2009

The Laboratory of Judicial Debate: Examining a Commodity Based Approach to Punishing Sex Offences

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THE LABORATORY OF JUDICIAL DEBATE: EXAMINING A COMMODITY BASED APPROACH TO PUNISHING SEX OFFENSES

LUCAS R. FRANKLIN

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I. INTRODUCTION

Winston Churchill described him as “one of the greatest beings alive in our time.” King George V wrote, “[h]is name will live in history.” The man they described was T.E. Lawrence. He was a World War I hero, an author, a scholar, a diplomat, and a designer. T.E. Lawrence was also a victim of rape.

The incident occurred during Lawrence’s Arabian campaign in World War I. While on a covert scouting mission, Lawrence was captured in Deraa by the Turks. He described what followed in vivid detail:

They took me upstairs to the Bey’s room; or to his bedroom rather . . . . [H]e looked me over, and told me to stand up: then to turn round. I obeyed; he flung himself back on the bed, and dragged me down with him in his arms. When I saw what he wanted I twisted round and up again, glad to find myself equal to him, at any rate in wrestling.

His face changed and he stood still, then controlled his voice with an effort, to say significantly, ‘You must understand that I know: and it will be easier if you do as I wish.’ . . . [I] threw up my chin, which was the sign for ‘No’ in the East; then he sat down, and half-whispered to the corporal to take me out and teach me everything.

For his refusal, Lawrence suffered violent brutality. The flesh over his ribs was pierced with a bayonet. He was lashed with a whip until he bordered on the edge of unconsciousness. He was kicked with boots and beaten. Finally, he describes, “[b]y the bruises perhaps they beat me further: but I next knew that I was being
dragged by two men, each disputing over a leg as though to split me apart: while a third man rode me astride.  

Lawrence escaped his captors later that night. While physically broken, he did not describe the need to mend his body, but rather his will. His description of the incident concludes, "[I] carry the burden, whose certainty the passing days confirmed: how in Deraa that night the citadel of my integrity had been irrevocably lost." Some academics argue that the choice to undergo physical violence rather than unwanted sex is not typical. They contend that most people would rather be subjected to unwanted sex than violence. Based on this assumption, Donald Dripps argues that the traditional crime of rape should be replaced by a system based in commodity theory which punishes the use of violence to achieve sex. Under this system, non-consensual sex that is not accompanied by "violence" would be treated as a misdemeanor. Are these views defensible? Did Lawrence make the wrong choice? Should he have just submitted to unwanted sex? Is non-consensual sex really not that serious?

No, sexual offenses inflict deeper harm than just the physical violence that may be used to achieve them. Non-consensual sex offenses are severe violations of an individual’s will and should be punished seriously. As Joan McGregor stated: 

Taking away the power to consent to sexual relationships, to control this most personal part of our domain, is an extremely grave injury . . . . Rape not only denies the ability to control a central part of one’s domain, but in doing so, it makes the victim a mere object, an instrument of her attacker’s sexual gratification.

While academics who argue that rape is not a serious offense may be rare, the debate over defining and punishing sexual offenses, particularly offenses not

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11 Id.
12 Id. at 401.
13 Id. at 402.
14 Id. Unfortunately, the devastating effects of sexual violation have not been relegated to history. In the United States, someone is sexually assaulted every two minutes. RAINN, Statistics, http://www.rainn.org/statistics/ (last visited Mar. 4, 2009). In 2007, there were 248,300 victims of sexual assault. Id.
15 See Michael Davis, Setting Penalties: What Does Rape Deserve?, 3 Law & Phil. 61, 84 (1984) (arguing that if people are given a choice they would rather be raped than beaten); Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 Colum. L. Rev. 1780, 1801 (1992) (stating "as a general matter unwanted sex is not as bad as violence").
16 Dripps, supra note 15, at 1796-97.
17 Id. at 1804. Michael Davis argues that rape should be treated as simple battery. Davis, supra note 15, at 61. Under his system, the "typical rapist probably would not receive . . . more than six-months imprisonment." Id. at 106.
achieved through physical violence, is quite extensive. Until November 2008, there was a circuit split over whether non-consensual sex offenses should qualify under § 2L1.2 of the U.S. Sentencing Guidelines as a “crime of violence.” While the judges deciding these cases never referred to Donald Dripps’ commodity theory for punishing sex offenses, the debate between the circuits centered on one of Dripps’ presuppositions—whether the severity of sexual crimes should be determined by the degree of physical force used to achieve them.

This Note will examine commodity theory as a system for assigning punishment for sexual offenses in the context of the 2007 circuit split over defining “crime of violence” under § 2L1.2 of the Sentencing Guidelines. Part II will discuss the problem of punishing sex offenses and describe Donald Dripps’ proposed commodity theory solution. Part III will discuss criticisms of using commodity theory as a basis for punishing sexual offenses. Part IV will provide background information on the U.S. Sentencing Guidelines generally and § 2L1.2 of the Guidelines specifically and explain why the circuit split serves as an ideal opportunity to analyze Dripps’ theory through judicial debate. Part V will examine in detail the reasoning and decisions on both sides of the circuit split. Part VI will discuss the inadequacies of the Ninth and Fifth Circuits’ decisions and highlight the shortcomings of Dripps’ theory. Finally, Part VII will highlight the current changes to the Sentencing Guideline and address the need for changing perspectives on violations of the will.

II. PUNISHING SEX OFFENSES

A. The Problem

Defining and punishing sexual crimes is problematic. The common law defined rape with a conjunctive view of the two elements as “the carnal knowledge of a woman forcibly and against her will.” The conjunctive view of force and breaking the will . . . implies . . . that nothing short of violence to break the victim’s will can constitute a crime. The problem the conjunctive view raises is that physical violence becomes the emphasis of the crime at the expense of marginalizing the victim’s will.

The use of the conjunctive view of force and will, with an emphasis on force breaking the will, stems from both society’s view of sexuality and society’s evolving view of the genders—particularly of women. Society views sexuality as desirable and naturally enjoyable to an extent that it could be argued that the default view is that sex is to be sought and enjoyed. As a consequence of viewing sex as desirable,
society views allegations of sexual offenses skeptically (she or he must have wanted it right?).  

More significantly, the historical view of the genders has added to society's skeptical treatment of sexual offenses. Throughout history, from ancient civilizations to the English law that served as a foundation for the U.S. system, women and female sexuality were viewed as a possession of men. Historically, the law regarding sexual crimes punished the offender, not for the violation of the victim, but for the violation of the men's rights who were associated with the female victim—her husband or other male family members. Furthermore, since males had rights over the exercise of female sexuality, a female's exercise of sexuality apart from the will of her male possessors, either through adultery or fornication or even disagreement over the choice of a future mate, was strictly punished. A female's violation could often be punished with death. However, many ancient codes provided an exception for females who had been raped. Because of the exception, society viewed accusations of rape with the suspicion that the female accuser was simply asserting the charge to avoid punishment for her own lechery. Proof of force sufficient to overcome the will of the victim thus became necessary to overcome society's skepticism of a female's claim of rape.

While modern societies have moved toward sexual autonomy, women who make accusations of rape are still viewed with skepticism. The dual requirement of force and the breaking of the will persists as the predominate means of defining sexual offenses. Force defines the sexual crime and consent provides a defense.


22 ANN J. CAHILL, RETHINKING RAPE 119-20 (2001). “We do not wish to hear the sufferings of rape victims. Such stories embarrass us and bring shame on those who tell them, and it seems that the main reason they do so is that we are never quite certain that the victims are innocent.” Id. at 120.

23 Dripps, supra note 15, at 1780-84 (describing the punishment of sexual crimes according to ancient codes, Roman law, and English common law).

24 Id. at 1782.

25 Id. at 1781-83.

26 Id. at 1781.

27 Id. at 1782.

28 Id.

29 Id. at 1780 n.1 (citing Matthew Hale). Hale was so skeptical of rape accusations that proof of nonconsent needed to be so clear that force was essentially inferred as a requirement for proving the offense. Id.

30 McGregor, supra note 18, at 232 (“Society often says to victims of rape ‘If you only had not done x, this wouldn’t have happened,’ where x is ‘looking sexy,’ or ‘dressing a particular way,’ or ‘drinking alcohol,’ or ‘went to a man’s apartment,’ and so on.”).

31 Dripps, supra note 15, at 1780. Dripps notes that New Jersey may be the only exception to the generalization that the United States defines sex offenses in terms of force and breaking the will. Id. at 1780 n.2.

32 Id. at 1793-94.
Unfortunately, this system views sexual offenses in terms of the force used by the offender with little emphasis placed upon the will of the victim.

The use of the conjunction of force and lack of consent in defining sexual offenses creates two problems. First, no matter how much force is used to perform the sexual act, consent can still be found to negate any wrongdoing. The textbook example is an incident in which a jury refused to convict an accused rapist because the victim was dressed lewdly despite the fact that the defendant had coerced the woman with a knife. Second, regardless of the fact that an offense is against the will of the victim, without the presence of physical force the sexual act may be viewed as consensual. This result is illustrated in State v. Alston, in which, despite the victim's tears and repeated protesting, the sexual act was viewed as consensual because of the absence of physical violence.

B. The Commodity Theory as a Solution

Donald Dripps specifically identified these problems posed by the conjunction of force and consent and proposed a new system for defining and punishing sexual offenses. He argued that force and consent should be separated through a system founded on a concept of sexual autonomy based on John Locke's commodity theory. The commodity theory defines sexual autonomy in terms of a personal property right. Essentially, every person has ownership over his or her individual body including the right to decide not to engage in sexual activity. Therefore, a violation of this property right over one's body occurs any time one person engages in sexual activity with the person of another either by force or without consent. Dripps suggests redefining sexual offenses by distinguishing between "two quite distinct offenses calculated to obtain sexual gratification by culpable means." Under such a system, sex obtained by physical force and non-consensual sex would both be punished, but as separate offenses.

34 See Jury: Woman in Rape Case "Asked for It," CHI. TRIB., Oct. 6, 1989, at C11; see also LINDA BROOKOVER BOURQUE, DEFINING RAPe 4 (1989) ("In the Spring of 1986, Pasadena Superior Court Judge Gilbert C. Alston dismissed charges of rape and sodomy brought by Rhonda DaCosta ... Judge Alston commented, 'A whore is a whore is a whore!'").

35 312 S.E.2d 470 (N.C. 1984).

36 Dripps, supra note 15, at 1797-1809. Professor Dripps wrote Beyond Rape while teaching at the University of Illinois College of Law. Id. at 1780.

37 Id. at 1789.

38 "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to put himself." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698), quoted in Dripps, supra note 15, at 1805 n.75.

39 Dripps, supra note 15, at 1786.

40 Sexual imposition through use of force would be analogous to robbery, and sexual imposition without the victim's consent would be analogous to theft. Id. at 1800. While Dripps directly states this analogy, the analogy is not new. Saint Thomas Aquinas used the same analogy. See infra note 325.

41 Dripps, supra note 15, at 1796.
Dripps proposes two classifications of sexual offenses. Sexual acts committed through use of force are classified as "Sexually Motivated Assault." Sexual acts committed against the will of the victim but without physical force are classified as "Sexual Expropriation." Sexually Motivated Assault is viewed as a violation of "the interest in freedom from violence" and Sexual Expropriation is a violation of "sexual autonomy."

Sexually Motivated Assault and Sexual Expropriation carry different levels of punishment. Sexually Motivated Assault would be punished as a serious felony. Sexual Expropriation would be punished as a serious misdemeanor or a minor felony. The levels of punishment assigned to the offenses reflect Dripps' presupposition that "the interest in unwanted sex is less important than the interest in freedom from violence." Dripps goes as far as saying that "whether measured by

42 Id. at 1797. Professor Dripps suggests the following model language for a violation of "Sexually Motivated Assault":

1. For purposes of this section, "sexual act" means any act of coitus, fellatio, cunnilingus, buggery, or any insertion of an object into the vagina or the anus.
2. Whoever purposely or knowingly gives another person cause to fear physical injury, or purposely or knowingly inflicts physical injury on another person, or purposely or knowingly overpowers another's physical resistance, for the purpose of causing any person to engage in a sexual act, is guilty of Sexually Motivated Assault. Sexually Motivated Assault is subject to the same sentence as aggravated assault.
3. Whoever purposely or knowingly gives another person reasonable cause to fear death, injury from a deadly weapon, dismemberment or disfigurement, or who purposely or knowingly injures another with a deadly weapon, dismembers, or disfigures another person, for the purpose of causing any person to engage in a sexual act with any other person, commits Aggravated Sexually Motivated Assault. Aggravated Sexually Motivated Assault is subject to the same sentence previously applicable to rape.

