual assault laws. Third, this Note will address problems with the statutory recognition of the crime of "initial consent" rape. Fourth, this Note will address problems with the crime of "initial consent" rape within the context of the Illinois statutory code. Fifth, this Note will examine the effects of rape on the victim. Sixth,

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<sup>5</sup>*Id.* at 52-53.

<sup>6</sup>*Id.* at 53.

<sup>7</sup>*Judge Drops Charge Against Bryant* (Sept. 1, 2004), at <http://www.cnn.com/2004/LAW/09/01/bryant.trial/index.html>.

<sup>8</sup>Associated Press, *New Rape Law Protects People Who Change Mind During Sex* (July 29, 2003), at <http://www.highbeam.com/library/doco.asp?docid=1G1:10860%947&teaser=> (last visited Nov. 12, 2004).

<sup>9</sup>S.B. 406, 93<sup>rd</sup> Gen. Assem., Reg. Sess. (Ill. 2003).

<sup>10</sup>The Leader-Chicago Bureau, *Illinois' New Rape Law Raises National Discussion* (Aug. 1, 2003), at <http://www.illinoisleader.com/news/newsview.asp?c=7446>.

<sup>11</sup>Adriana Colindres, *Blagojevich Vetoes New Rules on State Lease Arrangements*, THE STATE JOURNAL-REGISTER (Springfield, Ill.), July 29, 2003, at 12. Senate Bill 406 is gender neutral. See The Leader-Chicago Bureau, *supra* note 10. However, in the majority of rape cases, the assailant will be male and the victim will be female. Studies indicate that male rape constitutes only 5 to 10 percent of all reported rapes. MARY E. WILLIAMS, RAPE 44 (Greenhaven Press 2001). For the purposes of this Note, it will be assumed that the assailant is male and that the victim is female. Pronouns will be used accordingly.

<sup>12</sup>The Leader-Chicago Bureau, *supra* note 10.

this Note will discuss potential solutions to the problems of Illinois’ amended rape law.

## II. BACKGROUND

### A. Origin of Illinois Senate Bill 406

Senate Bill 406 was inspired by *In re John Z.*,<sup>13</sup> a recent California Supreme Court case.<sup>14</sup> *In re John Z.* involved the alleged rape of a seventeen-year old female.<sup>15</sup> According to the facts of the case, the victim and the defendant were alone in the defendant’s parents’ bedroom. Prior to sexual intercourse, the victim and the defendant engaged in sexual activity that was, for the sake of argument, consensual. At one point, the victim was sitting on the edge of the bed with her clothing strewn across the room. The defendant rolled the victim over so that she was lying on her back. Once she was on her back, the defendant began kissing the victim and telling her that she had “a really beautiful body.” The victim said nothing in response to the defendant’s conduct. The defendant then proceeded to achieve sexual penetration. The victim testified that after the commencement of sexual intercourse, “she kept like trying to pull away.” She further testified that she informed the defendant that she did not want to engage in sexual intercourse at that time and that she needed to go home. Despite the victim’s claimed resistance, the defendant continued to engage in sexual intercourse.<sup>16</sup> The juvenile court found the defendant guilty of forcible rape.<sup>17</sup> The California Supreme Court granted *certiorari* to resolve a conflict in appellate court decisions as to whether or not a person had the right to revoke consent following the commencement of sexual intercourse.<sup>18</sup>

The California court system first addressed the concept of a right to revoke consent during sexual intercourse in the 1985 case of *People v. Vela*.<sup>19</sup> *Vela* involved the alleged rape of a fourteen-year old female by a nineteen-year old male.<sup>20</sup> The evidence presented at trial was such that a juror could reasonably find that the victim initially consented to the sexual intercourse at issue; that the victim revoked her consent during the act of sexual intercourse; and that the defendant continued to engage in sexual intercourse following the victim’s revocation of consent.<sup>21</sup> During the deliberation phase of the trial, the jury posed the following question to the trial court: “Once penetration has occurred with the female’s consent, if the female

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<sup>13</sup>60 P.3d 183 (Cal. 2003).

<sup>14</sup>Matt Bean, *Saying Yes, then No: Bryant Case Enters National Debate* (Aug. 6, 2003), at <http://www.cnn.com/2003/LAW/08/05/ctv.bryant.law/index.html>.

<sup>15</sup>*In re John Z.*, 60 P.3d at 184.

<sup>16</sup>*Id.* at 184-85.

<sup>17</sup>*Id.* at 184.

<sup>18</sup>*Id.*

<sup>19</sup>172 Cal. App. 3d 237, 241 (Cal. Ct. App. 1985).

<sup>20</sup>*Id.* at 239.

<sup>21</sup>*Id.* at 240.

changes her mind does force from that point constitute rape?"<sup>22</sup> The trial court informed the jury that it did not possess an answer to the question.<sup>23</sup> The jury subsequently found the defendant guilty of rape.<sup>24</sup>

On review, the California Court of Appeals for the Fifth Appellate District sought to determine an answer to the jury's question.<sup>25</sup> In attempting to determine an answer to the jury's question, the court of appeals looked to the essence of the crime of rape.<sup>26</sup> It identified the essence of the crime of rape as "the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood."<sup>27</sup> The court of appeals concluded that a victim who initially consented to sexual intercourse and later revoked consent during the act of sexual intercourse could not experience the same magnitude of outrage as a victim who resisted sexual intercourse from the outset.<sup>28</sup> As a result, the court of appeals held that the crime of rape could not occur in a scenario in which a woman initially consented to sexual intercourse and then later revoked her consent during the act of sexual intercourse.<sup>29</sup> The court of appeals did caution, however, that a person who persisted in sexual intercourse following a revocation of consent could be subject to other criminal charges, namely assault and battery.<sup>30</sup> Refusing to recognize the right to revoke

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<sup>22</sup>*Id.*

<sup>23</sup>*Id.* The trial court initially answered in the jury's question in the affirmative. *Id.* After further consideration, the trial court advised the jury: "The note that you gave us yesterday, quite frankly, is something that took us a while to check on. And to be candid with you, we do not have a definitive answer to the question." *Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 241. The court of appeals explained that the trial court had a *sua sponte* duty to instruct the jury on general principles of the law. *Id.* The court of appeals further explained that the trial court had a *sua sponte* duty to reinstruct the jury on a principle of law if it was apparent that the jury was confused as to the principle of law. *Id.* The court of appeals concluded that the trial court committed error by failing to answer the jury's question. *Id.* The court of appeals explained that whether or not this error was prejudicial, warranting the reversal of the trial court judgment, depended on whether or not the answer to the jury's question was "yes" or "no." *Id.*

<sup>26</sup>*Id.* at 243.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* In arriving at this conclusion, the *Vela* court consulted the case law of other jurisdictions. *See id.* More specifically, the *Vela* court cited a Maryland case and a North Carolina case. *See id.* In *Battle v. State*, 414 A.2d 1266, 1271 (Md. 1980), the Court of Appeals of Maryland held that a woman could withdraw consent up until the point of penetration, but not thereafter. According to the Court of Appeals of Maryland, if the woman withdrew consent following penetration, there could be no rape. *Id.* Likewise, in *State v. Way*, 254 S.E.2d 760, 761 (N.C. 1979), the Supreme Court of North Carolina held that rape could not occur in a situation in which "actual penetration was accomplished with the woman's consent." Both of the cases focused on the presence or absence of consent at the point of penetration.

<sup>29</sup>*Vela*, 172 Cal. App. 3d at 241.

<sup>30</sup>*Id.*

consent during sexual intercourse, the court of appeals reversed the trial court's judgment.<sup>31</sup>

Nearly a decade and a half after *Vela* was decided, questions as to the right to revoke consent during sexual intercourse resurfaced in the California court system. *People v. Roundtree* involved the alleged rape of a fifteen-year old female by a thirty-nine year old male.<sup>32</sup> The victim ran away from a group home in an effort to locate her mother. Along the way, the victim crossed paths with the defendant, whom offered to assist her in her endeavors. The defendant drove the victim to an apartment complex that he supposedly lived in with his sister. The defendant informed the victim that they could not enter the apartment because his sister was asleep and then suggested that they take a nap in the car. At this point in the fact pattern, the victim's and the defendant's stories diverged. The victim testified that the defendant raped her after she insisted that they resume the search for her mother. The defendant testified that the victim initially consented to the sexual intercourse at issue. The defendant further testified that during sexual intercourse, the victim told him to stop because she thought she heard someone approaching the car.<sup>33</sup> During the deliberation phase of the trial, the jury posed the following question to the trial court: "If, after penetration, the female changes her mind and says 'stop' and the male continues, is this still rape?"<sup>34</sup> The trial court responded by saying, "...the fact that there was a prior penetration with the consent of the female [did] not negate rape."<sup>35</sup> The jury found the defendant guilty of rape.<sup>36</sup>

On review, the California Court of Appeals for the First Appellate District sought to determine whether or not the trial court correctly instructed the jury.<sup>37</sup> In attempting to do so, it consulted the *Vela* decision. The court of appeals characterized the *Vela* decision as being unsound.<sup>38</sup> It criticized the *Vela* court for failing to apply the statutory definition of rape to the fact pattern presented.<sup>39</sup> The court of appeals explained that when the statutory elements of the crime of rape are satisfied, "the outrage to the victim is complete."<sup>40</sup> The statutory code defined rape as "an act of sexual intercourse accomplished ... against a person's will by means of force."<sup>41</sup> After considering the statutory definition of rape, the court of appeals concluded that rape could occur in a scenario in which a woman initially consented to sexual intercourse and later revoked her consent during the act of sexual

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<sup>31</sup>*Id.* at 244.

