2015

When No is Not Enough: Force in Rape Statues and the Epidemic of Underreporting

Samantha N. Polizzi
Part I: Introduction

A woman is walking down the street to her car with a clutch purse under her arm when a man walks up behind her and slips the clutch out from under her arm and runs off. Is this a robbery? The New Jersey Supreme Court deal with this exact question in 1990.\(^1\) The State argued that the Appellate Division erred in stating that the robbery statute required force “greater than is necessary merely to remove the property from the victim’s person or control.”\(^2\) The State took issue with the standard because it believed the standard was “inexact and unworkable” and would require juries “to use concepts founded in the science of physics to determine whether more force was use than that quantum necessary merely to remove the object.”\(^3\) The court in that case looked at how other states had dealt with these “purse-snatchings”. The majority rule the court considered was that a simple snatching could not constitute robbery unless a struggle ensued, or “the property [was] so attached to the victim’s person or clothing as to create resistance to the taking.”\(^4\) The court ultimately determined that in order for a theft to be a robbery “more force than that necessary to snatch the object” was required, and the defendant’s conviction was overturned.\(^5\)

What does this case have to do with rape? The answer is nothing, directly, but deals with the way in which force is defined in other areas of the criminal law. Robbery often is explained by a simple equation: theft + force = robbery,\(^6\) and so it strikes a reader as odd when a court spends four and a half pages discussing different ways to define force in a robbery case. A force requirement for robbery is necessary because there are ways to commit the underlying crime of theft without the use of any force at all. Theft can be accomplished without even seeing the

---

\(^2\) Id. at 212.
\(^3\) Id. at 212-213.
\(^4\) Id. at 214.
\(^5\) Id. at 217.
\(^6\) N.J.S.A. 2C:15-1
person whose property you are illegally taking. Rape is not so simple. Why is force so difficult to define in terms or rape? Why do courts spend so much time defining force in rape but not robbery? As will be discussed, the requirement of force in rape statutes is contentious because the inquiry necessarily boils down to: how much force is enough force? Through analyzing statutes and cases, this paper seeks to prove that the trouble in defining force in rape contributes to the problem of underreporting and ultimately, the force requirement of rape needs to be eliminated.

This piece seeks to explore the interplay between the variety of state statutory constructions of rape and the epidemic of underreporting of rape and sexual assault in the United States. Rape is by no means a solely criminal problem; it is not even a solely legal problem; it is a wide-spread and deeply rooted social problem. Therefore, state legislatures cannot completely assuage the issues of underreporting rapes. They can, however, bolster rape victims’ faith in the police and the criminal justice system by making all non-consensual sex, regardless of the force used, a criminal and punishable offense. A strictly non-consent rape statute would alleviate the problem of underreporting in two ways. First, it would change the substantive law.

Rape and sexual assault have long been criminalized in the United States, both at common law and subsequently in the codified laws of the states. The definition of what specific conduct constitutes rape has been in flux throughout history and correlate with society’s changing views of women. Rape at common law was defined as a man’s “carnal knowledge of a woman forcibly and against her will.” 7 It was also not possible at common law for a man to rape his wife. 8 The shifting views of rape and the actions that give rise to criminality are focused on three aspects of the crime itself. These three aspects are the spousal exception (“not his wife”)

---

8 Id.
the force requirement ("forcibly") and the nonconsensual requirement ("against her will"). The first element, also known as the marriage exemption, has been abolished in most jurisdictions since the mid-1960s. The third element is essential in that consent, ensuring that mutually agreed upon rough sexual encounters do not give rise to criminal penalties. However, the second element, force, is the source of contention among state legislatures as can be gleaned from the various ways in which state rape statutes are written. What constitutes force? How much power or energy needs to be expended for a nonconsensual sexual act to be considered criminal and carry with it a risk of deprivation of liberty for the offender? Is the force necessary for the sexual penetration itself enough to meet the legal factor or is something more required? If more is required, how much more? These are the questions state legislatures must contend with when they craft their rape statutes. However, these are also the questions many rape victims ask themselves when they are considering whether or not to go to the police with their stories. Therein lies the inquiry at the heart of this endeavor: Does the force requirement contribute to the epidemic of underreporting of rapes and sexual assaults in the United States?

The National Criminal Victimization Survey ("NCVS") is a survey conducted each year by the Bureau of Justice ("BOJ"). According to the NCVS, in 2012, only 28% of rape or sexual assaults were reported to the police. Rape and sexual assault was the least reported of any crime surveyed by the NCVS including violent and property crimes. Violent crimes on the whole were reported 44% of the time, more than 50% more often than rape or sexual assault alone.