Id. app. at 1807.

43 Id. at 1799. Professor Dripps suggests the following model language for a violation of "Sexual Expropriation":

1. For purposes of this section, "sexual act" has the same meaning as for the purposes of Sexually Motivated Assault.
2. Whoever purposely or knowingly commits any sexual act with or upon any person
   A. known by the actor to have expressed the refusal to engage in that act, without subsequently expressly revoking that refusal; or
   B. believed by the actor to have refrained from expressing refusal because the actor has committed Sexually Motivated Assault or Aggravated Sexually Motivated Assault; or
   C. known by the actor to be unconscious, physically helpless, mentally incompetent, or otherwise unable to express the refusal to engage in that act, commits Sexual Expropriation. Sexual Expropriation is punishable by a maximum prison sentence of one year and one day.

Id. app. at 1807.

44 Id. at 1803.
45 Id. at 1797.
46 Id. at 1804.
47 Id.
the welfare or by the dignity of the victim, as a general matter unwanted sex is not as bad as violence.⁴⁸ Therefore, the penalties reflect the “relative seriousness” of the offenses.⁴⁹

III. CRITICISM OF THE COMMODITY APPROACH

Dripps’ proposed system is not without its critics. Most criticisms stem from his use of commodity theory to provide a basis for sexual autonomy. Robin West wrote Legitimating the Illegitimate: A Comment on Beyond Rape in direct response to Professor Dripps.⁵⁰ She contends that his system does not adequately address sex obtained through fraud and that commodity theory legitimizes sexual transactions in what Dripps calls “complex relationships” (e.g. sex within a marriage based on desire for financial security).⁵¹

Dripps’ theory is also susceptible to criticism based on the low punishment he assigns to crimes of “Sexual Expropriation” (sex offenses which violate the will of the victim).⁵² The assignment of a minor punishment is premised on the presupposition that the physical force sometimes used to effectuate sexual offenses causes more harm than merely violating the victim’s will.⁵³ However, evidence can be offered which tends to refute this premise.

The physical injuries associated with sexual offenses may be treated, “while psychological injuries, which may be even deeper, are ignored[,]”⁵⁴ In addition to the physical effects of these offenses, the victims are more likely to suffer from depression, to suffer from post traumatic stress disorder, to abuse alcohol, to abuse drugs, and are four times more likely to contemplate suicide.⁵⁵

⁴⁸Id. at 1801.
⁴⁹Id. at 1804.
⁵¹Id. at 1442-43. See also, Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL. L. REV. 777, 835-43 (1988) (arguing for a theory of mutuality under which both of the sexual participants’ consent would be judged on the basis of whether they would have chosen to initiate the sexual encounter); Margaret Jane Radin, Market-Alienability, 100 HARV. L. REV. 1849, 1921-25 (1987) (arguing commodity theory trivializes personal autonomy by treating it as property).
⁵²See Dripps, supra note 15, at 1807 (where a maximum penalty of one year and one day imprisonment is assigned to the offense of Sexual Expropriation).
⁵³Id. at 1799 (“Because I believe that violence is more dangerous and more culpable than an unwelcome sex act, I propose a modest penalty for expropriation[,]”). Based on the length of sentence terms recommended for Sexually Motivated Assault compared with Sexual Expropriation, Professor Dripps appears to believe that “violence” is significantly more culpable than unwelcome sex. The author struggles with conceptualizing how the unwanted physical intrusion into another’s body is not a violent act itself.
Some of these psychological injuries are described in terms of “the undoing of the self,” an ‘inability to feel at home in the world,’ a ‘paradox of practical reason: I can’t go on. I must go on,’ and ‘a radical undermining of trust.’ Psychological injuries are present regardless of whether violent physical force was used to perpetrate the offence.57

These psychological injuries are tied to the significance of the sexual act. Joan McGregor has explained that “[s]ex, sexuality, our bodies and control over them are central to who we are.”58 She further states that “[r]ape is such a serious violation because it transgresses this central zone for our identity, it exposes us and makes us a tool or thing for someone else’s sexual ends.”59

IV. TESTING IN THE LABORATORY OF JUDICIAL DEBATE

Rather than theoretically evaluating Professor Dripps’ system in terms of hypothetical scenarios,60 this Note will evaluate his system through the laboratory of judicial debate. The 2007 circuit split illustrates Dripps’ model in action.61 The central issue in the split was whether non-consensual sex offenses not perpetuated by physical force should receive the same sentence enhancement as sexual offenses committed using physical force. This issue arose out of the application of the 2007 version of § 2L1.2 of the U.S. Sentencing Guidelines. In order to properly frame the issue, it is necessary to provide a brief description of the Guidelines generally and of the particular section specifically.

A. Background of the Guidelines

In 1985, the Federal Sentencing Commission, an independent body within the judicial branch, was formed under the authority of the Sentencing Reform Act of 1984.62 The Commission drafted the Federal Sentencing Guidelines to provide a

56Wilkerson, supra note 54, at 123.
57Patricia A. Frazier & Lisa M. Seales, Acquaintance Rape is Real Rape, in RESEARCHING SEXUAL VIOLENCE AGAINST WOMEN: METHODOLOGICAL AND PERSONAL PERSPECTIVES, 54, 63 (Martin D. Schwartz ed., 1997) (stating that “the overall trend is that stranger and acquaintance rape victims do not differ in terms of postrape distress and symptomatology”; furthermore, there are “no differences between women who define their experience as rape and women who did not,” when lack of violent force is considered as the distinguishing characteristic).
58McGREGOR, supra note 18, at 221.
59Id. at 222.
60Dripps develops his theory using atypical hypothetical situations including the bedroom activities of inebriated husbands and wives, chance encounters between men at a gay bathhouse, and a “gentleman” who stealthily engages in intercourse with an unconscious victim but is sure to practice safe sex and do absolutely no physical harm. Dripps, supra note 15, at 1788-89.
61The circuit split was identified in United States v. Romero-Hernandez, 505 F.3d 1082, 1087 (10th Cir. 2007).
basis for determining the sentences for federal criminal violations. The Guidelines were intended to provide a method of sentencing that would promote uniformity and fairness while simultaneously providing an effective deterrent of crime.

The goal of the Guidelines is to provide a system of determinate sentences where the length of the sentence served would be determined at the time the sentence was imposed.

The Guidelines determine sentences by considering two factors: (1) the conduct associated with the offense (which determines the "offense level"), and (2) the defendant's criminal history (the "criminal history category"). Based on these two factors, the Guidelines provide a sentencing range (in months) for the court to impose on the particular offense.

B. Description of § 2L1.2

The specific section of the Guidelines at issue in the 2007 circuit split is § 2L1.2 Unlawfully Entering or Remaining in the United States. The purpose of this section's sentencing enhancement is to punish persons previously deported after committing a crime who illegally reenter the United States. This enhancement reflects Congress' view "that the flouting of American immigration laws is a far graver matter where the defendant's prior deportation was for committing a serious crime than where deportation was for a technical violation of the immigration laws." This section of the Guidelines provides the following:


62Id. Senator Patrick Leahy was quoted as describing the time before the use of the Federal Sentencing Guidelines as "the bad old days of fully indeterminate sentencing when improper factors such as race, geography and the predilections of the sentencing judge could drastically affect a defendant's sentence." Id. at 8-9.

65Id.

66As a result of the Supreme Court decision United States v. Booker in 2005, the U.S. Sentencing Guidelines are now considered advisory. 543 U.S. 220 (2005). What exactly the advisory nature of the Guidelines means is uncertain. Segretti, supra note 60, at 8-10. However, the current rule is that sentences must be reasonable. The Justice Department considers the Guidelines to be "presumptively reasonable." Hearings, supra note 63. Even in an advisory capacity, the Guidelines remain relevant as "[j]udges have said that they intend to stick with the Guidelines, absent something extraordinary." Lisa Siegel, Defense Attorneys Put on Notice Post-Booker Appeals Freighted with Risk, CONN. L. TRIB., Feb. 21, 2005, at 1, available at http://www.law.com/jsp/PubArticle.jsp?id=900005423978.

67U.S. Sentencing Guidelines § 2L1.2 (2007). The immigration aspect of this Guideline is not related to the circuit split. The Sentencing Guidelines were amended in November 2008, highlighted infra Part VII.


69United States v. Luna-Madellaga, 315 F.3d 1224, 1227 (9th Cir. 2003) (quoting United States v. Campbell, 967 F.2d 20, 24 (2d Cir. 1992)).
(a) Base Offense Level: 8

(b) Specific Offense Characteristic:

(i) Apply the Greatest: If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.70

In addition, the pertinent part of the Application Notes provides:

(iii) ‘Crime of violence’ means any of the following: Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.71

Under this definition felonies are “crimes of violence” if they are specifically enumerated in the Note (the “enumerated approach”) or if the felony had “as an

element the use, attempted use, or threatened use of physical force against the person of another” (the “elemental approach”).

When determining if a particular offense meets the definition of “crime of violence,” courts apply what is called a “categorical” analysis. The Supreme Court provided the framework of this analysis in Taylor v. United States. In Taylor, the Court held that courts must use “a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” However, under both Taylor and subsequently Shepard v. United States, the Court stated that “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented” may be used to determine which section of a statute the defendant violated. In some cases, these documents enable the court to determine what specific section of a broad statute the defendant violated.

C. A Framework for Analysis

The 2007 circuit split over determining how non-consensual sex offenses fit into this Guideline provides an excellent framework for analyzing Dripps’ theory in practice. Some courts in the split created a system similar to Professor Dripps’ proposal when deciding whether non-consensual sex can be considered “forcible” and thus receive the same sentencing enhancement as sexual offenses perpetuated through use of physical force under § 2L.1.2 of the Guidelines. Those courts that answered “no” to this question gave a lesser enhancement for non-consensual sex offenses; therefore, their application of the Sentencing Guideline mirrored that of Dripps’ proposal. Under both, sexual offenses committed through use of physical force (“Sexually Motivated Assault”) are more heavily penalized than non-consensual sex offenses (“Sexual Expropriation”).

The debate between the circuits serves as an ideal means of testing the principles inherent in Dripps’ system for several reasons. First, the courts’ application of the Guidelines only involved assigning a sentencing value for the prior sexual offense. The offenses had previously been adjudicated so there were no legal questions regarding establishing lack of consent. Second, since the prior sexual offenses had already been proven, there were no evidentiary issues. Finally, the circuit split illustrated a very limited application of Dripps’ proposal, specifically how the courts view force and violations of the will.

72 Popko, supra note 68, at *2.
74 Id. at 600.
75 544 U.S. 13, 16 (2005).
76 United States v. Romero-Hernandez, 505 F.3d 1082, 1085 (10th Cir. 2007).
77 See supra notes 42-43.
78 Romero-Hernandez, 505 F.3d at 1085-86.
79 Id.
80 The defendants in these cases were sentenced under a variety of statutes at the state level. The purpose of this analysis is not to comment on any shortcoming of the state.
V. SPLIT OVER FORCE

The circuit split included the Third, Fifth, Ninth, and Tenth Circuits. The issue dividing the circuits, while arising out of the application of § 2L1.2 of the Sentencing Guidelines, was not directly related to immigration. The issue that divided the courts was whether a non-consensual sex offense should qualify as a “crime of violence” under the Guideline. The Guideline imposed a more severe sentencing enhancement on offenses which qualify as a “crime of violence” than offenses which did not.

A. The Fissure: United States v. Sarmiento-Funes

On June 21, 2004, the Fifth Circuit held that a sexual crime based on the victim’s lack of consent was not a “crime of violence” under the Sentencing Guidelines. This decision provided the foundation for the circuit split identified by the Tenth Circuit in United States v. Romero-Hernandez. The court’s decision provided a basis for analyzing sexual crimes in terms of the force used to commit them rather than in terms of the victim’s lack of consent. In that respect, the court’s decision was similar to Dripps’ proposed system of defining the severity of sexual offenses in terms of the force used to commit them.