<sup>32</sup>*People v. Roundtree*, 77 Cal. App. 4th 846, 852 (Cal. Ct. App. 2000).

<sup>33</sup>*Id.* at 847-49.

<sup>34</sup>*Id.* at 850.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 847.

<sup>37</sup>*Id.* at 849. On appeal, the defendant contended that the trial court erred in issuing its jury instructions. *Id.*

<sup>38</sup>*Id.* at 851.

<sup>39</sup>*Id.* at 852.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

intercourse.<sup>42</sup> Recognizing the right to revoke consent during sexual intercourse, the court of appeals held that the jury instructions were appropriate and affirmed the trial court's judgment.<sup>43</sup>

In *In re John Z.*, the Supreme Court of California adopted the thinking of the *Roundtree* court. The supreme court noted that there were no means of accurately measuring the level of outrage suffered by a person.<sup>44</sup> In doing so, the supreme court attacked the assumption that the victim who consents to sexual intercourse and revokes consent during sexual intercourse does not experience the same magnitude of outrage as the victim who resists sexual intercourse from the outset.<sup>45</sup> The supreme court further noted that outrage to the person was not an element of the crime of rape.<sup>46</sup> The supreme court held that "a withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in ... nonconsensual intercourse."<sup>47</sup>

The California court system spent three years trying to clarify the definition of sexual assault.<sup>48</sup> Approximately six weeks after the Supreme Court of California decided *In re John Z.*, Illinois lawmakers introduced Senate Bill 406. At the time,

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<sup>42</sup>*Id.* In arriving at this conclusion, the *Roundtree* court, like the *Vela* court, consulted the case law of other jurisdictions. *See id.* The *Roundtree* court noted that several states had rejected the *Vela* court's reasoning. *Id.* In *State v. Siering*, 644 A.2d 958, 962 (Conn. App. Ct. 1994), the Appellate Court of Connecticut was asked to interpret the word "intercourse" as it appeared in the state's sexual assault laws. The appellant contended that the word referenced only initial penetration. *Id.* If this were the case, rape could not occur in a situation in which initial penetration was accomplished with consent. *Id.* The Appellate Court of Connecticut interpreted the word "intercourse" to include both initial intercourse and continued intercourse. *Id.* The court held that continued penetration accomplished in the absence of consent and through the application of force constituted rape. *Id.* at 963. In rendering its decision, the court stated, "it is a basic principle of law that common sense is not left at the courtroom door. Similarly, in *State v. Crims*, 540 N.W.2d 860, 865 (Minn. 1995), the Court of Appeals of Minnesota explained that the state's sexual assault laws "provide[d] a broader reference point than the moment of slightest intrusion." *Id.* The court held that "rape include[d] forcible continuance of initially-consensual sexual relations." *Id.*

<sup>43</sup>*Roundtree*, 77 Cal. App. 4th at 852.

<sup>44</sup>*In re John Z.*, 60 P.3d at 186.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 184. The Supreme Court of California upheld the defendant's conviction. *Id.* Justice Brown dissented. *Id.* at 188. Brown acknowledged the right of a woman to revoke consent during sexual intercourse. *Id.* Brown criticized the majority for failing to consider whether or not the victim's statements amounted to a revocation of consent. *Id.* He noted that a reasonable mistake as to the issue of consent was a defense to rape. *Id.* He further noted that "initial consent" rape cases were likely to involve credibility contests. *Id.* Brown also criticized the majority for failing to establish more explicit guidelines for future cases. *Id.* The majority did not set a time period in which a person had to cease sexual intercourse following a revocation of consent. *Id.* at 190. The majority also did not state whether or not persistence constituted force. *Id.*

<sup>48</sup>Robert Baxter, *Law Re-Examines Consensual Sex*, ROCKFORD REGISTER STAR, July 18, 2003, at 11A.

Illinois’ sexual assault law strongly resembled California’s sexual assault law.<sup>49</sup> Proponents of Senate Bill 406 characterized the legislation as a preventative measure against judicial controversy.<sup>50</sup> Senator Dan Rutherford, a cosponsor of Senate Bill 406, explained, “with Illinois and California’s laws being very similar, we wanted to craft a bill that would prevent us from going down the same path in Illinois that California did.”<sup>51</sup>

*B. Effect of Senate Bill 406 on Illinois’ Sexual Assault Laws*

The Illinois statutory code defines criminal sexual assault as “an act of sexual penetration by the use of or threat of force.”<sup>52</sup> Pursuant to this definition, the crime of sexual assault possesses two *actus reus* elements: sexual penetration and either the use of force or the threat of the use of force. The Illinois statutory code defines 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, of any part of the body of one person, into the sex organ or anus of another person . . .”<sup>53</sup> This definition does not limit sexual penetration to the act of initial intrusion. The definition of sexual penetration can be read to include both the act of initial intrusion and the act of sexual intercourse. The Illinois statutory code provides that the force element of criminal sexual assault can be satisfied in one of two situations.<sup>54</sup> The first situation occurs “when the accused threatens to use force or violence on the victim or on any other person, and the victim under the circumstances reasonably believe[s] that the accused ha[s] the ability to execute the threat.”<sup>55</sup> The second situation occurs “when the accused overcome[s] the victim by use of superior strength or size, physical restraint or physical confinement.”<sup>56</sup> The preceding statutory language does not deprive a person of the right to revoke consent during the act of sexual intercourse. Theoretically, a person could have been charged with the crime of “initial consent” rape before the enactment of Senate Bill 406.

Senate Bill 406 does not change the definition of sexual assault within the state of Illinois; Senate Bill 406 merely clarifies the definition of sexual assault within the state of Illinois.<sup>57</sup> Senator Dan Rutherford stated that “the goal [of Senate Bill 406] was not to change Illinois law as it pertains to sexual assault, but more simply to

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<sup>49</sup>*See id.*

<sup>50</sup>Associated Press, *New Illinois Rape Law Protects People Who Change Mind During Sex*, available at [www.foxnews.com/story/0,2933,93245,00.html](http://www.foxnews.com/story/0,2933,93245,00.html) (July 29, 2003) [hereinafter Associated Press].

<sup>51</sup>Baxter, *supra* note 48.

<sup>52</sup>720 ILL. COMP. STAT. 5/12-13(a)(1) (1998).

<sup>53</sup>720 ILL. COMP. STAT. 5/12-12(f) (1998).

<sup>54</sup>*See* 720 ILL. COMP. STAT. 5/12-12(d) (1998).

<sup>55</sup>720 ILL. COMP. STAT. 5/12-12(d)(1) (1998).

<sup>56</sup>720 ILL. COMP. STAT. 5/12-12(d)(2) (1998).

<sup>57</sup>Laura Jastram, *Bill Ensures “No Means No” in Illinois*, DAILY ILLINI (Champaign, Ill.), July 30, 2003, at 1.

clarify what most people believe the law says.”<sup>58</sup> According to Rutherford, Illinois lawmakers wanted to clarify once and for all that “no meant no.”<sup>59</sup> In reaction to the enactment of Senate Bill 406, Ross Wantland, coordinator of the sexual assault education program at the University of Illinois, stated, “no always meant no.”<sup>60</sup> She further stated that from a legal perspective, Senate Bill 406 contributed little to Illinois’ sexual assault law.<sup>61</sup> When asked about Senate Bill 406, Robert Shapiro, a defense attorney in the O.J. Simpson case, responded by saying that the legislation was likely to be unnecessary.<sup>62</sup>

### III. ANALYSIS

#### A. *Inherent Problems in Recognizing the Crime of “Initial Consent” Rape*

##### 1. Limitations on Evidence

In “initial consent” rape cases, prosecutors will have trouble amassing the evidence necessary to prosecute alleged assailants. Given the nature of the crime, evidence will be limited. For example, prosecutors typically will not have access to eyewitnesses. In an “initial consent” rape case, the sexual intercourse at issue is initially consensual. Consensual sexual intercourse often occurs in a private environment.<sup>63</sup> As a result, a third party is not likely to witness the crime.