---

10 Id.
The NCVS conducts its survey through a series of phone and in-person interviews with people over the age of 12.\textsuperscript{11} People are interviewed if they belong to a selected household.\textsuperscript{12} That household stays in the sample for three years and the eligible members of the household are interviewed every six months.\textsuperscript{13} A sample question from the “Respondent’s Screen Questions” is as follows: “Incidents involving forced or unwanted sexual acts are often difficult to talk about…have you been forced or coerced to engage in unwanted sexual activity by – (a) someone you didn’t know – (b) a casual acquaintance or (c) someone you know well?”\textsuperscript{14,15} The questionnaire then has follow-up questions regarding how many times the incident occurred and the happening of the incident. The NCVS also has supplemental questionnaires that are designed to elicit more specific information about the happening of crimes reported to them by participants. A sample question from one of those supplemental reports reads, “You mentioned rape. Do you mean forced or coerced sexual intercourse?”\textsuperscript{16} It is clear that the National Crime Victimization Survey is a well-organized, and well tested method of gathering data regarding victimization and the reporting of crimes across the United States. It provides for reliable data that can be used in analyzing crime and reporting across the country; however, not all victimization surveys are as reliable.

A small number of states have embarked to do their own crime victimization surveys, with varying degrees of success and even more greatly varying degrees of results. Some states found that their numbers were far above the 28% national average of reporting. For example,
Illinois reported in 2002 that 39% of their rape victims reported their crime to the police\textsuperscript{17}, while California reported 50% of rape victims reported their attack to the police in 2013\textsuperscript{18}, Massachusetts found 72% of their victims reported between 2001-2006\textsuperscript{19} and Indiana found an inspiring 75% of rape victims made reports to the police\textsuperscript{20}. However, other states found numbers below the national average, with Utah finding only 22.2% of rape victims reported in 2010\textsuperscript{21} and Arizona finding that in 2013, 0% of rape victims reported their attack to the police\textsuperscript{22}. The problems that plague these surveys are the same for each state. First, there are very few states that do victimization surveys, and even fewer that provide information on underreporting. Secondly, these states work with very small sample sizes, and often warn readers that the data provided might be skewed due to the lack of participants. Thirdly, at a state level, these surveys are neither uniform nor recurring. Unlike the NCVS which is done every year and has established a system for collecting participants and utilizing certain questions and methodologies, many states victimization surveys are one-offs, and therefore do not provide reliable information that can be analyzed over time and discussed in conjunction with other changing aspects of crime and the law. As a result, it is clear that state victimization surveys are not good indicators of underreporting in their particular state. Hopefully, as more states conduct victimization surveys on a more regular basis their data will become more reliable, but as of yet, they only provide negligible information of low indicative value.

\textsuperscript{19} Astion, et al., Understanding Sexual Victimization: Using Medical Provider Data to Describe the Nature and Context of Sexual Crime in Massachusetts, 2001-2006, April 2008 (31-36) (describing the findings on reporting of sexual assault based on a variety of factors).
\textsuperscript{20} 2010 Indiana Criminal Victimization Survey: Sexual Assault and Domestic Violence, Indiana Criminal Justice Institute, 2010.
\textsuperscript{21} Peterson, Ben. Utah Crime Survey 2010: Victimization & Perceptions, 2010 (6-12) (describing percentage of people reporting crime to the police and what factors impacted whether someone reported or not).
The best way to address the issue of underreporting as it stands is to change the law. As will be discussed later, rape is obviously not solely a legal issue, but one that permeates various aspects of society and of the national mindset. However, the opinions of a nation are much more difficult to change with the same efficiency as can be used in changing a law. What is necessary is a strictly non-consensual sex crime called “rape” or “sexual assault” that is sentenced and adjudicated with the same fervor as forcible rape is now. A restructuring of states’ rape statutes will help reduce the incidence of underreporting of sex crimes in the United States by providing an avenue of justice for those victims who did not have “enough” force used against them. This will be proven by analyzing both statutes and cases that have interpreted statues and been tasked with defining “force” in a way it is not in any other area of the law.

The statutes will illustrate different paradigms states use in crafting rape statutes the pros and cons of each paradigm. They will also provide some examples of statutes that can hinder or aid in finding a solution the underreporting problem. Statutes without force requirement are more flexibility and thus easier for victims to access when considering whether they have been subjected to a crime. When victims can see that states recognize the attack they suffered as a rape, something illegal and punishable, their faith in the system itself is bolstered. This confidence in the statute can help to alleviate some of the stresses of reporting such an intimate crime to the police.

Part III focuses on cases in which courts have been tasked with interpreting “force” in various states and the approaches they have taken or chosen not to take in determining if a victim was raped. They will also illustrate the obstacles prosecutors, and, in turn, victims face in getting convictions for assailants and perpetrators of sex crimes. Finally, this paper will discuss rape as a social issue and the limited effect changing the law can have when the national mindset is such
that rape victims are still often the ones shunned and blamed for the attacks committed against them.

What will be discovered throughout this endeavor is that states and courts have struggled with defining force in rape as they have in no other aspect of the criminal law, and that force requirement and the confusion surrounding it contributes to the epidemic of underreporting. The solution proposed herein, namely for states to craft rape statutes without a force requirement but still called “rape, is not an ultimate solution, but it is a tangible one and one that can catalyze the conversation that will permeate the national mindset and change the way people view rape and rape victims, and this shift in mindset will be what eventually leads to a solution to underreporting. Once rape victims feel as though they will not be labeled or shamed for their attack, once they understand that the police and the courts recognize their suffering, then they will feel more confident in being able to come forward and get justice.

Part II: What Approaches Have States Taken?