Jose Sarmiento-Funes, a citizen of Honduras, pled guilty to illegal reentry into the United States after previously committing a felony. Prior to Mr. Sarmiento-Funes’ illegal reentry, he had been convicted in Missouri for “sexual assault” and was subsequently deported. Missouri law defined “sexual assault” as: “sexual

sentencing schemes, but rather to isolate and examine the value judgment that must be made when confronting violations of the will.

81 Romero-Hernandez, 505 F.3d at 1087 (identifying the circuits in the split).
83 Id.
84 United States v. Sarmiento-Funes, 374 F.3d 336, 344-45 (5th Cir. 2004).
85 Romero-Hernandez, 505 F.3d at 1086. Each case in this circuit split references Sarmiento-Funes. See United States v. Remoi, 404 F.3d 789, 796 (3d Cir. 2005); United States v. Beltran-Munguia, 489 F.3d 1042, 1047 (9th Cir. 2007); United States v. Gomez-Gomez, 493 F.3d 562, 564 (5th Cir. 2007); Romero-Hernandez, 505 F.3d at 1086 (the court does not reference Sarmiento-Funes by name but specifically analyzes and refutes the definition of “forcible” used by the Fifth Circuit in Sarmiento-Funes).
86 Sarmiento-Funes, 374 F.3d at 339.
87 Dripps, supra note 15, at 1797.
88 Sarmiento-Funes, 374 F.3d at 338.
89 Id. The specific facts surrounding Mr. Sarmiento-Funes’ conviction are not known or relevant. The record in this case tracked the language of the state statute and did not provide specific details. Id. at 338 n.1. Although the police report did include more detail, such detail may not be used in determining whether Mr. Sarmiento-Funes’ conviction amounts to a “crime of violence” under the Sentencing Guidelines. Under the categorical approach prescribed by Taylor, such information must be excluded from analysis. Id.
intercourse with another person knowing that he does so without that person’s consent.90

Mr. Sarmiento-Funes argued that his offense should not be considered a forcible crime.91 He asserted that Missouri had a different section of the code that dealt with “forcible rape.”92 He argued that the separation of “forcible rape” and “sexual assault” under two distinct sections of the Missouri criminal code indicated that sexual assault could be committed without the use of force.93 The district court rejected this argument, stating that the sexual assault was committed using force—the force of penetration.94 As a result, the district court sentenced him to four years in jail, which “included a sixteen-level enhancement based on a previous conviction for a ‘crime of violence’ within the meaning of U.S.S.G. § 2L1.2 cmt. n.1(B)(ii) (2002).”95

On appeal, Mr. Sarmiento-Funes reiterated his argument to the circuit court.96 Whether the Missouri sexual assault law inherently involves the use of force was the issue before the court.97 In analyzing this issue, the court considered whether sexual assault itself was forcible, as well as whether the act of penetration without the consent of the victim was sufficient to qualify a sexual offense as being forcible.98 Based on its analysis of these questions, as discussed below, the court overruled the district court’s decision, holding that Mr. Sarmiento-Funes’ offense was not a “crime of violence” because it did not meet the definition of “forcible.”99

The district court had enhanced Mr. Sarmiento-Funes’ sentences under the 2002 Sentencing Guidelines.100 Under the 2002 Guidelines, “crime of violence” was defined as:

90 Id. at 338 (quoting Mo. Ann. Stat. § 566.040(1) (West 1999)).
91 Id.
92 Id. Mr. Sarmiento-Funes was referring to section 566.030 of the Missouri code, which outlaws rape accomplished through forcible compulsion. Mo. Ann. Stat. (West 1999). Forcible compulsion is “[p]hysical force that overcomes reasonable resistance; or . . . [a] threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person . . . .” Sarmiento-Funes, 374 F.3d at 339 n.2 (quoting Mo. Ann. Stat. § 556.061(12) (West 1999)). It is interesting to note the similarities between the Missouri statute and Professor Dripps’ proposed system for sentencing sexual offenses. See sources cited supra notes 42-43. The language of both separates offenses involving the extrinsic use of physical force from offenses that involve violation of the victim’s will.
93 Sarmiento-Funes, 347 F.3d at 338.
94 Id.
95 Id. (emphasis omitted).
96 Id.
97 Id. at 339.
98 Id.
99 Id. at 344-45.
100 Id. at 338.
(I) means an offense under federal, state or local law that has as an element the use, attempted use, or threatened use of physical force against the person or another; and

(II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.101

Since the district court found that sexual assault was "forcible" according to the elements of the Missouri statute, the court enhanced Mr. Sarmiento-Funes' sentence using part I of the Sentencing Guideline's definition of "crime of violence."102 On de novo review, the circuit court examined both the first and second part of the Guideline's definition of "crime of violence."103

The circuit court started by analyzing Mr. Sarmiento-Funes' offense under first part of the Guideline's definition of "violent crime," the elemental approach.104 Under this analysis, the court considered whether sexual assault involved the use or threatened use of force as one of its elements.105 The court immediately agreed with Mr. Sarmiento-Funes that "the Missouri sexual assault statute does not require force in the same sense as does a traditional forcible rape statute ... [in that it] does not require that physical violence, coercion, or threats accompany the sex act."106 However, the district court had concluded that, for purposes of the Sentencing Guidelines, sexual assault could be deemed "forcible" regardless of whether the offense involved the use of "physical violence, forcible compulsion, or threats."107 Therefore, the circuit court had to determine what constituted "force" under the Guidelines.108

The government argued that since the sexual assault under Missouri law required sexual intercourse,109 physical penetration and the force inherent in it110 were

101See id. (quoting U.S. SENTENCING GUIDELINES § 2L1.2 cmt. n.1(B)(ii) (2002)). It should be noted that the sentencing guidelines have subsequently been amended. The 2007 version of the Guidelines reverses the order of the two methods of analysis—the enumerated offenses are listed first followed by the elemental approach. In addition, "sexual abuse of a minor" and "statutory rape" have been independently added to the enumerated list ("forcible sex offenses" now stands alone). U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2007). This language was substantially changed in the 2008 amendment to the Guidelines and will be highlighted infra Part VII.

102United States v. Sarmiento-Funes, 374 F.3d 336, 338 (5th Cir. 2004).

103Id.

104Id. at 339.

105Id. at 339-42.

106Id. at 339.

107Id. The district court ruled that the fact that Missouri had two statutes, one for forcible rape and one for sexual assault, did not mean that sexual assault was not forcible. Id.

108Id. at 339 n.4. That question depended on the meaning of the phrase "use of physical force" in the Sentencing Guidelines.

109Sexual intercourse was defined in terms of penetration. MO. ANN. STAT. § 556.010(4) (West 1999) (defining sexual intercourse as "any penetration, however slight").
required elements of sexual assault. The circuit court agreed that there is force inherent in penetration; however, in the court’s view it is same force that accompanies any touching of another person. The court stated that it could not rule “that the force of penetration per se amounts to ‘the use of force’ to which the Sentencing Guidelines refer.” The court had already rejected defining penetration as “forcible per se” in United States v. Houston.

The government argued that the Missouri sexual assault statute did not criminalize the act of penetration; the statute criminalized the act of penetration without the victim’s consent. According to the government’s argument, penetration with the lack of the victim’s consent makes the act forceful. Once again, the court relied on the holding in Houston to reject the government’s argument.

Based on the presupposition that use of force is not present where there is consent-in-fact, the court reexamined the language of the Missouri statute. The Missouri statute served as a prohibition on non-consensual intercourse. However, as defined by the statute, lack of consent included instances when consent-in-fact

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10 See United States v. Yanez-Saucedo, 295 F.3d 991, 995-96 (9th Cir. 2002) (holding that force is inherent in penetration such that defendant’s prior offense could be considered rape); Missouri v. Niederstadt, 66 S.W.3d 12, 15 (Mo. 2002) (holding penetration is a type of force).
11 United States v. Sarmiento-Funes, 374 F.3d 336, 339 (5th Cir. 2004).
12 Id. at 340. Such touching “involves ‘force’ in a physics or engineering sense.” Id.
13 Id.
14 364 F.3d 243, 246 (5th Cir. 2004) (holding that a sex crime did not involve the "use of force" though physical penetration was present). In United States v. Houston, the court considered the application of the Sentencing Guidelines to a defendant previously convicted of statutory rape. The court held that the offense of statutory rape was not "forcible" because, while the sexual act was illegal, the act was consensual. Id. at 246. The Sarmiento-Funes court stated that the Houston holding was in regards to a different provision of the Guidelines (U.S. SENTENCING GUIDELINES 4B1.2(a)(1)), however, the "use of force" language employed there was identical to that employed in the Guideline’s provision for illegal reentry into the United States under § 2L1.2 cmt. n.1(B)(ii)(I). Sarmiento-Funes, 374 F.3d at 340 n.5. The court in Sarmiento-Funes acknowledged that the holding in Houston may seem strange since the basis of culpability under statutory rape is the notion that the minor is incapable of giving valid consent. Id. at 341. However, the court noted that Houston distinguished two types of consent—consent-in-fact and consent-in-law. Id. In the case of statutory rape, the minor may consent-in-fact to the sexual act while being incapable of consent-in-law. Id. The court concluded that “[t]he rule that emerges from Houston, therefore, is that intercourse does not involve the use of force when it is accompanied by consent-in-fact.” Id.
15 Sarmiento-Funes, 374 F.3d at 340.
16 Id.
17 Id.
18 See supra note 114 and accompanying text.
19 Id.
20 Id.
was present, but when consent-in-law was deemed to be lacking. Based on the ruling of Houston, force cannot exist in the presence of consent-in-fact, therefore, the Sarmiento-Funes court held that the Missouri statute did not “require the use of physical force against the victim, [and] the statute therefore does not have, as an element, the use of physical force against the person of another.”

The district court had decided that Mr. Sarmiento-Funes’ offense was a “crime of violence” using the first part of the definition in the Guideline. In the alternative, on appeal the government argued that sexual assault was a “crime of violence” under the Guideline’s second approach to defining “crime of violence” because sexual assault constituted a “forcible sex offense.” To decide if sexual assault was a “crime of violence” under the second definition, the court had to define the phrase “forcible sex offense.” The 2007 Sentencing Guidelines did not define “forcible sex offense.” Instead, the court looked to the common meaning of the phrase.

121 United States v. Sarmiento-Funes, 374 F.3d 336, 340-41 (5th Cir. 2004). The Missouri statute defined consent as the following:

Consent or lack of consent may be expressed or implied. Assent [consent-in-fact] does not constitute consent if:

(a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor, or

(b) It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) It is induced by force, duress or deception.

Id. at n.6 (citing Mo. ANN. STAT. § 566.030(1) (2007)).

122 Sarmiento-Funes, 374 F.3d at 341. The dissent argued that under the language of the Missouri statute, the victim is not able to give consent-in-fact. Id. at 346 (Garza, J., dissenting). The dissent argued that the victim does not have the capacity to judge the ramifications of his or her actions and, therefore, is incapable of any form of consent, consent-in-fact or consent-in-law. Id. at 346-47. However, this argument is not very compelling in light of Houston. One of the “incapacities” listed by the statute is “youth.” See sources cited supra note 121. “Youth” is the very incapacity present for statutory rape, but Houston held that the victim can give consent-in-fact. United States v. Houston, 364 F.3d 243, 246-47 (5th Cir. 2004). Unfortunately, the dissent never addressed this issue.