Prosecutors have traditionally relied on the results of medical examinations in prosecuting rape claims.<sup>64</sup> Following incidents of rape, victims may seek medical attention.<sup>65</sup> Most hospitals follow a similar protocol for treating rape victims, namely the rape kit.<sup>66</sup> A rape kit includes the instructions and materials necessary to collect and preserve forensic evidence of rape.<sup>67</sup> During a rape kit examination, medical personnel perform a very methodical procedure.<sup>68</sup> This procedure is aimed

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<sup>58</sup>Colindres, *supra* note 11.

<sup>59</sup>Jastram, *supra* note 57.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>The Leader-Chicago Bureau, *supra* note 10. Wendy Murphy, director of the Victim Advocacy and Research Group in Boston, adopted a similar attitude. See Associated Press, *supra* note 50. In reaction to Illinois’ amended rape law, Murphy issued the following statement: “If it ain’t broke, don’t fix it. I don’t think that it was broke.” *Id.*

<sup>63</sup>See Wendy McElroy, *Law Needs New Category of Sexual Assault*, at <http://www.foxnews.com/story/0,2933,95069,00.html> (Aug. 19, 2003).

<sup>64</sup>See JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 222 (1993).

<sup>65</sup>See *id.*

<sup>66</sup>*Gathering Medical Evidence: What will Happen to Me in the Hospital?*, at [http://www.nd.edu/~ucc/ucc\\_sexualvictimhospital.html](http://www.nd.edu/~ucc/ucc_sexualvictimhospital.html) (last modified Feb. 20, 2004).

<sup>67</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 226.

<sup>68</sup>*Id.* at 227.

towards the recovery of foreign fluid, foreign hair, and foreign tissue from the body of the victim.<sup>69</sup>

Prosecutors use the rape kit to establish the identity of the assailant and the act of sexual intercourse. For obvious reasons, the rape kit has little, if any, evidentiary value in an "initial consent" rape case. In an "initial consent" rape case, the primary issue is the withdrawal of consent. The identity of the assailant and the act of sexual intercourse will have already been established.

In the course of performing a rape kit examination, medical personnel will examine the victim's body for external physical injury.<sup>70</sup> Bruises and abrasions are indicative of resistance on the part of the victim. Such marks will tend to prove a withdrawal of consent. Unfortunately, bruises and abrasions will not be commonplace in an "initial consent" rape case. The victim will withdraw consent while engaged in sexual intercourse with the assailant. Presumably, the assailant will be in position to combat resistance without inflicting significant bodily injury.

In approximately two-thirds of all reported rape cases, the victim exhibits no external physical injury.<sup>71</sup> This statistic has led to the increased use of the colposcope in rape cases.<sup>72</sup> The colposcope is a "microscope on wheels" that enables physicians to examine the female reproductive track at a magnification of up to fifteen times.<sup>73</sup> With the colposcope, physicians are able to identify subtle changes in the female reproductive track.<sup>74</sup>

Laura Slaughter, medical director of the Suspected Abuse Response Team for San Luis Obispo County, California, has conducted extensive research on the application of colposcopy to rape cases.<sup>75</sup> In a 1993 study, Slaughter compared colposcope photographs taken from rape victims with colposcope photographs taken from women who engaged in consensual sexual intercourse.<sup>76</sup> Slaughter found evidence of genital trauma in 89 percent of the rape victims and only 15 percent of the women who engaged in consensual sexual intercourse.<sup>77</sup>

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<sup>69</sup>See JOHN M. MACDONALD, *RAPE: CONTROVERSIAL ISSUES* 146 (1995); see also ALLISON & WRIGHTSMAN, *supra* note 64, at 228 (providing rape kit instructions for a crime lab in Missouri).

<sup>70</sup>See ALLISON & WRIGHTSMAN, *supra* note 64, at 227.

<sup>71</sup>ROB HALL, *RAPE IN AMERICA* 105 (1995).

<sup>72</sup>See *id.* The colposcope was originally used as a diagnostic test for uterine cancer. *Id.*

<sup>73</sup>*Id.*

<sup>74</sup>Kristen Wood, *Instrument Used to Detect Rape Evidence* (Sept. 29, 2000), available at [www.localnews8.com/stories/september2000/29/rapeinstr.htm](http://www.localnews8.com/stories/september2000/29/rapeinstr.htm).

<sup>75</sup>HALL, *supra* note 71, at 106.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.* The mean number of injury sites on women who sustained genital trauma through consensual sexual intercourse was one. *Id.* In contrast, the mean number of injury sites on women who sustained genital trauma through rape was three. *Id.* Slaughter attributed differences in the degree of genital trauma to the position of the pelvis during sexual intercourse. *Id.*

In an earlier study, Slaughter attempted to identify the types of internal injuries detected through colposcopy.<sup>78</sup> Slaughter found that the internal injuries most frequently detected occurred at the point of initial contact between the penis and the vagina.<sup>79</sup> She described these injuries as “mounting injuries.”<sup>80</sup> In an “initial consent” rape case, a victim will unlikely sustain “mounting injuries” because sexual penetration is consensual. Thus, the colposcope, much like the rape kit, will be of diminished evidentiary value.

Prosecutors have been known to employ the use of the polygraph in rape cases lacking eyewitnesses and physical evidence.<sup>81</sup> The polygraph is an instrument that monitors an individual’s autonomic nervous system responses.<sup>82</sup> Theoretically, when an individual lies, there will be notable deviations in his or her blood pressure, pulse rate, respiration rate, and galvanic skin response.<sup>83</sup> The key word in the preceding sentence is “theoretically.” Polygraphs are not completely accurate.<sup>84</sup> Polygraphs have been known to yield false results, especially when the subject is of a nervous disposition.<sup>85</sup> Moreover, there are ways to defeat the polygraph.<sup>86</sup> For example, some subjects state a proposition over and over again until they accept its truth.<sup>87</sup> Some categories of persons have been deemed wholly unsuitable for polygraph testing.<sup>88</sup> Such categories of persons include, but are not limited to, the following: psychopathic liars, alcoholics, persons who are hungry or thirsty, persons with heart conditions, persons with colds, and persons on medication.<sup>89</sup> Due to concerns surrounding the accuracy of the polygraph, some jurisdictions have restricted the use of the polygraph and the admissibility of polygraph results in criminal trials.<sup>90</sup>

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<sup>78</sup>*Id.*

<sup>79</sup>*Id.* The most frequent injury was tears to the posterior fourchette. *Id.* The second most frequent injury was abrasions to the labia minor. *Id.* The third most frequent injury was ecchymosis to the hymen. *Id.*

<sup>80</sup>*Id.*

<sup>81</sup>See MACDONALD, *supra* note 69, at 146.

<sup>82</sup>Ben Clark, *Trial by Ordeal? Polygraph Testing in Australia*, 7 MURDOCK UNIV. ELEC. JOURNAL OF LAW 1 (Mar. 2000), at [http://www.murdoch.edu.au/elaw/issues/v7n1/clarke71\\_text.html](http://www.murdoch.edu.au/elaw/issues/v7n1/clarke71_text.html).

<sup>83</sup>*Id.*

<sup>84</sup>MACDONALD, *supra* note 69, at 146.

<sup>85</sup>Clark, *supra* note 82.

<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at n.4.

<sup>90</sup>*Id.* Illinois restricts the use of the polygraph and the admissibility of polygraph results in criminal trials. Pursuant to the Illinois statutory code,

In the course of a criminal trial the court shall not require, request, or suggest that the defendant submit to a polygraphic detection deception test, commonly known as a lie detector test, to questioning under the effect of thiopental sodium, or to any other test or questioning by means of a mechanical device or chemical substance.

## 2. Potential for False Accusations and Wrongful Convictions

The unfounded rate of rape exceeds that of any other Crime Index crime.<sup>91</sup> Many motives underlie false reports of rape.<sup>92</sup> Most motives fall within one of four classifications: alibi motives, revenge motives, financial motives, or attention motives.<sup>93</sup> False reports of rape are detrimental because they tie up police and judicial resources.<sup>94</sup> Moreover, false reports of rape disrupt the lives of the defendant and those persons close to the defendant. In the worst-case scenario, a false report can culminate in a wrongful conviction.