As with any criminal law, each state legislature crafts a rape statute in a way they believe most suits their state and the residents of that state and what conduct they wish to criminalize. Rape laws are no different and the various requirements for penetration force, consent, and injury give each state a unique depiction of what sexual acts constitute rape and which are merely lesser charges or not criminal at all. This paper is not focused on those instances where rape occurs against someone with a mental disease or defect, when sexual acts are commenced due to misrepresentations or abuse of authoritative power, when the victim is unconscious or under the influence of controlled substances, or statutory rape. Therefore, those circumstances are not discussed, though they are part of the rape law of every state analyzed herein.
So why is it necessary to explore, evaluate, and classify the rape statutes employed by various states when discussing underreporting? Analyzing state statutes gives a menu of sorts of the options states have when rewriting their rape statutes. These statutes show that even without the common law definition of rape, the issue of reporting still exists with the modern construction of rape statutes. These statutes will also reveal the flaws in the injury and type of force paradigms that lead to questions of force and subsequently to difficulty prosecuting and then to victim underreporting. Conversely, it will also reveal how no force statutes theoretically assuage these issues.

A paper consisting of an analysis of the rape statutes of all 50 states would be a Herculean undertaking, even after categorizing them, so only seven statutes are discussed. The statutes analyzed are from a variety of states around the country and were selected by a writer trying to account for cultural difference across different regions of the country and across states with varying degrees of population and population density. Therefore, discussed below are three different paradigms of rape statutes: injury, type of force, and no force. The “injury” paradigm has been adopted in Massachusetts, New Jersey, and Texas and delineates the degrees of rape or sexual assault by the injury sustained by the victim. The “type of force” paradigm has been adopted in Illinois and Indiana and delineates the degree of rape or sexual assault by the type of force used to commit the assault. Finally, the “no force” paradigm has been adopted by Arizona and Utah and these statutes do not require force to be used to commit rape or sexual assault, though there are more serious, aggravated crimes that can be charged when force is used. Each of these paradigms and the states that follow them will be discussed below.

Some states base the differences in their statutes on whether or not the victim suffered bodily injury and to what degree. States like New Jersey, Massachusetts, and Texas have
differing degrees of criminal activity delineated by the amount of injury suffered by the victim. In New Jersey, the two crimes that require sexual penetration\textsuperscript{23} are sexual assault and aggravated sexual assault. Both crimes require force or coercion, but the difference between first degree aggravated sexual assault and second degree sexual assault is injury. If a perpetrator “uses physical force or coercion and severe personal injury is sustained by the victim”, an act of aggravated sexual assault has occurred.\textsuperscript{24} However, if “the victim does not sustain severe personal injury”, the crime is one of second degree sexual assault.\textsuperscript{25} New Jersey’s statute does not give any clarification as to what constitutes force or coercion, but the judiciary has provided clarification on what constitutes force. In \textit{State of New Jersey In the Interest of M.T.S.}, the New Jersey Supreme Court found that the act of penetration itself was sufficient force to constitute sexual assault.\textsuperscript{26} The court in that case analogized the force requirement of rape to that of assault and battery and came to the conclusion that non-consensual penetration satisfied the force requirement for sexual assault in New Jersey\textsuperscript{27}. Therefore, although New Jersey’s statute as written falls into the “injury” paradigm, in practice, New Jersey also has many similarities with the “no-force” states. Fortunately, as can be gleaned from both \textit{M.T.S.} and \textit{Sein}, the New Jersey Supreme Court has taken the time to analyze the force requirements in both the robbery and rape context and come down one way or the other. However, some states do not have such well-established case law when it comes to the force requirement of rape and thus, their statute is where victims and prosecutors must turn to make their cases.

\textsuperscript{23} Sexual penetration is defined as “vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor’s instruction. The depth of insertion shall not be relevant as to the question of commission of the crime. N.J.S.A. 2C:14-1(c).
\textsuperscript{24} N.J.S.A. 2C:14-2(a)(6).
\textsuperscript{25} N.J.S.A. 2C:14-2(c)(1).
\textsuperscript{26} \textit{State of New Jersey In the Interest of M.T.S.}, 129 N.J. 422 (1992).
\textsuperscript{27} \textit{Id.}
Massachusetts’ rape law is also demarcated by injury: sexual intercourse with force or threat of bodily injury and against the will of the victim that results in serious bodily injury is punishable by up to life in prison.\textsuperscript{28} However, Massachusetts is similar to New Jersey, in that it also provides for a statutory violation if the victim does not sustain severe bodily injury.\textsuperscript{29} In Massachusetts, a defendant convicted of rape without inflicting severe bodily injury upon his victim, the actor can be sentenced to a maximum of twenty years in prison.\textsuperscript{30} The problem with the Massachusetts statute and that no explanation of “force” is given either by the legislature or in another part of the statute. As has been shown, the force requirement for rape is not as easily defined or met as force requirements in other areas of criminal law such as robbery. If this were a robbery statute, the force requirement would most likely not the one of most contention (it would probably be the injury element). The difference in Massachusetts is that unlike in New Jersey, where the legislature has clarified how much force is necessary, or other states that give statutory clarification as to what constitute force, Massachusetts provides no explanation. The determination of how much force is enough is then left up to judges to interpret, and so the law remains unclear and victims who suffer a sexual assault without being seriously injured may very well not feel that they were criminalized in a way that Massachusetts recognizes as punishable.