123 Sarmiento-Funes, 374 F.3d at 342.

124 Id.

125 Id.

126 Id. at 343. In addition, neither of the parties in the case offered their own definition of the phrase. Id. The government did try to analogize to other sections of the Sentencing Guidelines that used the phrase “forcible sex offense” to illustrate that the phrase did not require actual force. The court summarized the government’s argument as: “(1) that certain ‘sexual abuse crimes’ are ‘crimes of violence,’ and (2) that ‘forcible sex offenses’ are also ‘crimes of violence.’” Id. Therefore, sexual abuse crimes are forcible sex offenses. Id. A simple Venn diagram illustrates the fallacy in this argument. Just because the category of “crimes of violence” contains the subset of “sexual abuse crimes” and the subset of “forcible sex offenses” does not make the two subsets equivalents. The court found the government’s analogy to be faulty. Id. Therefore, in order to complete its analysis, the court determined its own definition of “forcible sex offense.” Id. at 344. Because “[r]elatively few appellate cases
relying upon the dictionary for the definition.\textsuperscript{127} Using \textit{Black's Law Dictionary}, the court defined “forcible” as “effected by force or threat of force against opposition or resistance.”\textsuperscript{128} Based on this definition, the court concluded that “the adjective ‘forcible’ centrally denotes a species of force that either approximates the concept of forcible compulsion or, at least, does not embrace some of the assented-to-but-not-consented-to conduct at issue here.”\textsuperscript{129}

Based on the assumption that “forcible” denotes some use of physical compulsion, the court determined the conviction for sexual assault under the Missouri statute did not qualify as a “forcible sex offense” under the Guidelines.\textsuperscript{130} As a result, Mr. Sarmiento-Funes’ offense could not be defined as a “crime of violence” under either part of the Sentencing Guidelines definition, and the district court’s sixteen-level sentence enhancement was held to be improper.\textsuperscript{131}

While the holding of the court may seem definitive, a footnote in the court’s decision indicates that it was not. Footnote eight states that the court’s decision was based upon the “distinction between consent-in-fact and consent-in-law.”\textsuperscript{132} The court left open the possibility that in cases where there is no consent-in-fact, there could be “force” for the sake of the Sentencing Guidelines without the use of extrinsic force or threats.\textsuperscript{133} This was the very issue the Third Circuit confronted in \textit{United States v. Remoi}, a case involving a physically helpless victim.\textsuperscript{134}

\textbf{B. Non-Consensual Sex Is Forcible: United States v. Remoi}

In 2004, the Third Circuit took a step away from defining “forcible sex offenses” solely in terms of a perpetrator overcoming a victim’s resistance.\textsuperscript{135} The sexual offense in this case was committed against a physically helpless victim.\textsuperscript{136} To Dripps, sex with a physically helpless victim should “uncontroversially” be considered Sexual Expropriation and result in a modest penalty.\textsuperscript{137} The Third Circuit

\footnotesize{had discussed the meaning of ‘forcible sex offenses’ for Guidelines purposes,” the court did not rely on prior cases to define the phrase. \textit{Id.}}

\footnotesize{\textsuperscript{127} \textit{Id.}}

\footnotesize{\textsuperscript{128} \textit{Id.} (quoting \textit{BLACK'S LAW DICTIONARY} 657 (7th ed. 1999)).}

\footnotesize{\textsuperscript{129} Sarmiento-Funes, 374 F.3d at 344-45. The court failed to define force. It is apparent from the phrase “forcible sex offense” that “force” will be a component of such a crime. However, what is force? The court assumes that “force” is to be defined in terms of physical compulsion. \textit{Id.} at 345. Since the court failed to define “force,” the issue remained unresolved.}}

\footnotesize{\textsuperscript{130} \textit{Id.}}

\footnotesize{\textsuperscript{131} \textit{Id.}}

\footnotesize{\textsuperscript{132} \textit{Id.} at 341 n.8.}

\footnotesize{\textsuperscript{133} \textit{Id.}}

\footnotesize{\textsuperscript{134} \textit{United States v. Remoi}, 404 F.3d 789, 791 (3d Cir. 2004).}

\footnotesize{\textsuperscript{135} \textit{Id} at 793-95.}

\footnotesize{\textsuperscript{136} \textit{Id.} at 791.}

\footnotesize{\textsuperscript{137} Dripps, supra note 15, at 1800.}
came to the opposite conclusion, holding that non-consensual sex imposed on a helpless victim constitutes a "crime of violence."  

The case provided an opportunity for the Third Circuit to rule on the issue identified by the Fifth Circuit in Sarmiento-Funes—the possibility that "force" under the Sentencing Guidelines could mean more than the physical compulsion normally associated with rape. The court shifted from defining "force" through the perspective of a perpetrator's physical acts to a focus on the victim and a definition of force centered on lack of consent. By defining "force" in terms of the violation of consent, the court ruled that sexual offenses committed against physically helpless victims constitute "forcible sex offenses" and are "crimes of violence" under § 2L1.2 of the Sentencing Guidelines.

In Remoi, the court applied the Sentencing Guidelines to a defendant who had committed a sexual crime against a physically helpless victim. Mr. Remoi argued that his crime could not be a "forcible sexual offense" since no force is required to overcome a physically incapacitated person. The court disagreed and found that "penetration against a physically helpless, mentally defective or mentally incapacitated victim...constitutes a 'forcible sexual offense' under section 2L1.2" of the Sentencing Guidelines.

In order to reach the conclusion that "forcible" means more than physical compulsion, the court analogized sexual crimes against helpless victims to sexual crimes against minors. The court started by rejecting Mr. Remoi’s assertion that the Guideline required the force used in the crime to be physical. The court noted that the first part of the definition of "crime of violence" (the elemental approach), defined "crime of violence" in terms of physical force, while the second part of the definition, the list of enumerated crimes (specifically "forcible sex offense"), omits "the antecedent modifier 'physical.'" Because the omission was contained within

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138 Remoi, 404 F.3d at 796.

139 United States v. Sarmiento-Funes, 374 F.3d 336, 341 n.8 (leaving the issue of "use of force" as defined by the Guidelines open under certain circumstances).

140 Remoi, 404 F.3d at 796.

141 Id. at 795.

142 Id. at 793. Mr. Remoi had been convicted under a New Jersey statute which provided: An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances: (1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury; (2) The victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated... N.J. STAT. ANN. § 2C:14-2c (West 1990) (quoted in Remoi, 404 F.3d at 793).

143 Remoi, 404 F.3d at 794.

144 Id. at 795 (internal quotation marks omitted).

145 Id.

146 Id. at 794.

147 Id. Note that the application note was subsequently amended; the two sections have been reversed. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, app. n.1(B)(iii) (2007).
the text of the same advisory note, the court concluded that the Sentencing Commission intended "crime of violence" to be defined to include more than just offenses involving physical force.\textsuperscript{148}

The court continued by pointing out that the Sentencing Guidelines included "sexual abuse of a minor" as a "forcible sex offense."\textsuperscript{149} The basis for this inclusion is that children are naturally weaker and more susceptible to coercion by adults.\textsuperscript{150} Therefore, regardless of consent or lack of physical resistance, sexual crimes against minors are presumed forcible.\textsuperscript{151} The court reasoned that similarly, a physically incapacitated or mentally handicapped victim is unable to give consent. The vulnerability of such victims renders them in a child-like state.\textsuperscript{152} Therefore, the sexual penetration of an incapacitated, helpless victim should be deemed forcible.\textsuperscript{153}

Based on the analogy to sexual abuse of a minor, the court equated force with lack of consent.\textsuperscript{154} The court stated, "If a 'forcible' sexual offense is not associated with physical compulsion, it must therefore mean a sexual act that is committed against the victim's will or consent."\textsuperscript{155} However, the court limited the scope of this view of force to apply specifically to incapacitated victims in an effort to reconcile its position with the position that the Fifth Circuit had taken in United States v. Sarmiento-Funes.\textsuperscript{156} In Sarmiento-Funes, the Fifth Circuit held that "forcible sex offense" did not include intercourse without consent.\textsuperscript{157} There the court stated that "it seems that the adjective 'forcible' centrally denotes a species of force that . . . approximates the concept of forcible compulsion."\textsuperscript{158}

\textsuperscript{148}Remoi, 404 F.3d at 794.
\textsuperscript{149}Id. at 795. The Sentencing Guidelines have been subsequently amended. The enumerated list of crimes of violence now specifically includes "sexual abuse of a minor" and "statutory rape." U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2007).
\textsuperscript{150}Remoi, 404 F.3d at 795.
\textsuperscript{151}Id.
\textsuperscript{152}Id.
\textsuperscript{153}Id. In using this analogy, the Third Circuit attempted to give its decision more weight with the other circuits by reconciling its decision with the Fifth Circuit's decision in Sarmiento-Funes. Id. at 796. The court noted that its broad interpretation of "forcible sex offense" was consistent with the position taken by circuits reviewing sexual crimes committed against minors. The court noted that the Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits had all recognized that "sexual abuse of a minor—forcible or not—constitutes a crime of violence." Id. (internal quotation marks omitted) (citing United States v. Rayo-Valdez, 302 F.3d 314, 316, 318-19 (5th Cir. 2002)); United States v. Pereira-Salmeron, 337 F.3d 1148, 1152 (9th Cir. 2003); United States v. Vargas-Garnica, 332 F.3d 471, 473-74 (7th Cir. 2003); United States v. Gomez-Hernandez, 300 F.3d 974, 979 (8th Cir. 2002); United States v. Pierce, 278 F.3d 282, 290-91 (4th Cir. 2002); United States v. Coronado-Cervantes, 154 F.3d 1242, 1245-46 (10th Cir. 1998)).
\textsuperscript{154}United States v. Remoi, 404 F.3d 789, 795 (3d Cir. 2005).
\textsuperscript{155}Id. at 796.
\textsuperscript{156}374 F.3d 336 (5th Cir. 2004).
\textsuperscript{157}Id. at 344.
\textsuperscript{158}Id.
The Third Circuit attempted to distinguish the two definitions of force noting that in Sarmiento-Funes, lack of consent was defined broadly by the statute at issue in that case to include instances where there was consent-in-fact, whereas in Remoi, the victims were incapable of any consent.\(^{159}\) Though it rejected the position that non-consensual sex acts are forcible, the Fifth Circuit had “expressly reaffirmed that sexual abuse of a minor is a crime of violence.”\(^{160}\) The Third Circuit reasserted its analogy to sexual crimes against minors stating that the “[Sarmiento-Funes] ruling, therefore, did not shut the door on treating sexual acts involving other types of helpless victims as ‘forcible.’”\(^{161}\) The court concluded that its decision was consistent with the positions taken by other circuits.\(^{162}\)

The fact that the Third Circuit used most of the last page of the Remoi decision to show continuity with other circuits suggests that the court hoped its expansion of the concept of force would be broadly accepted.\(^{163}\) While the Remoi decision hinted at broadly using lack of consent as a means of defining “forcible,” the court limited this proposition by narrowing it to instances where the victim was incapable of consent in its attempt to reconcile with the Fifth Circuit.\(^{164}\) Despite these attempts to gain widespread acceptance, both the Ninth and Fifth Circuits subsequently rejected defining “forcible” in any terms other than “physical compulsion.”

C. Two Steps Back: The Ninth and Fifth Circuits

Both the Ninth and Fifth Circuits explicitly rejected the expansion of the concept of force as described by the Third Circuit in Remoi.\(^{165}\) The rulings of both the Ninth and Fifth Circuits mirror Dripps’ proposed sentencing scheme.\(^{166}\) In both cases, non-consensual sex offenses not committed through physical force are punished as lesser crimes.

1. United States v. Beltran-Munguía

The Ninth Circuit’s rejection of Remoi came on June 7, 2007 in United States v. Beltran-Munguía.\(^{167}\) The court held that “force” should be defined solely in physical terms and that non-consensual sex is not “forcible.”\(^{168}\) The Ninth Circuit reached this conclusion through a very different analysis than that previously applied by the Third Circuit in Remoi.

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\(^{159}\) Remoi, 404 F.3d at 796.

\(^{160}\) Id. (citing United States v. Sarmiento-Funes, 374 F.3d 336, 344 (5th Cir. 2004)).

\(^{161}\) Remoi, 404 F.3d at 796.

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Id.

\(^{165}\) See United States v. Gomez-Gomez, 493 F.3d 562, 568 (5th Cir. 2007); United States v. Beltran-Munguía, 489 F.3d 1042, 1047 (9th Cir. 2007).

\(^{166}\) See sources cited supra notes 42-43.

\(^{167}\) Beltran-Munguía, 489 F.3d 1042 (9th Cir. 2007).

\(^{168}\) Id. at 1043.
Mr. Beltran-Munguia pled guilty to illegal reentry after previously committing a second degree sexual battery in violation of Oregon law. The Ninth Circuit had to determine if this prior conviction constituted a "crime of violence" under the Guidelines. The court started the analysis under the same two-way approach of determining a "crime of violence" under the Guidelines—the enumerated crimes or the physical force element approach. However, the court analyzed the two prongs in reverse order. Without explanation, court started the analysis with the elemental approach.

To determine if violation of the Oregon statute required force as an element, the court considered the language of the statute, the statute's legislative history, the types of victims protected by the statute, and the nature of sexual penetration. In the statutory language, the court focused on the phrase "the victim does not consent thereto." The court identified this phrase as the central element for the offense. Since the phrase identified "the victim's lack of consent [as] the crime's defining characteristic," the offense could not be deemed to categorically require force as an element.