On July 8, 1979, Cathleen Crowell, who at the time was sixteen years old, engaged in consensual sexual intercourse with her boyfriend.<sup>95</sup> Shortly thereafter, Crowell grew nervous that her boyfriend might have impregnated her.<sup>96</sup> The following night, she “ripped the buttons off [of her] clothing, scratched [her] body with a piece of broken glass, made a mark around [her] vaginal area and pinched and bruised [herself] and did other things to make it appear that [she] had been violently attacked.”<sup>97</sup> She then stood on the outskirts of a road near a shopping mall and flagged down a police officer.<sup>98</sup> With tears in her eyes, Crowell informed the officer that three men abducted her in the shopping mall parking lot and that one of those men violently raped her.<sup>99</sup> The officer took Crowell to a hospital, where a rape kit examination was performed. Later at the police station, Crowell worked with a sketch artist, who was able to draw up a composite sketch of the fictitious assailant.<sup>100</sup> Unfortunately for twenty-two-year old Gary Dotson, the composite sketch resembled him.<sup>101</sup> With the assistance of police, Crowell identified Dotson as

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725 ILL. COMP. STAT. 5/115-19. Like Illinois, California also restricts the use of the polygraph and the admissibility of polygraph results in criminal trials. California law provides that polygraph results are inadmissible unless all parties stipulate to their admission. CAL. EVID. CODE § 351.1 (2004).

<sup>91</sup>HALL, *supra* note 71, at 16. Not all unfounded reports are false reports. Unfounded reports are those reports that have been determined to be false or for which there is insufficient evidence to support the offense. *Id.* In 1991, the unfounded rate of rape was 8 percent. *Id.* In that same year, the average unfounded rate for all other Crime Index crimes was 2 percent. *Id.*

<sup>92</sup>MACDONALD, *supra* note 69, at 87.

<sup>93</sup>*Id.*

<sup>94</sup>*See id.* at 85.

<sup>95</sup>Center on Wrongful Convictions, *The Rape that Wasn't – The First DNA Exoneration in Illinois* (Sept. 8, 2003), available at <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/Dotson.htm> [hereinafter Center on Wrongful Convictions].

<sup>96</sup>*Id.*

<sup>97</sup>MACDONALD, *supra* note 69, at 84.

<sup>98</sup>Center on Wrongful Convictions, *supra* note 95.

<sup>99</sup>*Id.*

<sup>100</sup>*Id.*

<sup>101</sup>*Id.*

the assailant.<sup>102</sup> Dotson was convicted of rape and sentenced to twenty-five to fifty years in prison.<sup>103</sup> Today, with the enactment of Feminist rape reform legislation and with the recognition of the crime of “initial consent” rape, Crowell would not have had to have gone to such great lengths in making a false report of rape.

*a. Feminist Rape Reform*

In 1960, approximately 36 percent of women worked outside the home.<sup>104</sup> Ten years later, as the decade drew to a close, more than 50 percent of women worked outside of the home.<sup>105</sup> Some men resisted the integration of women into the workplace, “view[ing] women’s newfound assertiveness and involvement in the public sphere as an attack on traditional roles and a defiance of chivalry.”<sup>106</sup> The increased presence of women in the public sphere, which was accompanied by adamant opposition from some men, increased opportunities for victimization.<sup>107</sup> As women gained ground in the workplace, they began to voice their dissatisfaction with social policies that adhered to traditional gender roles.<sup>108</sup> One area of focus was rape law.<sup>109</sup> “Feminists charged that the law of sex legitimated a societal order in which the sexual abuse of women was commonplace.”<sup>110</sup>

The feminist movement is responsible for two significant rape reforms: the elimination of the physical resistance requirement and the enactment of rape shield laws.<sup>111</sup> Traditionally, physical resistance was an element of the crime of rape.<sup>112</sup> Prosecutors were required to prove that the victim physically resisted her assault.<sup>113</sup> The victim’s physical resistance served as evidence of lack of consent.<sup>114</sup> Feminists

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<sup>102</sup>*Id.*

<sup>103</sup>*Id.* In 1985, Crowell retracted her rape claim. *Id.* By this time, Dotson had served more than half a decade in prison. *Id.* The judge did not believe Crowell’s retraction. *Id.* However, with public sentiment mounting, Illinois Governor James Thompson commuted Dotson’s sentence to the time already served. *Id.* On August 14, 1989, DNA evidence officially exonerated Dotson of the crime of rape. *Id.* Dotson became the first person in Illinois to be exonerated of a crime through the application of DNA testing. *Id.*

<sup>104</sup>CONFRONTING RAPE AND SEXUAL ASSAULT 40 (Mary E. Odem & Jody Clay-Warner eds., 1998) [hereinafter CONFRONTING].

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* at 41.

<sup>110</sup>Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 796 (1988).

<sup>111</sup>*Id.* at 799.

<sup>112</sup>Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2691 (1991).

<sup>113</sup>*Id.*

<sup>114</sup>*Id.*

challenged the physical resistance requirement of rape on the grounds that it “prescribed a course of action that significantly increased [the victim’s] chances of suffering additional physical injury.”<sup>115</sup> Feminist pressures effected change in 1974, as Michigan passed landmark rape reform legislation.<sup>116</sup> The rape reform legislation shifted the focus from the victim’s actions to the defendant’s actions.<sup>117</sup> It phased out the physical resistance requirement by defining the crime of rape solely in terms of the amount of force applied by the defendant.<sup>118</sup> Michigan’s rape reform legislation had a domino effect. Today, a majority of states have eliminated the physical resistance requirement.<sup>119</sup>

A majority of states have also enacted rape shield laws.<sup>120</sup> Generally, rape shield laws prohibit a defendant from presenting testimony as to a victim’s prior sexual history.<sup>121</sup> From a feminist perspective, rape shield laws serve three purposes. First, rape shield laws “counter the assumption that a promiscuous woman [is] more likely to consent to [sexual intercourse] than a virgin.”<sup>122</sup> Second, rape shield laws prevent the fact-finder from punishing the victim for what may be deemed to be an unacceptable lifestyle.<sup>123</sup> Third, rape shield laws protect victims from a second victimization on the stand.<sup>124</sup>

b. “Initial Consent” Rape in Light of Feminist Rape Reform

The statutory recognition of the crime of “initial consent” rape coupled with the enactment of feminist rape reform legislation encourages false accusations of rape.

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<sup>115</sup>Chamallas, *supra* note 110, at 799.

<sup>116</sup>CONFRONTING, *supra* note 104, at 45.

<sup>117</sup>Chamallas, *supra* note 110, at 799.

<sup>118</sup>*Id.*

<sup>119</sup>Berliner, *supra* note 112, at 2692.

<sup>120</sup>A. M. JOHNSON & ROBERT T. SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS 23-24 (1997). By 1990, more than forty states had rape shield laws. *Id.*

<sup>121</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 178-79. Rape shield laws vary from state to state. JOHNSON & SIGLER, *supra* note 120, at 24. The most restrictive rape shield laws are those that exclude evidence as to a victim’s sexual history with anyone but the defendant. *Id.* Illinois enforces a restrictive rape shield statute. Pursuant to the Illinois rape shield statute

[T]he prior sexual activity or the reputation of the alleged victim ... is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim ... with the accused when this evidence is offered by the accused upon the issue of whether the alleged victim ... consented to the sexual conduct with respect to which the offense is alleged; or (2) when constitutionally required to be admitted.

725 ILL. COMP. STAT. 5/115-7. Some individuals believe that the Illinois rape shield statute is too restrictive. These individuals have criticized the statute for failing to acknowledge certain situations in which evidence of the victim’s sexual history might be pertinent. See MACDONALD, *supra* note 69, at 176.

<sup>122</sup>JOHNSON & SIGLER, *supra* note 120, at 23.

<sup>123</sup>Chamallas, *supra* note 110, at 800.

<sup>124</sup>See ALLISON & WRIGHTSMAN, *supra* note 64, at 178.