Finally, Texas also categorizes its rape law on the basis of bodily injury sustained by the victim. However, Texas seems to conflate the ideas of consent and force in its statutory construction. The statute reads that if a person “intentionally or knowingly causes the penetration of the anus or sexual organ of another by any means;…causes the penetration of the mouth of another person by the sexual organ of the actor; without that person’s consent” or “causes the sexual organ of another person, without that person’s consent to contact or penetrate

\textsuperscript{28}  M.G.L.A. 265 §22(a)
\textsuperscript{29}  Id.
\textsuperscript{30}  M.G.L.A. 265 §22(b)
the mouth, anus, or sexual organ of another person, including the actor”, that person commits sexual assault. However, the caveat “without the person’s consent” at the end of the first two circumstances is misleading. Further on, the statute provides clarification as to what “without consent of the person” means, and it requires use or threat of force or violence or a victim who has not consented but is presently physically helpless or unaware. Texas conflates consent and force in that non-consent requires force. This conflation seems like the same thing the New Jersey court did in M.T.S., however M.T.S. makes it easier for victims to bring their cases while the definition of consent in Texas makes it more difficult. In New Jersey, force is satisfied by non-consensual sexual penetration, simply put: force requires non-consent. However, in Texas, the exact opposite is true, in that non-consent requires force. Under New Jersey law, a victim who was sexually assaulted by the mere act of non-consensual sexual penetration has had force used against her in a manner that satisfies the statue. In Texas, however, the prosecutor must prove force was used against the victim in order to go back and prove that consent was not given. The problem with this is that force is the contentious definition, it is the aspect of these cases that courts get hung up on, and it is the grounds on which convictions are overturned. New Jersey makes the definition of force simpler while Texas makes it more complex by requiring in essence two findings of force: one to establish the non-consent element and one to establish the force element. This need to prove force in two different ways opens the proverbial can of worms in that it is not clear whether force for each of these different elements would be met in the same way? Is the same force required to satisfy the non-consent element also enough to also to satisfy the independent force element? In a legal scheme where the issue is the lack of uniformity among states and the many questions raised by trying to define force, Texas’ statute seems to

31 V.T.C.A., Penal Code §22.011(a)(1)(A)  
raise more questions than it answers and create more problems than it solves. A statute that required only non-consensual sex to convict someone for rape would alleviate the definitional issues as well as help to alleviate the issue of underreporting. Even though the statutes of New Jersey, Massachusetts, and Texas are use the level of injury sustained by a victim to categorize the seriousness of the crime, the criminal activity must still be the result of use or threat of force applied against the victim in order for the conduct to be criminal.

The “type of force” paradigm has been used by both Illinois and Indiana in their crafting of their rape statutes. Whereas New Jersey, Massachusetts, and Texas define what the differing degrees or rape or sexual assault are based on the victim’s bodily injury, Illinois and Indiana do so based on the type of force used. Though they do not go so far as to say how much force is enough force, they do take into account the differing types of force when charging assailants. Illinois and Indiana do so by taking into account that some assailants use, for lack of a better term, “simple” force, while others use “deadly” force. Illinois defines rape34 (they name it “criminal sexual assault”) as requiring sexual penetration and use or threat of force35. The difference then in Illinois criminal sexual assault statute and the statute of aggravated criminal sexual assault is one of force and bodily injury. In Illinois, aggravated criminal sexual assault, a class X felony is defined as criminal sexual assault and the actor “displays, threatens to use, or uses a dangerous weapon other than a firearm” or “causes bodily harm to the victim.”36 The problem with the statute the way it is constructed is a lack of clarification similar to that in Massachusetts’ statute. While Illinois provides a definition of dangerous weapon further on in the statute, again the definition of the “simple” force is absent. It is therefore left up to the courts

34 Criminal sexual assault in Illinois is also committed if the victim is “unable to understand the nature of the act or is unable to give knowing consent.” 720 I.L.C.S. 5/11-1.20(a)(2) . However, as previously stated, circumstances in which the victim is unable to understand, unable or incapable of giving consent, has a mental disease or defect, or cannot give consent on the basis of age are not within the purview of this examination of state rape laws.
to decide how much force is enough force to constitute rape when dealing with anything other
than a deadly weapon or a firearm and a victim who has not sustained bodily injury. Therefore
for any other victims than those victimized with a dangerous weapon or injured, it is difficult for
them to understand whether what they suffered can be considered rape because they do not know
if their assailant used enough force. This uncertainty may lead many victims to simply remain
silent rather than risk going through the ordeal and publicity of giving a statement and testifying
in front of a grand jury to no avail.