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169 Id. Mr. Beltran Munguia had violated Oregon law, which defined the offense as:
(1) A person commits the crime of sexual abuse in the second degree when that person subjects another person to sexual intercourse, deviate sexual intercourse or, except as provided in ORS 163.412 [where "(1) The penetration is part of a medically recognized treatment or diagnostic procedure; or (2) The penetration is accomplished by a peace officer or a corrections officer acting in official capacity, or by medical personnel at the request of such an officer, in order to search for weapons, contraband or evidence of crime."], penetration of the vagina, anus or penis with any object other than the penis or mouth of the actor and the victim does not consent thereto.
(2) Sexual abuse in the second degree is a Class C felony.

OR. REV. STAT. ANN. § 163.425 (West 2008). Oregon law defines incapacity to consent as:
(1) A person is considered incapable of consenting to a sexual act if the person is:
(a) Under 18 years of age;
(b) Mentally defective;
(c) Mentally incapacitated; or
(d) Physically helpless.
(2) A lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact along with all other relevant evidence.

Id. § 163.315(1)-(2). Mr. Remo's victim was considered to be physically helpless. "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act." Id. § 163.305(5).

170 Beltran-Munguia, 489 F.3d at 1044.

171 In 2003, the Sentencing Commission amended the definition of 'crime of violence' to list the enumerated offenses first followed by the forcible element prong of the definition. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, app. n.1(B)(iii) (2003).

172 Beltran-Munguia, 489 F.3d at 1044.

173 Id. at 1045-48.

174 Id. at 1045.

175 Id.

176 Id.
The court also concluded that the legislative history of the statute indicated that force was not a necessary element of the offense.\textsuperscript{117} Oregon's second degree sexual abuse statute was created to fill a gap in the state's criminal code.\textsuperscript{118} Previously, the code failed to criminalize "subject[ing] another to sexual intercourse without the victim's consent—but not by forcible compulsion."\textsuperscript{179}

Furthermore, the court stated that the types of victims protected by the statute seemed to reflect that the statute did not require force as an element.\textsuperscript{180} Some of the victims protected by the statute were victims incapable of consent.\textsuperscript{181} Victims deemed incapable of consent included those under the age of eighteen, the mentally defective, the mentally incapacitated, or the physically helpless.\textsuperscript{182} The court viewed these types of protected victims as evidence that the statute did not require an element of force, because though these victims are incapable of legal consent, it is possible that they could consent-in-fact to the sexual act.\textsuperscript{183} This reasoning echoed that used in \textit{Sarmiento-Funes} by the Fifth Circuit.\textsuperscript{184}

Finally, the court stated that the force inherent in penetration was insufficient to establish an element of force in the offense.\textsuperscript{185} Here, the court directly referenced the decision in \textit{Sarmiento-Funes} ruling that "the act of penetration itself is not enough to supply the force required under \textsection 2L1.2."\textsuperscript{186} The court concluded that the Oregon statute did not make physical force an element of the crime of second-degree sexual abuse; therefore, the offense could not qualify as a "crime of violence" under the elemental approach.\textsuperscript{187}

After finding that second-degree sexual abuse could not qualify as a "crime of violence" under the elemental approach, the court devoted very little analysis to the first prong of the definition—the enumerated offenses.\textsuperscript{188} The court stated, "Beltran-Munguia's prior conviction does not qualify . . . [under the] ‘forcible sex offenses’ alternative either."\textsuperscript{189} The court explained, "Not surprisingly, given its language, we

\textsuperscript{117}Id.
\textsuperscript{118}\textit{Beltran-Munguia}, 489 F.3d at 1045.
\textsuperscript{119}Id. (quoting \textit{State v. Stamper}, 106 P.3d 172, 177-78 (Or. Ct. App. 2005)).
\textsuperscript{180}Id. at 1045 n.3.
\textsuperscript{181}Id. at 1045.
\textsuperscript{182}Id. at 1046. The statutory definition of "mentally incapacitated" included those victims who were rendered incapable of consent "because of the influence of a controlled or other intoxicating substance administered to the person without the consent of the person or because of any other act committed upon the person without her consent." OR. REV. STAT. ANN. \textsection 163.305(4) (West 2007).
\textsuperscript{183}\textit{Beltran-Munguia}, 489 F.3d at 1045.
\textsuperscript{184}United States v. \textit{Sarmiento-Funes}, 374 F.3d 336, 342 (5th Cir. 2004).
\textsuperscript{185}\textit{Beltran-Munguia}, 489 F.3d at 1047.
\textsuperscript{186}Id. (quoting \textit{Sarmiento-Funes}, 374 F.3d at 340).
\textsuperscript{187}Id. at 1051.
\textsuperscript{188}Id.
\textsuperscript{189}Id.
have interpreted the phrase ‘forcible sex offenses’ as requiring the use of force, an interpretation that precludes application to the Oregon crime here at issue.\textsuperscript{190} The Ninth Circuit did not analyze the meaning of “forcible” in the phrase, but instead relied heavily on prior precedent to find that Mr. Beltran-Munguia’s offence did not constitute a “forcible sex offense.”\textsuperscript{191} The court primarily relied on United States v. Lopez-Montanez, which held that California’s sexual battery statute could not be considered a “forcible sex offense.”\textsuperscript{192} There the court stated that under the statute, “the touching may be ‘ephemeral’ or committed without the use of force.”\textsuperscript{193} The court reasoned that such contact is not “forcible” because it is not violent.\textsuperscript{194} Based on the court’s interpretation of the language in the Oregon statute, any force inherent in the act of penetration was not “violent” force.\textsuperscript{195}

The court specifically addressed and rejected the Third Circuit’s reasoning in Remo.\textsuperscript{196} The court agreed with the Third Circuit that “sexual abuse of a minor,” one of the enumerated offenses in the definition of “crime of violence,” did not necessarily include violent physical force.\textsuperscript{197} Such offenses are considered forcible by definition.\textsuperscript{198} Yet the court relied on Lopez-Montanez, which concluded that an offense committed against a victim who is not a minor does not “constitute[] a crime of violence if the statute of conviction does not require the use of force.”\textsuperscript{199} Based on this precedent, the court declined to define force absent the “application of direct physical force” and specifically rejected the Third Circuit’s position.\textsuperscript{200}

While the Ninth Circuit found that Mr. Beltran-Munguia’s offense did not constitute a crime of violence, two of the three Circuit Judges felt that this result was unjust.\textsuperscript{201} Both Judge Rymer and Judge Tallman wrote concurring opinions stating that had they not been bound by precedent they would have decided differently.

\textsuperscript{190}Id.\textsuperscript{.}

\textsuperscript{191}Id.\textsuperscript{.}

\textsuperscript{192}Id. (citing United States v. Lopez-Montanez, 421 F.3d 926, 929 (9th Cir. 2005) (“[T]he force necessary to constitute a crime of violence . . . must actually be violent in nature.”) (quoting Ye v. INS, 214 F.3d 1128, 1133 (9th Cir. 2000))).

\textsuperscript{193}Lopez-Montanez, 421 F.3d at 929.

\textsuperscript{194}Beltran-Munguia, 489 F.3d at 1051. This definition is circular. In applying the Sentencing Guideline, the court must determine if the defendant has committed a “crime of violence.” The Guidelines define “crime of violence” as a “forcible sexual offense.” Here the court is defining “force” as “violence.” As a result, “crime of violence” is defined as “violence.” This circular definition defeats any purpose of defining “crime of violence.” The two part definition of “crime of violence,” the enumerated list approach and the elemental approach, indicates that a variety of acts can be considered “violent.”

\textsuperscript{195}Id.\textsuperscript{.}

\textsuperscript{196}Id. at 1051 n.8.

\textsuperscript{197}Id.\textsuperscript{.}

\textsuperscript{198}Remo, 404 F.3d at 796.

\textsuperscript{199}Id. (quoting Lopez-Montanez, 421 F.3d at 930).

\textsuperscript{200}Beltran-Munguia, 489 F.3d at 1051 n.8 (quoting Remo, 404 F.3d at 794).

\textsuperscript{201}Id. at 1053 (Rymer, J., & Tallman, J., concurring).
2. Unjust Result of Precedent

Judge Rymer stated, “If we were writing on a clean slate, I would hold that non-consensual penetration falls within the plain meaning of ‘physical force.’” Judge Tallman’s concurring opinion was much more extensive. Judge Tallman stated, “[i]n our zeal to be good legal technicians, we are abandoning the role of common sense in fashioning appropriate punishment for repeat offenders like Beltran-Munguia.”

He explained that he saw difficulties in separating forcible offenses from non-consensual offenses. He stated that “[t]he victim’s perspective, both acts are ‘violent.’” Despite this perspective, the judge stated that he could not say that the Oregon statute required an element of physical force. Judge Tallman explained that if not for precedent, he would find that “the Oregon conviction categorically qualifies as a ‘crime of violence’ because it is a specifically enumerated offense—namely, a ‘forcible sex offense.’”

Furthermore, Judge Tallman expressed a willingness to depart from linking the definition of a violent sex offense to physical force. He acknowledged that an act committed forcibly and an act committed non-consensually share a common denominator—both are committed against the victim’s will. Judge Tallman noted that “forcible” can be defined in terms of being against the victim’s will regardless of absence of physical force. He argued that the 2003 amendment to the Guidelines actually supports this definition of force since the commentary specifically states that the element of physical force is not necessary for the enumerated offenses.

Judge Tallman stated that “a fundamental rule of statutory construction supports interpreting ‘forcible sex offenses’ to encompass all sex acts taken against a victim’s will.” Judge Tallman continues by stating, “Specifically, courts should not interpret one provision in a way that renders another part of the same statute superfluous.”

He acknowledged the narrowing affect of analyzing the second prong of the definition of “violent crime” first, and stated that doing so “subsumes ‘forcible sex offenses,’ and renders the phrase meaningless.” Based on principles of statutory construction, Judge Tallman concluded that the court should have

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202 Id. (Rymer, J., concurring).
203 Id. (Tallman, J., concurring).
204 Id.
205 Beltran-Munguia, 489 F.3d at 1053 (Tallman, J., concurring).
206 Id.
207 Id.
208 Id.
209 Id. at 1054.
210 Beltran-Munguia, 489 F.3d at 1054 (Tallman, J., concurring).
211 Id.
212 Id. (citing United States v. Fish, 368 F.3d 1200, 1205 (9th Cir. 2004)).
213 Id.
followed the Third Circuit’s decision in United States v. Remoi. However, because of Ninth Circuit precedent, Judge Tallman reluctantly concurred in finding that Mr. Beltran-Munguia had not committed a crime of violence.

3. United States v. Gomez-Gomez

The most startling result of emphasizing physical force in evaluating sexual offenses came in the case United States v. Gomez-Gomez. In Gomez-Gomez, the Fifth Circuit reviewed the application of the Sentencing Guidelines to a defendant who had illegally reentered the country after being convicted of forcible rape.

\[\text{id.} \]

\[\text{id. at 1055.} \] Despite agreeing with the holding, Judge Tallman states in his concurrence: Nevertheless, there is confusion in our case law, and I urge our court to revisit any precedent that precludes us from classifying nonconsensual sex as a “crime of violence” under section 2L1.2(b)(1)(A)(ii). We should join the Third Circuit and define “forcible sex offenses” to include any sexual act committed against the victim’s will or consent.

\[\text{id.} \]

\[\text{id. at 564.} \] The defendant was previously convicted under California law, which defined rape as:

(a) . . . an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(2) Where it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(7)(b) As used in this section, “duress” means a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(c) As used in this section, “menace” means any threat, declaration, or act which shows an intention to inflict an injury upon another.

\[\text{CAL. PENAL CODE § 261 (1990).} \]

Though not directly at issue in Gomez-Gomez, the language also defined rape as, intercourse without consent due to disability, intercourse where the victim’s resistance has been overcome by use of a drug, intercourse where the victim is unconscious, intercourse by deception, intercourse by threat of retaliation, and intercourse by threatened use of public authority. Id. § 261(1)-(7). This broad range of acts included in the definition of rape illustrates an emphasis placed on defining rape in terms of lack of consent rather than simply the use of physical force to achieve intercourse.