There is an inherent limitation on the availability of evidence in an “initial consent” rape case. As a result, law enforcement personnel and prosecutors will expect less from the alleged victim in terms of evidence. Moreover, just as there is a lack of evidence to prove an act of “initial consent” rape, there is a lack of evidence to prove a false accusation of “initial consent” rape. At trial, the alleged victim is not required to establish physical resistance, or the lack of consent that logically follows from physical resistance.<sup>125</sup> In some states, that burden now rests on the defendant.<sup>126</sup> Furthermore, the alleged victim is protected from intrusive questions into her sexual history.<sup>127</sup> She is shielded from verbal abuse and harassment.<sup>128</sup>

In the wake of feminist rape reform, statutory recognition of the crime of “initial consent” rape creates a legitimate threat of wrongful conviction. A charge of “initial consent” rape will oftentimes entail a “he said, she said” scenario, and nothing more.<sup>129</sup> In the absence of physical evidence and eyewitnesses, prosecutors will be inclined to attack the defendant’s character. As a result, the outcome of the case will depend largely on the perceived credibility of the victim and the defendant. In a case that boils down to a credibility contest, the defendant is at a clear disadvantage. Rape shield laws prohibit the defendant from using the victim’s sexual history to cast doubt on the victim’s claimed revocation of consent.<sup>130</sup> At one time, physical resistance served as an objective measure of consent.<sup>131</sup> With physical resistance as an element of rape, the issue of consent was not subject to misinterpretation by the defendant or the jury.<sup>132</sup> The same cannot be said today.

### *c. Procedural and Societal Safeguards*

Admittedly, there are both procedural and societal safeguards against the threat of wrongful conviction. For example, prosecutors tend to prosecute only those rape cases in which there is sufficient evidence of the assailant’s guilt.<sup>133</sup> In cases that are

<sup>125</sup>See Berliner, *supra* note 112, at 2692.

<sup>126</sup>See Chamallas, *supra* note 110, at 800. Illinois recognizes consent as a defense to criminal sexual assault.

Pursuant to the Illinois statutory code, 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.

720 ILL. COMP. STAT. 5/12-17.

<sup>127</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 178.

<sup>128</sup>*Id.* Some individuals view the enforcement of rape shield statutes as a violation of the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. *Id.*

<sup>129</sup>See McElroy, *supra* note 63.

<sup>130</sup>JOHNSON & SIGLER, *supra* note 120, at 23.

<sup>131</sup>Berliner, *supra* note 112, at 2696.

<sup>132</sup>*Id.*

<sup>133</sup>See HALL, *supra* note 71, at 22. In 1988, there were approximately 15,562 rape convictions in the United States. *Id.* Of those convictions, 77 percent resulted from a guilty

prosecuted, jurors tend to be skeptical of alleged victims.<sup>134</sup> Rape myths are "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists."<sup>135</sup> One of the most widespread rape myths is that the victim "asked for it."<sup>136</sup> This rape myth shifts blame from the defendant to the victim.<sup>137</sup> "[Rape] myths combine to create a climate hostile to rape victims, a climate in which the victim is blamed for the rape."<sup>138</sup> Defense attorneys are well aware of the prejudicial attitudes towards rape. At trial, defense attorneys attempt to feed off of such attitudes.<sup>139</sup> Judges themselves tend to adopt a certain degree of partiality towards the defendant when the alleged victim's character or behavior is questionable.<sup>140</sup> A judge's attitude towards parties is important because it is the judge who maintains control of the courtroom and renders decisions as to the admissibility of evidence.<sup>141</sup> In the end, the standard of proof for "initial consent" rape is the same as that of all other crimes. Prosecutors must prove the elements of rape beyond a reasonable doubt.<sup>142</sup>

Despite the existence of such procedural and societal safeguards, wrongful convictions do occur, as is evident from the Gary Dotson case. The public invests trust in prosecutors, judges, and jurors; however, prosecutors, judges, and jurors cannot always be trusted.<sup>143</sup> A 1987 study found that since the dawn of the twentieth century, more than 350 people had been wrongfully convicted of crimes punishable

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plea. *Id.*; see also Berliner, *supra* note 112, at 2687. Research indicates that prosecutors are less likely to prosecute when the victim and the assailant are acquaintances than when the victim and the assailant are strangers. *Id.*

<sup>134</sup>In a criminal trial, the defendant has some discretion as to the fact-finder. ALLISON & WRIGHTSMAN, *supra* note 64, at 179. Prior to the commencement of a trial, the defendant may request that a judge determine the verdict. *Id.* Nonetheless, most rape trials are decided by a jury. *Id.*

<sup>135</sup>JOHNSON & SIGLER, *supra* note 120, at 94.

<sup>136</sup>*Id.*; see also COLLEEN A. WARD, ATTITUDES TOWARD RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVE 43-45 (1995). In a 1977 survey conducted by Barnett and Field, 34 percent of the respondents agreed that "a woman should be responsible for preventing her victimization in rape." *Id.* at 44. In a 1988 survey conducted by Ward, 46 percent of the respondents disagreed that "men, not women, are responsible for rape." *Id.* In a 1991 survey conducted by Holcomb, 22 percent of the respondents agreed that "any woman could prevent rape if she really wanted to." *Id.* at 45.

<sup>137</sup>JOHNSON & SIGLER, *supra* note 120, at 94.

<sup>138</sup>CONFRONTING, *supra* note 104, at 252.

<sup>139</sup>A defense attorney once began a rape trial by attempting to insert a pencil into the opening of a spinning Coke bottle. *Id.* at 39. The purpose of the demonstration was to convince the jury that a woman could avoid an act of rape if so desired. *Id.* In effect, the defense attorney was attributing blame to the victim.

<sup>140</sup>See WARD, *supra* note 136, at 105-06.

<sup>141</sup>*Id.* at 105.

<sup>142</sup>Jeff Goldblatt, *Illinois First State to Pass 'No Means No' Law* (Aug. 20, 2003), at <http://www.foxnews.com/story/0,2933,95277,00.html>.

<sup>143</sup>See LISA STOLZENBERG & STEWART J. D'ALESSIO, CRIMINAL COURTS FOR THE 21ST CENTURY 356 (1999).

by death.<sup>144</sup> Of those 350 people, 116 were sentenced to death.<sup>145</sup> Of those 116 people, twenty-three were executed.<sup>146</sup> In *In re Winship*, the Supreme Court of the United States established the principle that it is better to let a guilty person go free than to convict an innocent person.<sup>147</sup> “The greatest injustice that any society can perpetrate is to convict, and possibly even put to death, an innocent person.”<sup>148</sup>

*B. Problems with the Crime of “Initial Consent” Rape Within the Context of the Illinois Statutory Code*

1. Ambiguous Language

“Criminal law’s most obvious weak spot [in addressing the crime of rape] is its vagueness.”<sup>149</sup> Despite continuous efforts to reform rape law, standards for determining the existence of rape remain uncertain.<sup>150</sup> In a 1992 survey, 22 percent of the female respondents reported that a man had forced them to engage in sexual intercourse.<sup>151</sup> In the same survey, 3 percent of the male respondents reported they had forced a woman to engage in sexual intercourse.<sup>152</sup> Researchers attributed the discrepancy to a general misconception as to the legal definition of “force.”<sup>153</sup> Vague statutory language is problematic in that it does not adequately inform citizens of their rights. The potential defendant is unaware of the legal limits of his actions. Likewise, the potential victim is unable to recognize when she has a valid claim.

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<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

<sup>146</sup>*Id.*

<sup>147</sup>*In re Winship*, 397 U.S. 358 (1970). In the majority opinion, Justice Brennan wrote: The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime where there is reasonable doubt about his guilt. As was said in *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958), “There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing the other party the burden of ... persuading the factfinder at the conclusion of the trial of his guilt” beyond a reasonable doubt.

*Id.* at 363-64.

<sup>148</sup>STOLZENBERG & D’ALESSIO, *supra* note 143, at 356.

<sup>149</sup>RAPE 144 (Mary E. Williams ed., 2001).

<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>*Id.*

<sup>153</sup>*Id.* at 145.

The Illinois statutory code fails to clearly define the crime of "initial consent" rape. For instance, the code does not specify what constitutes a withdrawal of consent.<sup>154</sup> The code also does not specify the time period in which a sexual partner has to cease sexual intercourse following a withdrawal of consent.<sup>155</sup> Illinois lawmakers have reserved such questions for the courts.

## 2. Absence of a Graduated Rape Law

### *a. Moral Concerns*

Even more troubling, the Illinois statutory code fails to draw a distinction between the behavior of an "initial consent" rapist and the behavior of a stranger rapist.<sup>156</sup> Illinois does not enforce a graduated rape law. Pursuant to the Illinois statutory code, all first-time acts of rape not involving aggravating circumstances are "Class 1" felonies.<sup>157</sup> "Initial consent" rapists and stranger rapists are subject to the same sentencing guidelines.

The prosecution of an "initial consent" rapist for the same offense as a stranger rapist is morally inappropriate.<sup>158</sup> "Initial consent" rapists are not as culpable as stranger rapists. Concededly, the "initial consent" rapist, like the stranger rapist, may intend to violate the victim. However, unlike the stranger rapist, the "initial consent" rapist will formulate this intent during an excited sexual state.