Similarly, in Indiana, a level 3 felony rape is sexual intercourse when the victim is
“compelled by force or imminent threat of force”. Level 1 rape, however “is committed by
using or threatening the use of deadly force” or while the assailant is armed with a deadly
weapon, or when the victim sustains serious bodily injury”. Though both states do require that
for an act to be criminal, a victim must submit to the use or threat of force, they do account for
the different types of force that may be used and punish those who commit their crime with
deathly force more harshly. This is a step on the way to a statute that requires mere non-consent
as the basis for criminality, because if a state can recognize a person submitting to differing
levels of force, it seems like a small jump to then recognize someone submitting without the use
or threat of force at all.

Arizona and Utah are some of the most progressive states when it comes to the
construction of rape statutes. Both states have high ranking sex crimes that do not require a
showing of use or threat of force. Arizona has no force requirement in either its sexual assault
statute, and defines sexual assault as “sexual intercourse or oral sexual contact with any person
without consent of such person.” The crime is a class 2 felony and has a minimum of 5.25

37 I.C. 35-42-4-1(a)(1).
years for a first offender\textsuperscript{39}. However, violent sexual assault in Arizona does require use or threat of force. It requires that sexual assault involving "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or...serious bodily injury...and the [actor] has a historical prior felony conviction for a sexual offense."\textsuperscript{40} These are very high criteria to meet, however Arizona punishes those guilty of violent sexual assault to life imprisonment without parole, so the heavy burden of the elements seems necessary to ensure that only the worst sexual offenders are convicted of this crime.

Though it might seem so at first, the force requirement for violent sexual assault in Arizona does not undermine Arizona’s progressive stance on eliminating a force requirement for sexual assault. What Arizona is doing is providing an avenue of harsher punishment for perpetrators that commit more heinous sex crimes. Criminalizing a more violent crime does not shut the courtroom door to those victims who have been the victim of the same type of crime but to a less violent extent. Even if victims who believed they were the victim of violent sexual assault were not able to meet the requirement of deadly force or serious bodily injury still have the recourse of the sexual assault statute to fall back on and still see harsh punishments passed down if their attacker is convicted.

Similar to Arizona, Utah does not require use or threat of force in its rape statute, but instead requires use or threat of a dangerous weapon for more serious crimes. In Utah, the crimes of rape, aggravated sexual assault, and forcible sodomy all only require that the victim not consent to the sexual act in order for it to be criminalized.\textsuperscript{41} Only aggravated sexual assault requires that an assailant use or threaten the victim with a dangerous weapon or cause serious

\textsuperscript{39} A.R.S. §13-1406(B).
\textsuperscript{40} A.R.S. §13-1432(A).
\textsuperscript{41} U.C.A. §76-5-402(1) (rape); U.C.A. §76-5-405(1) (aggravated sexual assault); U.C.A. §76-5-403(4) (forcible sodomy); U.C.A. §76-5-402.2(1) (object rape).
bodily injury. However, the difference in minimum sentences is 5 years for a first offense of first degree rape and 15 years for a first offense of aggravated sexual assault.\textsuperscript{42}

Arizona and Utah have done what other states have not in that they have named non-consensual sex as rape or sexual assault. They have given the damning name to the act that most other states consider as some lesser sort of criminal sexual contact. By naming non-consensual sex rape and by punishing it in the same way that traditional forcible rape has been punished, Utah and Arizona send the message that \textit{any} force is enough to turn non-consensual sex into rape. The sole exertion of energy required for the sexual act itself is enough to punish someone for rape. Arizona and Utah seem to understand that the violation rape victims feel does not stem from being struck or having a deadly weapon brandished at them. The violation comes from the sexual act itself and so that must be the act legislators focus on when determining how much force they write into their rape statutes.

It is clear that states have a wide variety of what they consider to constitute rape or sexual assault and what amount of force, if any they require in order for an act to be criminal. However, given the bevy of options states have in how to craft their statutes, this author proffers that it is statutes like Utah and Arizona, which do not require force but only non-consensual sex in order for a person to face charges for the baseline sex crime in that state. Statutes such as these, because of their flexibility and applicability make it easier for victims to consider that they have been subjected to a crime and see that the state recognizes their experience as one that should hold serious consequences for their assailants. This faith in the statute and, in turn, the state should then reinforce faith in the criminal justice system and cause more people to report when they have been victimized. Otherwise, convoluted state laws that require a showing of force but do not give any explanation into how much force is required or laws that blur the line of consent

\textsuperscript{42} U.C.A. §76-5-402(3)(a) (rape) and U.C.A. 405(2)(a)(i).
and force only work to exacerbate the problem of underreporting rather than to offer solutions to that problem.

**Part III: How Have Courts Dealt With The Force Requirement?**

As previously stated, most states have given little to no indication as to what they believe constitutes the requisite force necessary to turn a sexual act into a rape. Even in some states where things like “forcible compulsion”, “duress”, and “menace” are defined, the end point is always use or threat of force. The force requirement means that a victim must be compelled to or must submit to the sexual act by use or threat of force. But this does not answer the fundamental question of how much force is enough force? Force, as seen in the statutes of Illinois and Indiana can have various definitions within the statute of a single state. There are elements of the action which cause something to be called “deadly force” rather than just “force”. But might there be such a thing as “lesser force”. This is not a physics analysis, but every physical action requires some form of force. Most statutes, however, are vague as to what constitutes sufficient force for rape and thus the interpretation of the word “force” in the context of rape law is left up to the courts. As will be discussed, these courts run into problems and questions that are not often raised when discussing force in other areas of the law such as robbery. For better or worse, the inquiry is so much more common in rape cases because of the act necessary to commit the crime itself.