It is important to note that while this offense is called “forcible rape,” this title is not relevant to the court’s analysis of the application of the Sentencing Guidelines. The Supreme Court has stated that a particular offense “must have some uniform definition independent of
Since the court applied a categorical analysis under *Taylor*, the facts of Mr. Gomez-Gomez's offense were not analyzed or disclosed.\(^{218}\)

Despite the construction of the definition of "crime of violence" in the Sentencing Guidelines (enumerated offenses followed by the forcible element analysis), the Fifth Circuit started the analysis in reverse order just as the Ninth Circuit had done in *Beltran-Mungia*.\(^{219}\) Under the elemental approach, the court quickly determined that the defendant's crime of forcible rape did not include an element of physical force.\(^{220}\)

The court found that "forcible rape" under the California statute could be committed without using physical force based on the 1991 version of California's "forcible rape" statute, the version of the statute that Mr. Gomez-Gomez had violated.\(^{222}\) A subsection of the statute defined "force" in terms of "duress."\(^{223}\) Duress was defined by the statute as "a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted."\(^{224}\)

The court focused on the terms "hardship" and "retribution" and decided that "duress" encompassed more than physical coercion.\(^{225}\) Based on the use of these terms in the statute, the court reasoned that rape could be committed by several non-forcible means. Rape could be committed through "hardship," such as by threats to reveal embarrassing information about the victim.\(^{226}\) Likewise, rape could be committed through "retribution" by an employer's threat to fire the victim unless sexual acts were performed.\(^{227}\) Since rape as defined by the statute could be committed without physical force, the court reasoned that force could not be the labels employed by the various States' criminal codes." *Taylor v. United States*, 495 U.S. 575, 592 (1990).

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\(^{218}\) *United States v. Gomez-Gomez*, 493 F.3d 563, 566 n.3 (5th Cir. 2007).

\(^{219}\) *Id.* at 564. The court followed the precedent of *Sarmiento-Funes*, where the court stated that the elemental analysis helped define the enumerated offenses. 374 F.3d 336, 345 (5th Cir. 2004).

\(^{220}\) *Gomez-Gomez*, 493 F.3d at 564.

\(^{221}\) *Id.* at 564-65.

\(^{222}\) *Id.* at 564.

\(^{223}\) *Id.* at 565.

\(^{224}\) *Id.* (quoting CAL. PENAL CODE § 261(b) (1990)).

\(^{225}\) *Id.* at 564. The court noted that there was very little case law applying "hardship" and "retribution" as means of achieving "forcible rape." *Id.* at 565 n.2. The lack of case law stems partly from the fact that "hardship" was only included in the statutory definition of "duress" from 1990 through 1993. *Id.* During this time period there was only one case that dealt with the threat of hardship sufficient to constitute "duress" under the "forcible rape" statute. *Id.* In *People v. Bergschneider*, 211 Cal. App. 3d 144 (Cal. Ct. App. 1989), a stepfather was convicted of forcible rape when he told his stepdaughter that he would ground her if she did not have sex with him. *Id.* at 150-51.

\(^{226}\) *Gomez-Gomez*, 493 F.3d at 564.

\(^{227}\) *Id.*
considered an element of the crime. Therefore, when Mr. Gomez-Gomez was convicted of "forcible rape" the actual, attempted, or threatened use of force was not an element of the crime, and his offense could not be considered a "violent crime" under the elemental analysis.

After finding that California's "forcible rape" statute could not be defined as a "crime of violence" under the elemental analysis, the court proceeded with the enumerated offense analysis. In analyzing whether the California conviction constituted a "forcible sex offence," the court started by referring to the Supreme Court's decision in Taylor stating that lower courts must "consider the enumerated crimes in the 'generic sense in which [they are] now used in the criminal codes of most States." The court stated the "generic, contemporary meaning" of "forcible sex offence" could be determined using preexisting Fifth Circuit precedent which suggested that "forcible rape" under the California statute did not qualify as a "forcible sex offense.

The court stated that to qualify as a "forcible sex offense" all means of violating the statute must qualify as "forcible sex offenses." Since the court had already found means of violating the statute without physical force (hardship and retribution), the court concluded that not all means of violating the statute qualified as "forcible sex offenses." In coming to this conclusion, the court plainly stated that "[t]he elemental and enumerated offence approaches are essentially the same question." The court added that prior case law suggested that "any statute that does not satisfy the elements prong will also not qualify as a 'forcible sex offense.'

Despite the court's assertion that the two tests prescribed by the Guideline were essentially the same, the court proceeded to analyze Mr. Gomez-Gomez's offense in light of the Guideline's enumerated "forcible sex offence." In proceeding with the "forcible sex offense" analysis, the court defined force as "physical force that overcomes reasonable resistance; or [a] threat express or implied, that places a person in reasonable fear of death, serious physical injury, or kidnapping of such person or another person.' In using this definition, the court interpreted the

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228Sarmiento-Funes, 374 F.3d at 341 ("Since some (though not all) methods of violating the Missouri statute do not require the use of physical force against the victim, the statute therefore does not have, as an element, the use of physical force against the person of another) (citing United States v. Vargas-Duran, 356 F.3d 598, 605 (5th Cir. 2004) (en bane)).

229Id.

230Gomez-Gomez, 493 F.3d at 566.

231Id. (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)).

232Id.

233Id.

234Id.

235Id.

236Gomez-Gomez, 493 F.3d at 566 n.4.

237Id. at 567-68.

238Id. at 567 n.5 (quoting Sarmiento-Funes, 374 F.3d at 339 n.2).
Guideline's enumerated "forcible sex offense" as containing a premise that any force used in the offense would be by its nature physical force.\(^1\) The court's decision was not based on a definitional analysis of "forcible sex offense" as much as it was based on precedent.\(^2\) In previous cases, the court decided that all of the following were not "forcible" for purposes of the Guidelines: sex by intoxication or deception even if the offender knows the sex is not consensual,\(^3\) sex with a minor and sex accomplished by deceiving the victim into believing that the offender was her spouse,\(^4\) sex with a person who is incapable of consent due to mental defect or incapacitation because of alcohol or drugs,\(^5\) and sex that "exploits the [victim's] emotional dependency."\(^6\) In the court's reasoning, the common thread through all of these scenarios was that though the acts may be in violation of the victim's will, the acts are not committed through use or threat of "physical force."\(^7\) Similarly, since the California "forcible rape" statute at issue in Gomez-Gomez could be violated without physical force or threat of physical force, therefore, the court found that violation of the statute was not a "forcible sex offense" under the Guidelines as interpreted by the Fifth Circuit.\(^8\)

In reaching the conclusion that the California "forcible rape statute" did not meet the definition of "forcible sex offense," the Fifth Circuit specifically declined to follow the Third Circuit's decision in United States v. Remoi. The Remoi decision had specifically rejected the Fifth Circuit's previous reasoning in Sarmiento-Funes.\(^9\) The court noted that the Third and Fifth Circuits' positions were clearly different and any resolution could only be achieved through an en banc decision.\(^10\)

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\(^1\) Id. at 567.

\(^2\) Id.

\(^3\) United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004).

\(^4\) United States v. Palomares-Candelas, 104 F. App'x 957, 961 (5th Cir. 2004).

\(^5\) United States v. Meraz-Enriquez, 442 F.3d 331, 333 (5th Cir. 2006).

\(^6\) United States v. Luciano-Rodrigues, 442 F.3d 320, 322 (5th Cir. 2006).

\(^7\) United States v. Gomez-Gomez, 493 F.3d 562, 567 (5th Cir. 2007).

\(^8\) Id. It should be noted that in concluding that the California "forcible rape" statute did not meet the definition of "forcible sex offense" under the Guidelines, the court added a footnote addressing the concept of "constructive force." Id. at 567 n.6. In United States v. Beliew, the Fifth Circuit determined that molestation by duress and psychological intimidation would constitute "forcible compulsion" through the legal fiction of "constructive force." 492 F.3d 314, 316 (5th Cir. 2007). However, the court went on to explain that "the fiction of constructive force is bounded by Sarmiento-Funes." Id. The court concluded that any conflict between the holdings of Beliew and Gomez-Gomez may provide a valuable opportunity for the court to reconsider precedent but any reconsideration would have to be done by the Fifth Circuit sitting en banc. Gomez-Gomez, 493 F.3d at 567 n.6.

\(^9\) See United States v. Fernandez-Cuso, 447 F.3d 382, 387-88 (5th Cir. 2006).

\(^10\) Gomez-Gomez, 493 F.3d at 568.
4. Need for a Common Sense Approach

Judge E. Grady Jolly concurred in the majority opinion but expressed a desire for the case to be reconsidered en banc.249 He asserted that "under any common sense standard" sex against the will of the victim is "forcible sex" and is, therefore, a "crime of violence."250 The judge analyzed the California forcible rape statute using the following syllogism:

When a woman is coerced to have sex against her will because of threats that could impair or devastate her life, it is unwilling sex; if it is unwilling sex, it is not unforced sex; and if it is not unforced sex, it is forcible sex within the meaning of the Sentencing Guidelines.251

Despite this common sense approach, the court was bound by the precedent set by Sarmiento-Funes.252 Judge Jolly stated, "[u]nder Sarmiento-Funes, the majority is forced to conclude that forcible sex is not forcible sex."253 This paradoxical conclusion was the result of Sarmiento-Funes’ mixing the elemental approach with the enumerated analysis and "frustrat[ing] the intent of the Sentencing Guidelines."254 Mixing the two methods of analysis eliminated the need for two distinct approaches and violated common rules of statutory interpretation because it eliminated the need for a portion of the statutory language.255

Judge Jolly argued that the Fifth Circuit should have followed the Third Circuit’s decision in United States v. Remo.256 He explained that the Third Circuit’s conclusion that “one can commit a ‘forcible sexual offence’ . . . without employing physical force was consistent with the Sentencing Guidelines’ amended definition of ‘crime of violence.’”257 Judge Jolly concluded with stating that he hoped the issue is reheard en banc to address the confusion generated by the Fifth Circuit’s precedent.


On October 16, 2007, the Tenth Circuit Court recognized a non-consensual sex offense as a “crime of violence.”258 The case involved a sexual offense committed

249 Id. at 569 (Jolly, J., concurring).
250 Id.
251 Id. Judge Jolly uses the language “against her will because of threats that could impair or devastate her life” as a parallel to the language of the California “forcible rape” statute which uses the language defining rape as sex committed against the victim’s will by means including duress or menace. Id. (quoting CAL. PENAL CODE § 261(a)(2) (1991)). The significance of the syllogism is the emphasis of defining the sexual offense in terms of the victim’s will.
252 Gomez-Gomez, 493 F.3d at 569 (Jolly, J., concurring).
253 Id.
254 Id.
255 Id. at 570 (citing White v. Black, 190 F.3d 366, 368-69 (5th Cir. 1999)).
256 Id.
257 Id.
258 United States v. Romero-Hernandez, 505 F.3d 1082 (10th Cir. 2007).
against a physically helpless victim and provided the circuit an opportunity to address the issue left open by Sarmiento-Funes—whether where there is no factual assent, “use of force” could be present for purposes of the Guidelines.\(^\text{259}\) According to Dripps’ system, sex with a physically helpless victim should “uncontroversially” be considered Sexual Expropriation and result in a modest penalty.\(^\text{260}\) The Tenth Circuit came to the opposite conclusion holding that non-consensual sex imposed on a helpless victim constitutes a “crime of violence.”\(^\text{261}\)

Felipe Romero-Hernandez, a Mexican national, pled guilty to illegal reentry in violation of 8 U.S.C. § 1326(a) and (b)(2).\(^\text{262}\) Prior to his illegal reentry, Mr. Romero-Hernandez had pled guilty in state court to misdemeanor unlawful sexual contact.\(^\text{263}\) He was sentenced to 720 days of imprisonment and was subsequently deported. Less than six months following his guilty plea in state court, Mr. Romero-Hernandez was arrested in New Mexico and charged with a federal offense.\(^\text{264}\) The district court followed the Pre-Sentencing Report (PSR),\(^\text{265}\) which recommended an

\(^{259}\)United States v. Sarmiento-Funes, 374 F.3d 336, 341 n.8 (5th Cir. 2004).

\(^{260}\)Dripps, supra note 15, at 1800.

\(^{261}\)Romero-Hernandez, 505 F.3d at 1089.

\(^{262}\)Id. at 1084. 8 U.S.C. § 1326(a) states that any alien who has been deported and renters “shall be fined under Title 18, or imprisoned not more than 2 years, or both.” 8 U.S.C § 1326(a) (1992). 8 U.S.C. § 1326(b)(2) imposes criminal penalties for reentry on aliens “whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both.” Id. § 1326(b)(2).