Oftentimes, an act of "initial consent" rape will be the product of miscommunication. Men possess a more sexualized view of the world than women.<sup>159</sup> As a result, men are sometimes insensitive to signals conveyed by women.<sup>160</sup> In an "initial consent" rape case, the victim will say "no" to sexual intercourse while she is engaged in the act of sexual intercourse. By saying "no," the victim may feel that she is clearly expressing her desire to terminate sexual intercourse. However, given the victim's prior consent, the assailant is prone to ignore the victim's statement.<sup>161</sup>

Token resistance further complicates matters. Token resistance is a practice in which a woman indicates that she does not want to engage in sexual intercourse even though, in actuality, she does want to engage in sexual intercourse and is willing to engage in sexual intercourse.<sup>162</sup> Women tend to offer token resistance to sexual

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<sup>154</sup>See 720 ILL. COMP. STAT. 5/12-17.

<sup>155</sup>See *id.*

<sup>156</sup>See 720 ILL. COMP. STAT. 5/12-13.

<sup>157</sup>*Id.*

<sup>158</sup>See MARK COWLING, DATE RAPE AND CONSENT 132 (1998).

<sup>159</sup>See *id.* at 57.

<sup>160</sup>See *id.* at 58.

<sup>161</sup>See *id.* at 61. Kanin interviewed self-disclosed date rapists. *Id.* Each of the rapists stated that the act of rape was preceded by some consensual sexual activity. *Id.* In 84 percent of the cases, this consensual activity involved genital play. *Id.* The rapists stated that the intimacies had gone so far that they did not take rejections seriously. *Id.*

<sup>162</sup>ALLISON & WRIGHTMAN, *supra* note 64, at 78.

intercourse. In a 1988 study, Muehlenhard and Hollabaugh asked 610 female students at Texas A&M University if they ever said “no” to sexual intercourse when they really meant “yes.”<sup>163</sup> Thirty-nine percent of the students surveyed admitted to offering such token resistance on at least one prior occasion.<sup>164</sup>

Women tend to engage in token resistance in large part because of societal and cultural norms.<sup>165</sup> Women are expected to say “no” to sexual intercourse regardless of their true feelings.<sup>166</sup> Consequently, men are reluctant to interpret the word “no” as a denial or revocation of consent.<sup>167</sup> In a 1987 study, Sandberg, Jackson, and Petretic-Jackson asked college students to explain what their dating partners meant when they said “no” to sexual activity.<sup>168</sup> A majority of the male respondents expressed their belief that the word “no” meant “yes.”<sup>169</sup>

In a study funded by the National Institute of Mental Health, researchers conducted a survey of acquaintance-rape victims and stranger-rape victims.<sup>170</sup> More specifically, researchers questioned the victims as to their reactions during the actual commission of the rape.<sup>171</sup> Eleven percent of the acquaintance-rape victims reported that they screamed for help during their assault.<sup>172</sup> In contrast, 31 percent of the stranger-rape victims reported that they screamed for help during their assault.<sup>173</sup> In comparison with the stranger-rape victims, twice as many stranger-rape victims reported that they tried to flee their assailant.<sup>174</sup> Identical proportions of both groups reported that they offered resistance to their assailant. Seventy percent of the

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<sup>163</sup>*Id.* at 78-79.

<sup>164</sup>*Id.* at 79. Of those women who admitted to engaging in the practice of token resistance, 32.5 percent reported doing it only once, 45.6 percent reported doing it two to five times, 11.2 percent reported doing it six to ten times, 7.8 percent reported doing it eleven to twenty times, and 2.9 percent reported doing it more than twenty times. *Id.*

<sup>165</sup>JOHNSON & SIGLER, *supra* note 120, at 22; *see also* RAPE, *supra* note 149, at 61.

From very early ages, men and women are conditioned to accept different roles. Women are raised to be passive and men are raised to be aggressive. We are conditioned to accept certain attitudes, values and behaviors. Our conditioning is continuously and relentlessly encouraged and reinforced by the popular media, cultural attitudes and the education system. . . . Social training about what is proper and ladylike, as well as what is powerful and macho, teaches women to be victims and men to be aggressors.

<sup>166</sup>JOHNSON & SIGLER, *supra* note 120, at 22.

<sup>167</sup>*See id.* 22-23.

<sup>168</sup>*Id.* at 96.

<sup>169</sup>*Id.*

<sup>170</sup>RAPE, *supra* note 149, at 154.

<sup>171</sup>*Id.*

<sup>172</sup>*Id.*

<sup>173</sup>*Id.*

<sup>174</sup>*Id.*

acquaintance-rape victims and 70 percent of the stranger-rape victims indicated that they struggled with their assailant.<sup>175</sup>

Although identical proportions from the two groups reported offering resistance, independent evidence suggests that the stranger-rape victims may have offered more substantial resistance than the acquaintance-rape victims. Research has revealed a curvilinear relationship between the amount of force applied by the assailant and the degree of acquaintance between the victim and the assailant.<sup>176</sup> A possible explanation for the curvilinear relationship is that the stranger-rape victim offers more resistance than the acquaintance-rape victim. Therefore, the assailant must counter more resistance with more force.

In all likelihood, the "initial consent" rape victim will be less likely than the acquaintance-rape victim to scream, run, and resist. The degree of acquaintance will probably be greater between the "initial consent" rape victim and the assailant than the typical acquaintance-rape victim and the assailant. After all, the relationship between the "initial consent" rape victim and the assailant will have already progressed to the level of some consensual sexual activity. In the absence of definite signals of non-consent, the "initial consent" rapist may not perceive his act as an act of force.

#### *b. Practical Concerns*

The absence of a graduated rape law also has practical implications.<sup>177</sup> Without a graduated rape law, a jury might be apt to engage in the practice of jury nullification.<sup>178</sup> Some rape laws mandate a maximum life sentence.<sup>179</sup> A jury that finds a defendant guilty of "initial consent" rape may nonetheless acquit because it does not feel that the defendant's actions warrant such a severe punishment.<sup>180</sup> While an "initial consent" rapist might not be as culpable as a stranger rapist, he or she should not go unpunished.

Criminal law is dominated by two theories of punishment: the utilitarian theory and the retributive theory.<sup>181</sup> Although the two theories employ different approaches in determining the justification of punishment, the two theories can hardly be considered opposites.<sup>182</sup> The utilitarian theory justifies punishment whenever there is

<sup>175</sup>*Id.*

<sup>176</sup>*Id.* at 29. Koss, Dinero, Siebel, and Cox found that marital rapes involved the most violence and that acquaintance rapes involved the least violence. *Id.* Stranger rape fell in between the two. *Id.*

<sup>177</sup>See COWLING, *supra* note 158, at 132.

<sup>178</sup>The term "jury nullification" refers to "a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." BLACK'S LAW DICTIONARY 389 (2d pocket ed. 2001).

<sup>179</sup>See COWLING, *supra* note 158, at 132.

<sup>180</sup>See *id.*

<sup>181</sup>JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 31 (2d ed. 1999).

<sup>182</sup>A third theory of punishment, the mixed theory, is a combination of the utilitarian theory and the retributivist theory. FOUNDATIONS OF CRIMINAL LAW 63 (Leo Katz et al. eds.

a net social gain.<sup>183</sup> Under the utilitarian theory, if the benefit to society outweighs the harm to the defendant and the defendant's family, the punishment is justified.<sup>184</sup> Social gains of punishment may include the following: general deterrence, specific deterrence, incapacitation, and rehabilitation.<sup>185</sup>

Generally, the "initial consent" rapist will be one of two types: the "initial consent rapist who misinterprets the actions of his sexual partner or the "initial consent" rapist who formulates intent during the heat of passion. In the case of the "initial consent" rapist who has misinterpreted his sexual partner, punishment yields only one social benefit, general deterrence. Without actual punishment, the threat of punishment will lose its effect.<sup>186</sup> Nevertheless, the benefit of general deterrence will not suffice to offset the harm experienced by the defendant and the defendant's family.

In the case of the "initial consent" rapist who has formulated intent during the heat of passion, punishment may yield several social benefits. For example, the punishment may serve to notify other members of society of the potential consequences of their actions. The punishment may serve to physically prevent the individual from striking again. Along the same lines, the punishment may serve to condition the individual so that he does not strike again. Undoubtedly, there will be instances where there is a net social gain. However, this does not mean that the "initial consent" rapist should be punished to the same extent as the stranger rapist. Given the circumstances of the crime, the "initial consent" rapist will require less deterrence, incapacitation, and rehabilitation than the stranger rapist.