In Texas in 1987, the court of appeals gave some insight into what was required for force in Texas in *Jiminez v. State*[^43^]. In that case, the victim feigned sleep while her assailant digitally penetrated her and then attempted to have intercourse with her[^44^]. The victim stated she feigned sleep because she had gotten a glimpse of her attacker and saw that he was a university police officer.

[^44^]: *Id* at 791.
officer and thus had a gun and she became afraid. The facts show that the assailant moved the victim’s panties aside and digitally penetrated her for five minutes before leaving and returning again. It was upon this return that the assailant attempted the sexual intercourse. She coughed loudly in order to make him believe she was waking, and so the sexual intercourse did not occur. However, the court reversed the sexual assault conviction on the basis that “the evidence [was] insufficient to prove the allegations of use and threats of physical force and violence.” The court stated that it was not necessary for a victim to resist in order for a sexual assault to have occurred, but stated that instead, “the fatal defect in this case is not the absence of resistance, but the absence of threat or use of force or violence.”

It is clear from this case that in this court’s understanding, “force” required more than the defendant acting to move the panties of his victim out of the way. It requires more than the physical exertion it took him to digitally penetrate her for five minutes. It was not even enough that her assailant had a gun on his hip when he was digitally penetrating her for this action to be considered done with the use or threat of force. The victim in this case clearly did not consent to the actions taken against her, and she clearly felt violated because she immediately reported her incident to the police. However, the statute in Texas, as previously discussed conflates the issues of force and consent, requiring that non-consent be the result of some use of force. Therefore, the fault of overturning this conviction is both of the statute and of the court. The fault of the statute is that it does not provide any clarification as to what constitutes force in the context of rape, and thus the court must analyze blind and make a determination without statutory clarification. The fault of the court is that by reversing the conviction, the court rejected the

\footnotesize{45 Id.  
46 Id.  
47 Id.  
48 Id. at 790.  
49 Id. at 792.}
violation of the victim’s body. It effectively told her that she had not been sufficiently victimized and that the law could not help women in her situation. Therefore, other women in her situation know that if they attempt to go to the police or report what has happened to them, they cannot be given any justice. It is interesting to wonder whether if the defendant in this case had moved the victim’s pajamas aside in order to take a wallet from her pajamas whether the court would have spent so much time analyzing whether enough force was used to constitute robbery and whether they would have turned over a conviction of robbery. This is doubtful considering how courts normally have not been concerned with defining force in terms or robbery, and how concerned they have been with making sure enough force is exerted upon a rape victim before they will uphold her assailant’s conviction.

The court in State v. Vantreece held similarly in 2007 in North Dakota50. In that case, the victim feigned sleep while her assailant opened a hole in her pajama and then eventually had sex with her51. Again, the victim did not express her non-consent, but she also did not expressly nor impliedly give her consent to her assailant. The court states “evidence of the tearing of the pajama is not adequate under these circumstances to demonstrate force sufficient to compel the complainant to submit to having sex with the defendant.”52 The court uses the word “tear” to describe the action taken by the assailant upon the victim’s clothing. This denotes a certain amount of force that needs to be exerted as one imagines what it would take to “tear” a piece of clothing. It is certainly more than would be necessary to simply move aside the victim’s panties as was the case in Jiminez. Still, however, the court demonstrates that the amount of force necessary to remove the victim’s clothing out of his way (or in this case, “tear” it) and the force necessary to actually commit the sexual act itself does not make his conduct rape. As with most

50 State v. Vantreece, 736 N.W.2d 428 (N.D. 2007).
51 Id. at 430-431.
52 Id at 435.
interpretations of “force” the court here determines that enough force to compel the complainant to submit is required for the crime of rape. However, sometimes even force that holds the victim in place for the commission of the act is not sufficient.

The court in *Com v. Berkowitz* faced such an issue in Pennsylvania in 1994.\(^{53}\) There, the victim repeatedly said “no” throughout the encounter and the court determined that “the weight of his body on top of her was the only force applied.”\(^{54}\) The court does not contend that the victim expressly did not consent, it merely held that simple non-consent is not sufficient to allow the victim’s assailant to be punished for his actions. The court states that “even if all of the complainant’s testimony was believed, the jury as a matter of law, could not have found Appellee guilty of rape.” [emphasis added].\(^{55}\) By virtue of this statement, the court points out a very troubling realization: that the law failed this victim. Like in *Jiminez*, this failing falls on both the legislature and the court. By requiring both a force and a non-consent element of rape, the Pennsylvania legislature made it impossible for this defendant to be convicted as a rapist and punished accordingly. The court, in turn, interpreted the requisite “force” to require something more than the action of the sexual penetration itself and because of that the law, as written, fell short. The law in this case told the victim that being held down by the weight of her assailant while he continued to penetrate her against her express wishes was not punishable as a rape.