\(^{263}\)Romero-Hernandez, 505 F.3d at 1084. Mr. Romero Hernandez violated Colorado law, which defined sexual acts as involving acts committed without the victim’s consent or when the victim has some diminished capacity to consent (due to physical condition or legal status). COLO. REV. STAT. ANN. § 18-3-404(1)(a)-(g) (2008). The statute specifically provides:

Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:

(a) The actor knows that the victim does not consent; or (b) The actor knows that the victim is incapable of appraising the nature of the victim’s conduct; or (c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or (d) The actor has substantially impaired the victim’s power to appraise or control the victim’s conduct by employing, without the victim’s consent, any drug, intoxicant, or other means for the purpose of causing submission; or (e) repealed. (f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit; or (g) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

\(^{264}\)Romero-Hernandez, 505 F.3d at 1084.

\(^{265}\)Mr. Romero-Hernandez argued that the PSR was improper because “his state conviction was neither a felony nor a crime of violence.” Romero-Hernandez, 505 F.3d at 1085. The District Court rejected the argument holding that the state offense constituted a felony and a “forcible sex offense” which is “specifically enumerated as a ‘crime of violence’ under the Guidelines.” Id. (citing U.S. SENTENCING GUIDELINES § 2L1.2 cmt. n. 1(B)(iii)). The court
adjusted offense level of 21 based on an upward adjustment for a prior felony conviction for a crime of violence under the Sentencing Guidelines.\textsuperscript{266}

Whether “a sex offense is ‘forcible’ if it is nonconsensual, including those situations in which the victim is legally or medically unable to consent,” was an issue of first impression for the court.\textsuperscript{267} In analyzing this issue, the court considered whether a “forcible” sex offense had to be accomplished by means of physical force,\textsuperscript{268} as well as whether nonconsensual sexual contact is inherently forcible.\textsuperscript{269}

Based on its analysis of these factors, as discussed below, the court affirmed the district court’s decision, holding that Mr. Romero-Hernandez’s offense was a “crime of violence” because it met the definition of force.\textsuperscript{270}

The circuit court analyzed the issue using the categorical approach adopted in \textit{Taylor v. United States.}\textsuperscript{271} The categorical analysis required the court to look only to the statutory description of a crime and to disregard the particular facts of the case.\textsuperscript{272} Under this approach, the circuit court “conclude[d] that the particular section of the Colorado state at issue prohibits conduct that is categorically a crime of violence under § 2L1.2 . . . .\textsuperscript{273}

The pivotal point of analysis that led the Tenth Circuit to reach this conclusion was the court’s approach to defining “force” and “forcible.” The Guidelines do not provide a definition of “forcible sex offense.”\textsuperscript{274} Therefore, the court had to look at the “ordinary, contemporary, and common” meaning of the phrase.\textsuperscript{275}

sentenced Mr. Romero-Hernandez to forty-six months of imprisonment and two years of supervised release. \textit{Id.} On appeal, Mr. Romero-Hernandez argued that while his state conviction for unlawful sexual contact “is a felony offense for purposes the Guidelines[,]” it is not a “crime of violence.” \textit{Id.}

\textsuperscript{266} \textit{Id. at 1084.} It should be noted that the Guidelines also allow for downward adjustments. A downward adjustment is applied when, the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels . . . [and when the] . . . defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a-b) (2007). Due to his guilty plea, Mr. Romero-Hernandez received a downward adjustment of three levels. \textit{Romero-Hernandez,} 505 F.3d at 1084.

\textsuperscript{267} \textit{Id. at 1087.}

\textsuperscript{268} \textit{Id. at 1089.}

\textsuperscript{269} \textit{Id.}

\textsuperscript{270} \textit{Id. at 1089.}

\textsuperscript{271} \textit{Id. at 1085 (citing Taylor, 495 U.S. at 600).}

\textsuperscript{272} \textit{Romero-Hernandez,} 505 F.3d at 1085-86.

\textsuperscript{273} \textit{Id. at 1086.}

\textsuperscript{274} \textit{Id. at 1087.}

\textsuperscript{275} \textit{Id. (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).}
While the court analyzed the phrase “sex offense,” the definition central to the case was that of “forcible.” The court looked to Black’s Law Dictionary to determine the common usage of the word “forcible.”

The court refused to infer a requirement of “physical compulsion sufficient to overcome ‘opposition or resistance’” from this definition for two reasons. First, the court referred to the context of personal trespass where Black’s defines the unlawful touching of another as being “forcible” regardless of degree. Second, the court noted that the word “force” can be independent of physical compulsion. The court used a series of definitions, including the definitions of “force” and “power,” to demonstrate that “force” can be defined in common usage without reference to a physical component. In addition, the court stated that omitting the requirement of the physical element was consistent with prior case law. In United States v. Holly, the court had stated that “force may be inferred by such facts as disparity in size between victim and assailant, or disparity in coercive power.” Thus, the court in Romero-Hernandez concluded that “where one party has sufficient control of a situation to overcome another’s free will, force is present.” Therefore, Mr. Romero-Hernandez’s conviction under Colorado state law could be characterized as “forcible” since the sexual act committed was without the victim’s consent.

The court’s conclusion, which separated the concept of force from the notion of physical compulsion, was consistent with the Guidelines. The court noted that the Sentencing Guideline application note for § 2L1.2 cmt. n.1(B)(iii), which enumerates

276 Id. “A ‘sex offense’ is commonly understood as ‘[a]n offense involving unlawful sexual conduct.’” Id. (quoting BLACK’S LAW DICTIONARY 1112 (8th ed. 2004)).

277 Id. (citing BLACK’S LAW DICTIONARY 674 (8th ed. 2004)).

278 Romero-Hernandez, 505 F.3d at 1087 (quoting BLACK’S LAW DICTIONARY 674 (8th ed. 2004)).

279 The Fifth Circuit used this same definition of “forcible” in United States v. Sarmiento-Funes, 374 F.3d 336, 344 (5th Cir. 2004). Based on this definition, the Fifth Circuit stated, “it seems that the adjective ‘forcible’ centrally denotes a species of force that . . . approximates the concept of forcible compulsion.” Id.

280 Romero-Hernandez, 505 F.3d at 1087. “To lay one’s finger on another person without lawful justification is as much a forcible injury in the eye of the law . . . as to beat him with a stick.” Id. (quoting BLACK’S LAW DICTIONARY 674 (8th ed. 2004)).

281 Id. at 1088.

282 Id. The court focused on “force” being defined in terms of “power.” Id. “Power” was defined as “[d]ominance, control, or influence.” Id. (quoting BLACK’S LAW DICTIONARY 1207 (8th ed. 2004)). Dominance, control, and influence can all be exerted non-physically.

283 Id.

284 488 F.3d 1298, 1302 (10th Cir. 2007) (quoting United States v. Reyes Pena, 216 F.3d 1204, 1211 (10th Cir. 2000)).

285 Romero-Hernandez, 505 F.3d at 1088.

286 See COLO. REV. STAT. ANN. § 18-3-404(1) (2007).
"forcible sex offense" as a "crime of violence," does not use the modifier "physical" before "force." The list of enumerated offenses, the general definition of "crime of violence" includes any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." The court concluded that the omission of the word "physical" in the phrase "forcible sex offense" indicates that the Commission intended the concept of force pertaining to sexual offenses to include more than merely physical force. The court noted that its conclusion was supported by the fact that other crimes enumerated in the list (e.g., statutory rape and sexual abuse of a minor) do not require physical compulsion.

In concluding, the Tenth Circuit emphasized defining force in terms of overcoming lack of consent rather than in terms of overcoming physical resistance. The court stated that "[w]hen an offense involves sexual contact with another person, it is necessarily forcible when that person does not consent." While the victim is not physically resisting, the victim's lack of consent constitutes a form of resistance. The perpetrator overcomes this resistance in his own mind where the "knowledge of this lack of consent is insufficient to protect the victim." While the court upheld Mr. Romero-Hernandez's sentence as a "forcible sex offense" under the Guidelines, the logical explanation employed to reach that conclusion should be unnecessary. Much of the court's reasoning focused on definitions to show that "force" did not necessarily require a physical element. The court should not have to parse the Guidelines' language to determine that non-consensual sex offenses are "forcible" and therefore "crimes of violence."

VI. WHY THE NINTH AND FIFTH CIRCUITS GOT IT WRONG

Both the Fifth and Ninth Circuits' application of the Sentencing Guidelines and Dripps' proposed system fall short for assigning such a small penalty value to violations of the will. In both instances violations of the will were punished; however, the punishment was insufficient.

The Ninth and Fifth Circuits applied the 2007 Sentencing Guidelines differently than the Third and Tenth Circuits for several reasons. Differences between the views expressed within the circuit split were based on perspective. The Ninth and Fifth Circuits' perspective, like Dripps' system, viewed the offense in terms of the defendant's actions. The Third and Tenth Circuits' perspective was based on the victim and the results of the defendant's actions. This difference in perspective is evidenced in how the circuits interpreted the Guideline and defined the issues in question. Ultimately, the Fifth and Ninth Circuits' rulings were the result of their interpretation of the language of the Guideline and the definitions of "force" and "forcible" that guided their conclusions.

287 Romero-Hernandez, 505 F.3d at 1088.
289 Id.
290 Id.
291 Id.
292 Id. at 1089 (citing United States v. Remoi, 404 F.3d 789, 796 (3d Cir. 2005)).
293 Id.
A. Wrong as a Matter of Interpretation

Both the Ninth and Fifth Circuits analyzed "crime of violence" under § 2L1.2 starting with the second prong of the definition (the elemental approach). Starting with the second prong of the definition of "crime of violence" under § 2L1.2 was incorrect in light of the 2003 amendment to the definition of "crime of violence" provided by the Sentencing Guidelines. In 2003, the Sentencing Commission reversed the order of the definition, placing the enumerated offenses before the elemental approach. The Commission stated that one of the purposes of the amendment was clarity. According to the Commission, "[t]he amended definition makes clear that the enumerated offenses are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another." The Commission specifically did not want the "physical force" element confused as a requirement for the enumerated offenses.

In light of the amendment, the elemental approach to defining "crime of violence" logically serves to expand upon the enumerated list of offenses specified as "crimes of violence." Under this expansive approach, the first prong containing enumerated offenses is always defined as "crimes of violence," and the second prong of the definition allows other offenses which include the element of physical force, but that are not enumerated, to also meet the definition.

The Ninth and Fifth Circuits' reversal of the order of analysis—the elemental approach before the enumerated crimes approach—had the opposite effect. The courts' reverse approach restricted the definition of "crime of violence" rather than expand it. Both courts essentially used the second prong of the definition to inform the first. As a result, the element of physical force seemed to be a requirement of the enumerated offenses. This conclusion is supported by the fact that the Ninth Circuit in Beltran-Munguia never examined the definition of "force" under the first prong of the definition where "forcible sex offenses" are enumerated as a "crime of violence." Instead, the court simply reasoned that if the state statute did not include an element of physical force, the offense could also not be a "forcible sex offense."

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205 Id. at 795-96.


207 Id. at 393.

208 Id.

209 The importation of the physical force requirement is the very type of confusion which the Sentencing Commission sought to avoid with the 2003 amendment. See sources cited supra notes 147-49.

200 United States v. Beltran-Munguia, 489 F.3d 1042, 1051 (9th Cir. 2007). The court stated, "[n]ot surprisingly, given its language, we have interpreted the phrase 'forcible sex offenses' as requiring the use of force, an interpretation that precludes application to the Oregon crime here at issue." Id.

201 Id.
Similarly, in *Gomez-Gomez*, the Fifth Circuit’s view of the two tests—that the elemental test essentially makes the enumerated offense test unnecessary—ignored the text of the Guideline. The court’s statement that the two parts of the definition are essentially the same makes the enumerated list of offenses in the Guideline meaningless. Furthermore, this view ignored the expressed intent of the Sentencing Commission in the drafting of the amendment to the Guideline’s note.

Both courts’ conclusions ignored the absence of the modifier “physical” in “forcible sex offenses.” This distinction was discussed in *United States v. Remoi*. While both the Ninth and Fifth Circuits specifically rejected the Third Circuit’s decision in *Remoi*, each failed to address this distinction. By failing to recognize the absence of the modifier “physical,” both courts did not consider the possibility of “force” being defined in any terms other than physical compulsion.