The application of the retributive theory is more straightforward than the application of the utilitarian theory. Individuals understand and utilize the retributive theory to justify punishment on the grounds of just deserts.<sup>187</sup> Retributivists live by the oft-quoted phrase "an eye for an eye." The retributive theory identifies a good in punishment.<sup>188</sup> However, this good does not take the form of social gain.<sup>189</sup> "The good that punishment achieves is that someone who deserves it gets it."<sup>190</sup>

Under the retributive theory, the "initial consent" rapist who acts with intent deserves to be punished. He has deprived the victim of her personal freedom. Moreover, as will be discussed shortly, he has inflicted the victim with psychological, and possibly physical, injury. Although the "initial consent" rapist deserves to be punished, he does not deserve to be punished to the same extent as the stranger rapist. As previously noted, the stranger rapist tends to act with more

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1999) [hereinafter FOUNDATIONS]. According to the mixed theory, punishment is justified whenever there is (1) a net social gain and (2) a defendant who deserves to be punished. *Id.* In applying the mixed theory, desert acts as a limitation on punishment. *Id.*

<sup>183</sup>*Id.*

<sup>184</sup>*Id.*

<sup>185</sup>DRESSLER, *supra* note 181, at 34-35.

<sup>186</sup>*Id.* at 31.

<sup>187</sup>*Id.*

<sup>188</sup>FOUNDATIONS, *supra* note 182, at 62.

<sup>189</sup>*Id.*

<sup>190</sup>*Id.*

violence than the acquaintance rapist.<sup>191</sup> Furthermore, stranger rapes are often premeditated. In an “initial consent” rape, intent, if it exists, is developed during a heightened emotional state. Whether a juror resorts to a utilitarian line of reasoning or a retributive line of reasoning, he or she will be hesitant to convict an “initial consent” rapist when the mandated sentence is the same as that of the stranger rapist.

### C. Effect of Rape on the Victim

The Justice Department estimates that one in seven women will be raped during her lifetime.<sup>192</sup> For that unlucky one in seven, the act of rape will crack, if not completely shatter, the world around her. Rape has profound physical and psychological effects on the victim.<sup>193</sup> Generally, the rapist will apply some degree of force to subdue the victim.<sup>194</sup> Depending on the rapist, force may be the motivating factor behind the act of rape itself.<sup>195</sup> As a result, the victim may sustain some physical injury during the act of rape.<sup>196</sup> In some scenarios, the victim will walk away from the assault physically unscathed.<sup>197</sup> While some victims manage to avoid physical injury during the act of rape, nearly all victims must deal with some form of post-rape physical injury. Psychological injury tends to manifest itself physically.<sup>198</sup>

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<sup>191</sup>See n.176.

<sup>192</sup>RAPE, *supra* note 149, at 97.

<sup>193</sup>See HALL, *supra* note 71, at 91. According to one study, rape victims are three times more likely to describe their physical health as “poor” than women who have never been raped. *Id.* According to that same study, rape victims are five times more likely to describe their mental health as “poor” than women who have never been raped. *Id.*

<sup>194</sup>See A. NICHOLAS GROTH & H. JEAN BIRNBAUM, MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER 12 (Plenum Press 1979). “Rape is always and foremost an aggressive act.” *Id.*

<sup>195</sup>See *id.* Groth and Birnbaum have identified three elements that are common to all acts of forcible rape: anger, power, and sexuality. *Id.* The degree to which each element is present in an act of forcible rape is dependent upon the rapist. *Id.* Groth and Birnbaum have used the three elements to distinguish three categories of rapists: the anger rapist, the power rapist, and the sadistic rapist. *Id.* at 13. The anger rapist views sexual intercourse as “a means of expressing and discharging feelings of pent-up anger and rage.” *Id.* The anger rapist exerts more force than is necessary to accomplish sexual penetration. *Id.* “The assault is characterized by physical brutality.” *Id.*

<sup>196</sup>See ALLISON & WRIGHTSMAN, *supra* note 64, at 147 (providing personal account of a rape victim who sustained rope burns and a torn urethra during her assault); see also MACDONALD, *supra* note 69, at 7 (providing personal account of a rape victim who was struck with a hammer and cut with a razorblade during her assault).

<sup>197</sup>For example, the rapist may issue a threat against the life of the victim or the life of another person. Acting out of fear that the rapist will execute that threat, the victim may submit to the rapist without mounting a defense. In the absence of resistance, the rapist may forego the application of force.

<sup>198</sup>See HALL, *supra* note 71, at 94. Rape victims commonly experience “[l]oss of appetite, nausea, vaginal or oral pain and irritation, and stress-induced illness.” *Id.* In addition, studies have found a correlation between rape victimization and alcohol or drug use. See *id.* A study of rape victims in Tulsa, Oklahoma, found that 23 percent of the rape victims increased their alcohol or drug use following their assault. *Id.*

“[A]ll rape victims suffer from rape trauma syndrome to some degree.”<sup>199</sup> Rape trauma syndrome “describe[s] a predictable stress response pattern [that] a victim . . . typically displays following an assault.”<sup>200</sup> Rape trauma syndrome may be divided into two phases, the acute crisis phase and the long-term reaction phase.<sup>201</sup> The acute crisis phase deals with the victim’s immediate reactions to the assault.<sup>202</sup> This phase can last anywhere from days to weeks to months.<sup>203</sup> The emotions of anxiety and fearfulness dominate this phase.<sup>204</sup> The victim is prone to fall into a state of severe depression.<sup>205</sup> Multiple studies have found that at least three in ten sexual assault victims consider suicide.<sup>206</sup> During the acute crisis phase, the victim frequently replays the act of rape in her mind.<sup>207</sup> Fixation on the act of rape commonly prevents the victim from falling asleep.<sup>208</sup> When the victim finally does fall asleep, she ordinarily has nightmares about the assault.<sup>209</sup>

The long-term reaction phase commences when the victim attempts to pick up the pieces of her once structured world.<sup>210</sup> A primary symptom of this stage is the development of a phobia, “an irrational fear . . . [that] interferes with effective adaptation to one’s environment.”<sup>211</sup> For example, a victim who is raped in an unlit environment might develop a fear of the dark. As a result, she might leave on the lights in her home twenty-four hours a day.

During the long-term reaction phase, the victim commonly encounters difficulties in restoring the facets of everyday life.<sup>212</sup> The victim commonly has trouble reestablishing a normal eating pattern.<sup>213</sup> Some victims are unable to consume food

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<sup>199</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 152.

<sup>200</sup>HALL, *supra* note 71, at 95.

<sup>201</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 152.

<sup>202</sup>*Id.*

<sup>203</sup>HALL, *supra* note 71, at 96.

<sup>204</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 152. Other emotions might include anger, confusion, denial, and guilt. *Id.* at 154. In 1997, Kilpatrick, Veronen, and Resick studied the symptoms of rape victims two to three hours after their assault. *Id.* at 153. Of the victims surveyed, 96 percent indicated that they were scared, 96 percent indicated that they were worried, 92 percent indicated that they were terrified and confused, and 80 percent indicated that thoughts were racing through their minds. *Id.* at 153-54.

<sup>205</sup>HALL, *supra* note 71, at 96.

<sup>206</sup>*Id.* at 94.

<sup>207</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 153.

<sup>208</sup>*Id.*

<sup>209</sup>*Id.*

<sup>210</sup>*Id.* at 155.

<sup>211</sup>*Id.*

<sup>212</sup>*Id.* at 156.