This case is even more egregious than that in *Jiminez* because in this case, the assailant heard an express “no” coming from the victim throughout the attack and still was not punished for rape. The assailant was instead convicted of indecent assault, a misdemeanor. This case demonstrates to women that it doesn’t matter if they do not want the actions taken upon them to occur, it is not their pain, their humiliation, their victimization that matters, it is the force their


\(^{54}\) *Id.* at 1164.

\(^{55}\) *Id.* at 1165.
assailant uses that determines how he will be punished. It once again takes the power from the victim as was done to her during her attack. If the statute had merely required that non-consent be the standard for rape charges, the defendant in *Com* would have faced felony charges instead of the misdemeanor ones he had to face. A rewriting of the statute to require only non-consent for rape would also make it much easier for other women who have been assaulted in a similar way as the victim in *Com* to come forward with their stories and seek justice.

An appellate court in New York faced a similar situation in 2008 in *People v. Chapman*. In that case, the victim testified that she performed consensual oral sex on the defendant, hoping he would leave her alone. Defendant, however, then performed oral sex on the victim despite her verbal protest and eventually inserted his penis in her vagina without her consent. As in *Com*, the court states that “although this testimony was sufficient to establish that the sexual conduct occurred without the victim’s consent, it did not establish that defendant used physical force.” In order to sustain a conviction of first degree rape, New York requires sexual intercourse in addition to forcible compulsion. The fact that the victim did not consent to the action does not matter in New York unless force was also used. The court’s hands are tied in a similar way that the hands in the court in *Com* were tied. They had to work with a statute that required force be used in order to get a conviction for rape. Also similar to *Com* is the failure of this court to recognize that the violation sustained by the victim is the salient issue and that the force necessary to cause this violation is what should be criminalized. The violation comes from the unwanted sex act itself, and by not defining force to encompass any sex act that meets that definition, the court takes the power to define the victim’s suffering from her and claims it is at

---

57 *Id.* at 662.
58 *Id.*
59 *Id.*
the hands of a poorly written statute. Although consent may be used as an affirmative defense to the crime of rape, the fact that the victim verbally stated her objection to the defendant’s sexual acts has absolutely no value in the eyes of the law. Her consent does not matter to the law as it is written, similarly as to how it did not matter to her assailant as he performed unwanted sexual acts on her. And while Com might have a weaker value due to the fact that it is a 20 year old case, the same cannot be said of the court in Chapman. This case was in 2008 and a victim’s non-consent is still worth as much as it was 20 years ago, not very much.

More recently, in 2013, an Idaho court found that the defendant did not use force to assault his victim in State v. Elias. In this case, the defendant unlawfully entered the victim’s home and digitally penetrated her while she slept in her bed with her two young children. The court found that the force exerted on the victim that was necessary to digitally penetrate her was not sufficient for a finding of forcible sexual penetration by use of foreign object. The court stated that “the extrinsic force standard requires force beyond that inherent in the act itself; the intrinsic force standards holds that force necessary to accomplish penetration is itself sufficient.” The court, quoting State v. Jones stated that “some force beyond that which is inherent in the sexual act is required for a charge of forcible rape.” Although this case does not deal with forcible rape, it does deal with a statute that requires use of force or violence, duress, or threats of immediate and great bodily harm, accompanied by apparent power of execution. It is clear that Idaho has adopted a stance in which the victim’s non-consent is unnecessary as to the determination of whether a rape has occurred, and that the mere force necessary to complete the act is not sufficient to punish an assailant for rape. Similarly, in this case, the defendant cannot

---

61 Id.
62 Id.
63 Id.
64 Id.
be convicted of forcible penetration with a foreign object. The victim in this case did call the police after her attack. The police officer testified at trial stating that the victim was “visibly upset and it seems as though she was in shock.”\textsuperscript{65} Once again, the state of the victim does not matter to legislatures in states where there is a force requirement for rape statutes. These legislatures focus on the actions of the perpetrator and how much force they used rather than on the damage caused to the victim emotionally and mentally by having her body violated without her allowing it to be so.

\textbf{Conclusion: Rape is A Social Problem}

There are several reasons victims do not report their rapes or sexual assaults. The Bureau of Justice found that there were five major reasons why victims of violent crimes did not report to their crime to the police.\textsuperscript{66} They found that between 2006-2010, the most common explanation as to why victims of rape and sexual assault did not report their crime to the police was actually for an “other reasons [than those provided] or [there was] not one most important reason” with 33\% of respondents giving that answer.\textsuperscript{67} The second most reported answer at 28\% was that victims had a “fear of reprisal or getting offender in trouble”.\textsuperscript{68} This is troubling for several reasons. The fact that victims fear reprisal from their assailants highlights a defect in the criminal justice system. If victims are scared enough that the police and the courts cannot do enough to protect them from their assailants that over a quarter of the people who do not report cite it as their reason, there is a problem with how rapists are handled in the criminal justice system. It would be irresponsible to speculate as to where this defect is, however, it is clear that this fear has tangible and remediable effects. The more troubling, more troubling in that is a

\textsuperscript{65} Id.
\textsuperscript{66} Langton, et al., \textit{Victimization Not Reported to the Police, 2006-2010.}, August 2012 (4, Table 1) (2012) (providing empirical data on reasons for victims of different types of crime not reporting to the police).
\textsuperscript{67} Id.
\textsuperscript{68} Id.
harder problem to fix, is that victims fear getting their offender in trouble and thus do not report their crime to the police. Again, speculation would be unwise, however, this statistic highlights the fact that many rape victims know their attackers, and thus it is harder for victims (both emotionally and sometimes, financially) to see someone to see someone they know and possibly love go to jail than someone they do not know.