### B. Wrong by Definition

Both the Ninth and Fifth Circuit decisions were based, not just on their interpretations of the language in the Guideline, but also on the courts’ definitions of “force” and “forcible.” Both courts defined “force” and “forcible” solely in terms of violent physical compulsion. As a result, the courts did not consider any alternative definitions.

While the Fifth Circuit found that the second degree sexual battery under Oregon law in *Beltran-Munguia* did not contain an element of physical force, it overlooked the language of the statute that indicated the presence of force in the offense. Even disregarding the non-consensual nature of the second degree sexual battery, the statute’s use of the term “subjects” implies a level of force against the victim. In serving as a verb, “to subject” means “to cause or force to undergo or endure (something unpleasant, inconvenient, or trying).” However, since the court was specifically looking for a physical element of force under the elemental approach of

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302 See White v. Black, 190 F.3d 366, 368-69 (5th Cir. 1999).
305 United States v. Remoi, 404 F.3d 789, 794 (3d Cir. 2005).
306 United States v. Beltran-Munguia, 489 F.3d 1042, 1051 n.8 (9th Cir. 2007).
307 See supra note 169.
308 Mr. Beltran-Munguia was convicted of second degree sexual abuse. *Beltran-Munguia*, 489 F.3d at 1043. Under the state statute, “[a] person commits the crime of sexual abuse in the second degree when that person subjects another person to sexual intercourse, deviate sexual intercourse . . . and the victim does not consent thereto.” OR. REV. STAT. ANN. § 163.425(1) (2008) (emphasis added).
309 Merriam-Webster Online Dictionary (2007), available at http://www.merriam-webster.com/dictionary. The etymology of the word indicates that it comes from sub- + jacere to throw, literally meaning “to throw under.” Id. When viewed in this context, to subject another person against their will does carry a forcibly, violent connotation.
the definition of "violent crime," the court never considered any alternative characteristics of force.\textsuperscript{310}

An overlooked aspect of the Fifth Circuit's definition of "forcible" in \textit{Gomez-Gomez} was the use of the word "reasonable." The court referred to the definition of "force" used in \textit{Sarmiento-Funes} that included the phrase "[p]hysical force that overcomes reasonable resistance."\textsuperscript{311} The introduction of an element of reasonable resistance should have been helpful in defining what level of force was necessary to be deemed "forcible compulsion." What resistance is deemed as reasonable should be judged from the circumstance of the situation and the condition of the victim.

By definition, sexual offenses are always going to include a certain physical element. This physical element may range from penetration or touching to bodily force used to brutally overcome the victim. The amount of physical force used in the sexual offence may depend upon the level of resistance faced. As the definition used in \textit{Sarmiento-Funes} seems to acknowledge, less physical force is needed to overcome a weaker or incapacitated victim (reasonable resistance).\textsuperscript{312} While the degree of physical force may be diminished based on the diminished capacity of the victim to resist, the fact that the sexual offence is against the victim's will and is "forcible" remains.

\textbf{C. Wrong Because of Perspective}

The Ninth and Fifth Circuits' decisions mirrored Dripps' system of punishment in that both assigned a low punishment value for non-consensual sex offenses. This application of the Guideline illustrated the dilemma of punishing violations of the will. There is a tendency to address the physical harms of sexual offenses.\textsuperscript{313} Physical harms are easy to recognize and understand. However, what truly makes sexual crimes despicable is not the physical harm. Though the physical harm associated with sexual crimes cannot be minimized, that harm is not what distinguishes these offenses from common assault. What truly makes these crimes heinous—the true heart of sexual offenses—is the invasive violation of the will.

Sexual violations of the will are more dehumanizing than mere violence. Violence may be used for any variety of purposes including committing sexual offenses. There is no distinct difference between the use of violence to steal a person's wallet versus the use of violence to commit a sexual offense. In either situation, the violence is being used to achieve an end. In one case, that end is a wallet. In the other case, that end is the victim's body. What makes a violent rape more serious than a mugging is not the violence—it is the objective of the violence. The objective of sexual offenses is the theft of personhood. Actual possession of the victim is the purpose. In the mugging, violence can be avoided by simple handing over the wallet. In a sexual offense, theft of personhood will always occur regardless of the presence or absence of physical violence.

\textsuperscript{310}Beltran-Munguia, 489 F.3d at 1051 ("[T]he Oregon Revised Statute[ ] does not make 'the use, attempted use, or threatened use of physical force' an element of the crime[.]").

\textsuperscript{311}United States v. Gomez-Gomez, 493 F.3d 562, 567 n.5 (5th Cir. 2007) (quoting \textit{Sarmiento-Funes}, 374 F.3d at 339 n.2) (emphasis added).

\textsuperscript{312}Id.

\textsuperscript{313}See supra note 54.
"[A]ll rape is a form of soul murder ...." This statement is more than just a creative metaphor. The fact that rape is a common component of warfare and genocide is evidence of the destructive impact of non-consensual sex. "Throughout history, the rape of hundreds of thousands of women and children in all regions of the world has been a bitter reality." These atrocious sexual acts are committed not as a collateral effect of war but as a strategy. The intent of this strategy goes beyond the devastating physical effects of the individual acts. The sexual act is meant "to degrade not just the individual woman but also to strip the humanity from the larger group of which she is a part." Logically, if you can objectify and degrade a people through soul murder, the extermination of their bodies through genocide becomes easier to rationalize. While not all non-consensual sex offenses are accompanied by the horrific physical violence that typifies war crimes, all forms of non-consensual sex are an affront to individual humanity and a dehumanizing objectification of the soul.

The views of male prisoners also serve as a strong refutation of Dripps’ presupposition that most people view non-consensual sex as a better alternative than violence. Male victims of rape demonstrate many of the same psychological effects shared by their female counterparts. Men experience fear, self-blame, and questioning of self-worth. While men suffer a variety of effects from rape, it seems illogical that these results are from violence associated with the commission of the rape. Among the prison culture there is an "unwritten code of inmate beliefs, that a real man ‘would die before giving up his anal virginity.’" As one victim of prison rape stated, "[m]en are supposed to be strong enough to keep themselves from being raped." This statement reflects a "common inmate belief that a real man would never submit to rape." These attitudes are not evidence of a preference of

315 See generally Christoph Schiessl, An Element of Genocide: Rape, Total War, and International Law in the Twentieth Century, 4 J. Genocide Res. 197 (2002).
317 Id. at 29, 41.
318 Id. at 1-2. During the Rwandan genocide, "evidence indicates that many rapists expected, consequent to their attacks, that the psychological and physical assault on each Tutsi woman would advance the cause of the destruction of the Tutsi people." Id. at 35. Rather than killing the women, "they would leave them to die from their grief." Id.
320 Id.
322 Id. (quoting Letter to Human Rights Watch (Mar. 30, 1999)).
323 Id. at pt. V.
unwanted sex over violence; quite the contrary, they reflect a willingness to engage in extreme violence to avoid sexual violation.

VII. A COMMODITY BASED SOLUTION TO SOLVING THE SPLIT

Based on the experimental testing of Dripps' theory through analyzing the circuit split, the solution is twofold. The solution for the circuit split was simple. Sexual offenses in violation of another's will force a sexual act upon the victim and should be treated as "crimes of violence." In November 2008, the Sentencing Guidelines were specifically amended to punish these violations of the will. In an effort to address the confusion created by "non-forcible" sex offenses, the definition of "crime of violence" under § 2L1.2 of the Sentencing Guidelines was changed to the following:

iii) 'Crime of violence' means any of the following offenses under federal, state, or local law: Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.324

The second solution, speaking directly to Dripps' theoretical system, is much broader and deals with the value placed on violations of the will. Sexual autonomy may be described as a commodity. Historically, control of sexuality has been viewed as a property right.325 Conceptualizing individual autonomy in terms of a property

324U.S. SENTENCING GUIDELINES § 2L1.2, Application Note 1(B)(iii) (2008) (emphasis added). The Sentencing Commission gives the following explanation for the change:

First, the amendment clarifies the scope of the term "forcible sex offense" as that term is used in the definition of "crime of violence" in § 2L1.2, Application Note 1(B)(iii). The amendment provides that the term "forcible sex offense" includes crimes "where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced." The amendment makes clear that forcible sex offenses, like all offenses enumerated in Application Note 1(B)(iii), "are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another," USSC, Guideline Manual, Supplement to Appendix C, Amendment 658. Application of the amendment, therefore, would result in an outcome that is contrary to cases excluding crimes in which "there may be assent in fact but no legally valid consent" from the scope of "forcible sex offenses."

Id.

325SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 176 (William P. Baumgarth & Richard J. Regan eds., 1988). Saint Thomas Aquinas described rape in terms of a property offense. Id. at 180. According to Aquinas, there were two categories of property offenses—thief and robbery. Id. at 176. Theft involved taking another's property through stealth or in secret. Id. at 181. Robbery involved taking another's property forcibly or through violence. Id. Rape was viewed as being more serious than theft because it "takes what is another's, not as a possession but as a part." Id. at 180. Aquinas viewed the wife as being part of her husband as a limb is part of the body. Id. Aquinas addressed the issue of whether rape is always forcible, stating, "[t]he robbery of a woman cannot be secret on the
right can serve as a helpful philosophical basis for punishing violations of autonomy. Certainly the body and sexuality should be controlled by the individual. However, if viewed as a commodity, a very high value should be placed on the freedom from unwanted sex. Dripps sells short the commodity of sexual autonomy.

Sexual crimes are typically punished at the state level according to individual state statutes. Some states, as illustrated by the California “forcible rape” statute analyzed in Gomez-Gomez, have approached defining sexual crimes more in terms of lack of consent. However, as seen in the decisions making up the 2007 circuit split over § 2L1.2 of the Guidelines, non-consensual sex offenses are still often viewed as less serious than other violent crimes.

If the number of incidents of all forms of sexual violence is to be reduced, society needs to address the root of violent crime—dehumanization of the victim. Fundamentally there must be a change in the way the offender views the victim. Theoretically, society must emphasize the violation of the will as the essence of what makes sexual offenses wrong and craft the law to reflect this value. It is illogical to assume that sexual offenders will view their victims as anything more than objects as long as society and the courts do not view violations of the will as serious. Society’s view must change and recognize non-consensual sex offenses as serious crimes. This is the only way to reduce these offenses.

VIII. CONCLUSION

Non-consensual sex offenses violate the victim’s will and should be punished as serious crimes. What truly makes all sexual crimes heinous is the invasive violation of the will. The will is violated whether or not violent physical force accompanies the particular crime. Sexual crimes against another’s will are “the ultimate violation of self” and express “almost total contempt for . . . personal integrity and autonomy.” As Justice Burger stated, “[r]ape is not a mere physical attack it is destructive of the human personality.” These offenses dramatically affect the victim physically, emotionally, and psychologically. Society’s failure to adequately address these crimes only contributes to the devaluation of the individual.

Perhaps you have overheard a conversation like the following. This conversation was not necessarily serious and, for the participants, nothing that would be remembered after a few hours. One guy was describing the object of his fantasies for a group of eager listeners. He had seen his ideal around school, across the room in a few classes, and on stage in the occasional musical or dance recital. His description of the ideal included the flowing dark hair that one could get lost in, the part of the woman who is taken; wherefore, even if it be secret as regards the others from whom she is taken, the nature of robbery remains on the part of the woman to whom violence is done.” Id. at 182. Under a modern theory of sexual autonomy, in which every individual (male or female) controls his or her sexuality, application of Aquinas’ theory would result in sexual violations being viewed as robbery and inherently forcible.


328Id. at 612 (Burger, C.J., dissenting).

329See RAINN, supra note 55.
well-endowed breasts, and the tightly formed buttocks. These comments were met with common admiration for “good tastes,” speculation regarding cup size, and insight into how a flexible dancer could perform.

Suddenly, one of the eager listeners interjected, “Hey, I think I know who you’re talking about, her name is . . . .”

Before the eager listener could reveal the ideal’s name, the describer retorted, “Don’t tell me the name, you’ll ruin it!”

The conversation died down.

This conversation, while lacking class, was by no means criminal or unusual. However, while seemingly innocuous, it illustrates the ease of objectification that can take place even among otherwise upstanding individuals. A legal system that does not recognize the gravity of the harms caused by non-consensual sex can be just as dehumanizing. Society, legislators, and judges must recognize the value of sexual autonomy and adequately punish violations of the will.