<sup>213</sup>*Id.*

on a regular basis.<sup>214</sup> Other victims view food as a temporary solution to their problems.<sup>215</sup> Similarly, the victim commonly has trouble re-establishing a normal sleeping pattern.<sup>216</sup> For many victims, the nightmares experienced during the acute crisis phase carry over into the long-term reaction phase. In severe cases, the psychological consequences of rape cause insomnia.<sup>217</sup> Perhaps the greatest hurdle for the victim is the resumption of sexual activity. Rape victims often report a diminished sex drive or arousal level.<sup>218</sup> Due to this diminished sex drive or arousal level, some victims find that they are unable to orgasm.<sup>219</sup> For some victims, the resumption of sexual activity triggers flashbacks to the assault.<sup>220</sup> The duration of the long-term reaction phase varies with the victim.<sup>221</sup> Some victims will never fully recover from their assault.<sup>222</sup>

In addition to rape trauma syndrome, 65 percent of rape victims suffer from post-traumatic stress syndrome.<sup>223</sup> Post-traumatic stress syndrome is defined as "the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience."<sup>224</sup> All persons suffering from post-traumatic stress syndrome exhibit two symptoms.<sup>225</sup> First, the person becomes preoccupied with the traumatic event, reliving it over and over again in their mind.<sup>226</sup> Second, the person exhibits a reduced responsiveness to the environment in which they function.<sup>227</sup> In addition to the two aforementioned symptoms, a person suffering from post-traumatic stress syndrome must exhibit at least two of the following symptoms: difficulty sleeping, irritability, difficulty concentrating, hypervigilance, exaggerated startle response, and physiological reactivity upon exposure to events related to the traumatic event.<sup>228</sup> Of the six secondary symptoms, studies indicate that rape victims most often experience difficulty concentrating, hypervigilance, and physiological reactivity upon exposure

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<sup>214</sup>*Id.*

<sup>215</sup>*Id.*

<sup>216</sup>*Id.*

<sup>217</sup>*Id.*

<sup>218</sup>HALL, *supra* note 71, at 94.

<sup>219</sup>*Id.*

<sup>220</sup>*Id.*

<sup>221</sup>ALLISON & WRIGHTSMAN, *supra* note 63, at 159. "Burgess and Holmstrom found that 25 percent of the rape victims they studied had not significantly recovered several years after the rape." *Id.*

<sup>222</sup>RAPE, *supra* note 149, at 97.

<sup>223</sup>*Id.*

<sup>224</sup>ALLISON & WRIGHTSMAN, *supra* note 64, at 160.

<sup>225</sup>*Id.*

<sup>226</sup>*Id.*

<sup>227</sup>*Id.*

<sup>228</sup>*Id.*

to events related to the assault. Rape trauma syndrome and post-traumatic stress syndrome overlap in several respects.<sup>229</sup>

#### IV. CONCLUSION

Nonconsensual sexual intercourse has destructive effects on an individual's physical and mental health. Given the prevalence of nonconsensual sexual intercourse, destruction to the individual translates into destruction to society. State lawmakers should take an active approach towards deterring individuals from committing acts of forced sexual intercourse. However, this is not to say that state lawmakers should sacrifice basic tenets of American legal jurisprudence in pursuing these ends. The enactment of laws recognizing the crime of "initial consent" rape could very well help curb the destructive effects of forced sexual intercourse. This is not at issue. What is at issue is the attitude of such laws towards the defendant. Laws recognizing the crime of "initial consent" rape should not function to stack the deck, so to speak, against the defendant. As Matthew Hale, a British jurist, once proclaimed, "rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, though ever so innocent."<sup>230</sup>

This note *does not* support the proposition that states should refuse to recognize the crime of "initial consent" rape. Statutory recognition of the right to revoke consent during sexual intercourse is justifiable on several grounds. As previously noted, nonconsensual sexual intercourse is damaging to both the victim and society. From a retributive perspective, forced sexual intercourse warrants punishment. From a utilitarian perspective, punishing the offender promotes the well being of society. In a society that strives for equality, laws restricting the right to revoke consent after penetration are dominantly male oriented.<sup>231</sup> Such laws "reinforce the idea that, beyond a certain point in a sexual encounter, men are powerless to stop."<sup>232</sup> As a result, such laws deprive women of sexual freedom.<sup>233</sup> Furthermore, the right to revoke consent is a fixture in American legal jurisprudence. For example, the law of torts recognizes the right of the property owner to revoke consent as to entrance onto his or her property.<sup>234</sup> In the event of a revocation of consent to enter onto property, the licensee or the invitee must make a conscious effort to exit the property. If no such effort is made, he or she will be held liable for trespass.<sup>235</sup> One could easily make a more compelling argument for the right to revoke entrance into one's body than for the right to revoke entrance into one's home.<sup>236</sup>

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<sup>229</sup>*Id.*

<sup>230</sup>CONFRONTING, *supra* note 104, at 247.

<sup>231</sup>Chamallas, *supra* note 110, at 817.

<sup>232</sup>*Id.* at 818.

<sup>233</sup>*Id.*

<sup>234</sup>RESTATEMENT (SECOND) OF TORTS § 171 (1965).

<sup>235</sup>RESTATEMENT (SECOND) OF TORTS § 158 (1965).

<sup>236</sup>Bean, *supra* note 14.

This note *does* support the proposition that states should refuse to recognize the crime of "initial consent" rape in a manner consistent with the Illinois' statutory code. As it stands, Illinois' amended rape law is plagued with problems. At the heart of these problems are problems concerning the defendant's rights. Illinois' amended rape law fails to afford adequate protection to the defendant. The problem of inadequate protection is a byproduct of both the nature of "initial consent" rape and the statutory language in which the crime is framed.

An inherent problem of the crime of "initial consent" rape is that of limited evidence. Given the nature of "initial consent" rape, prosecutors will have a difficult time amassing evidence of the crime. As a result, prosecutors will be inclined to focus on issues of credibility. For the defendant who finds himself in the midst of a credibility contest, rape shield laws serve as a serious handicap. Rape shield laws restrict the defendant from introducing evidence as to the alleged victim's sexual history. Unable to refer to the alleged victim's sexual past, the defendant will have a more difficult time establishing that there was no revocation of consent.

The problem of limited evidence underlies two other inherent problems, false accusations and wrongful convictions. The unfounded rate of rape already exceeds that of any other Crime Index crime.<sup>237</sup> Inherent limitations on evidence act only to encourage false accusations. Prosecutors and judges will expect less from the alleged victim in terms of evidence. Prosecutors and judges will also have a difficult time identifying fictitious claims. The prevalence of false accusations coupled with the "he said, she said" nature of "initial consent" rape cases creates an environment ripe for wrongful conviction. Admittedly, the standard of proof remains that of "beyond a reasonable doubt." However, it must be recognized that a jury of laypersons must apply this standard. Although some jurors may harbor prejudicial attitudes toward alleged victims, it cannot be said that all will.

A lawmaker's hands are tied in dealing with the problem of limited evidence. Lawmakers, like everyone else, must await the development of improved methods of collecting and preserving evidence of rape. While lawmakers are handcuffed in dealing with the problem of limited evidence, they can erect safeguards against false accusations and wrongful convictions. For example, lawmakers can impose more stringent sanctions on persons who make false accusations of "initial consent" rape. Likewise, lawmakers can relax the enforcement of rape shield laws in "initial consent" rape cases. The relaxation of rape shield laws would accomplish two objectives. First, it would deter persons from making false accusations. Presumably, a person would think twice about filing a false report if their public history was subject to public disclosure. Second, it would give the innocent defendant much needed ammunition in credibility contests. Lawmakers can also reinstate the physical resistance element in "initial consent" rape cases. The reinstatement of the physical resistance would accomplish three objectives. First, it would make it difficult to prosecute frivolous claims. Second, it would ensure that the defendant received adequate notice of the victim's revocation of consent. Third, it would provide the fact-finder with an objective measure of consent, thus limiting possibilities of error.

Lawmakers are better equipped to deal with statutory problems than with inherent problems. In dealing with statutory problems, lawmakers need only

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<sup>237</sup>*See id.* at n.90.

restructure the statutory language. Illinois' amended rape law suffers from the problem of ambiguity. The Illinois statutory code does not define what constitutes a revocation of consent. Furthermore, the Illinois statutory code fails to indicate the time period in which an individual has to cease sexual intercourse following a revocation of consent. As a result, members of the public are not fully informed of their rights. Ignorance as to one's rights can, and often does, lead to the commission of crime. Illinois' lawmakers can solve the problem of ambiguity by passing bills containing the requisite information.

Illinois' rape law is also problematic in that it does not subdivide the crime of rape into varying offenses. In the absence of a graduated rape law, statutory recognition of the crime of "initial consent" rape generates both moral and practical concerns. Illinois' lawmakers can put these concerns to rest by amending the rape law so as to recognize different rape offenses with different sentencing guidelines. In such a system, lesser offenses can be reserved for those rape crimes in which consent is dubious. Such rape crimes include date rape, "initial consent" rape, and marital rape. A graduated rape law like the one described would protect the defendant who misinterprets signals or the defendant who gets caught up in the moment from excessive punishment. A graduated rape law like the one described would also protect society against jury nullification.

Through the enactment of Senate Bill 406, Illinois became the first state to formally recognize the crime of "initial consent" rape. Inevitably, other states will consider following suit. Lawmakers would be well-advised to approach the crime of "initial consent" rape with caution. As is evident from an analysis of Illinois' amended rape law, statutory recognition of the crime of "initial consent" rape can have dangerous ramifications.

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