The third most likely reason (constituting 20% of respondents) for not reporting a rape or sexual assault to the police was that the victim “dealt with [the attack] in another way” or felt it was a “personal matter”. The least likely reason victims gave for not reporting their crime to the police was that the victims felt it was “not important enough to [the] victim to report”. This feeling of unimportance is also a difficult one to remedy in that it is unclear whether these feeling are the result of personal perceptions or perceptions shifted onto the victim by her social surroundings. It is likely that this reasoning can be alleviated partially by a change in social perception, but that might not constitute a solution to the entire problem.

Finally, the reason at the heart of this inquiry, that “police would not or could not help” was the reason given by 13% of victims who did not report their crime to the police. This is to be expected when police have to work within the parameters of rape laws that do not criminalize conduct that many victims might consider criminal but that the law might not. The police would have to determine whether they had probable cause to arrest someone for rape or sexual assault, and in doing so they would need to make an initial judgment on whether the force used against the victim falls is sufficient for rape or sexual assault. These initial judgments would no doubt be informed by previous cases and what the facts of cases that were prosecuted and convicted were as opposed to those that lead to acquittals or could not be charged sufficiently as rape or

---

69 Id.
70 Id.
71 Id.
sexual assault. Analysis of the reasons provided for why victims do not report their crimes to the police demonstrate that the force requirement of many state rape laws is not the most important thing victims consider when deciding whether or not to report. The reasons given more often have to do with public perception of victims and the fears victims face in non-legal aspects of society.

As has been previously stated, rape is a social as well as a legal issue. The problem is borne out of a national conception of women, their sexuality, their equality, and their worth. Underreporting is a symptom of a society that tells women that they are the ones at fault. It tells them that they are the ones who should know better than to drink; they are the ones who should have not flirted with someone and made themselves “available”; they should have worn such tight jeans. This can be seen in the dichotomy between force in rape and force in robbery. A court is rarely presented with a robbery case in which the question is “did you use enough force?” When someone is robbed, it is implicitly known that something that was theirs was taken from their person without their consent. Sein provided a case of “purse-snatching” in which the clutch purse was held under a woman’s arm and a man came up behind her and slipped it out and ran. However, if the purse had been on a strap and the man had pulled on the strap and it broke, that most likely would have constituted enough force for robbery. It would have also been a robbery if the man had pushed the woman into her car and then after she dropped the purse he picked it up and ran off with it. Courts very seldom need to discuss the various ways force can be exerted upon a person in a robbery because any force is enough. The fact that the case is not so simple in rape demonstrates the worth put on the victim’s body. If a purse can be considered “robbed” without much inquiry into the force exerted upon it, why is it so difficult for a woman to be considered “raped” without getting into the minute details of the
manner in which the material covering her genitals was removed? Do we as a society place such little value on a woman’s body that to accept that it has been violated is an exponentially more difficult task than to accept that someone who has been shoved and had a few straps of leather and some cash have been taken off of them has been violated? Looking at the construction of rape statutes and the difficulty courts have in defining force, it would seem so.

Everyone, not just feminists and those keen on the issues women face every day simply by virtue of their sex should be infuriated when the first question someone asks upon hearing a person has been raped is “what was she wearing/doing” or “how much did she have to drink” or “why was she walking alone at night?”. These questions shift the blame onto the victim and they put her actions on trial and make her the one who must defend herself and justify her actions. In the court of public opinion and this jury is not bound by oath and presented with only relevant evidence that is not more prejudicial than probative. That court will hear its “evidence”, make its decision, and pass its judgment without any reference to the law. That court and its judgment are what rape victims face more frequently and with more damaging effect than a court of law. The shame, the taboo, and the social banishment silences victims just as often as their perception that the law cannot help them. It makes rape victims afraid to speak to their friends about the assault let alone to police officers, lawyers, and all of the strangers that are allowed into a public courtroom. This pressure makes many victims believe that it is best for them to keep their crime out of the public forum, not report it to the police, and avoid the shame they might face if they reported their attack.

It might seem that changing the law will make no difference considering the other social pressure rape victims face, but it can. It will. A showing of support from legislatures will help shift the focus of rape from the victim to the perpetrator. It will engage the public to debate and
discuss perceptions of women, their sexuality, and the worth society assigns to their bodies. Hopefully, one day a case analyzing if force is required for rape will be as absurd for law students to consider as asking how much force is necessary to make a theft a robbery was to law students in 2014. However, as has been said, underreporting is an epidemic and like any epidemic it cannot be cured overnight. It will take time and a lot of dedicated people and lawmakers to create a solution. One way the legal community and government can help is by states changing their rape statutes to define rape and sexual assault as simply sex without consent.