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Minnesota's Criminal Sexual Conduct Statutes: A Call for Change

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I. Introduction

Minnesota criminalizes five degrees of Criminal Sexual Conduct ("CSC"). The base conduct prohibited in fifth degree CSC is nonconsensual sexual contact. The four higher degrees of CSC require one or more aggravating elements in addition to a nonconsensual sexual act. The two aggravating elements which distinguish the degrees of CSC in Minnesota are force and personal injury. These aggravators are supposed to separate out the worst offenses and offenders for the harshest punishment. But problematic statutory definitions and judicial interpretations have created overlap in the meaning of force and injury. Because the same conduct satisfies both the force and injury elements, there is no difference between the degrees of CSC—higher and lower degrees of CSC prohibit exactly the same conduct. This means defendants who engage in identical conduct can receive vastly different sentences. As currently written and enforced by the courts, Minnesota's CSC statutes violate equal protection under the Minnesota Constitution.[2] The legislature should act swiftly to remedy this problem.

II. Background

Courts and legislatures have long struggled to define the crime of rape. At common law, rape was defined as carnal knowledge of a woman not one's wife, forcibly and against her will."[3] The common law definition of rape also required that the woman resist her assailant "to the

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[2] See infra, Part V; Minn. Const. art. I § 2; State v. Cox, 798 N.W.2d 517 (Minn. 2011).

[3] 4 William Blackstone, Commentaries on the Law of England 210 (Univ. Chi. Press 1979) (1769).

utmost" of her physical capacity.[4] The common law definition of rape had many problems. The utmost resistance requirement made rape nearly impossible to prove—few, if any, women could meet the high standard of physical resistance.[5] A definition of rape that requires any level of resistance is problematic because it makes criminal liability dependent on the actions of the victim, not the assailant. Also, requiring resistance leads to difficult questions about how much resistance is enough and what kind of resistance counts.[6] Moreover, the utmost resistance requirement had a harmful effect on victims because it required women to increase their risk of injury in order to prove they were raped, and sent the message that inadequate resistance meant there was no rape at all. Other elements of common law rape definitions also placed a heavy emphasis on the actions and state of mind of rape victims. For example, both the elements of force and nonconsent were traditionally defined based on the victim's actions.[7]

Feminist reforms led to significant changes in the criminal definition of rape. For example, rape reformers fought to abolish the utmost resistance requirement and achieved substantial success.[8] Today at least thirty-seven states have removed all references to resistance in their statutory definitions of rape or have specifically noted that resistance is not required.[9]

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4 See e.g., Brown v. State, 106 N.W. 536, 538 (*Wis. 1906) (requiring "the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person," including with her "hands, limbs, and pelvic muscles."); Michelle J. Anderson, Reviving Resistance in Rape Law, U. Ill. L. Rev. 953, 962 (1998).

5 See Anderson, supra note 3, at 964. Statistics show that a very small percentage of rape victims report fighting back against their assailants. See Bureau of Justice Statistics, Highlights from 20 Years of Surveying Crime Victims 30 (1993).

6 As a first step toward abolishing the utmost resistance requirement, some states changed their definition of rape to require "earnest resistance" or "reasonable resistance." See Anderson, supra note 3, at 964-66.

7 Susan Estrich, Rape, 95 Yale L.J. 1087, 1094 (1986).

8 See Anderson, supra note 3, at 959, 969-74.

9 Id. at 966-67.

But definitional problems persist. In some states, some form of resistance by the victim is still an element of rape.[10] Furthermore, "[e]ven in the absence of a formal resistance requirement, many courts continue to define force and nonconsent in terms of the woman's resistance."[11]

It is easy to critique various definitions of rape, but it is difficult to create a rape definition that does not in some way depend on evaluating the actions or state of mind of the victim. In some states, the use of force above and beyond the sexual act itself is one element of rape.[12] A definition that requires force may not seem to focus on the victim's conduct. But often, an assailant uses force only when a victim resists. In fact, the level of force required is often defined as "force sufficient to overcome the victim's will" or force necessary to overcome resistance.[13] As such, force requirements often double as resistance requirements. But in the absence of a force requirement, the definition of rape turns on the nonconsensual nature of the contact. Inquiries into the presence or absence of consent focus on the victim's state of mind and create the dynamic of "he said she said" in rape prosecutions.

There are many pitfalls in the drafting and interpretation of a rape statute. And as explained below, Minnesota has fallen into some of them.

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[10] See, e.g., State v. Jones, ___ P.3d ___, 2011 WL 4011738 at *5 (explaining that Idaho is one of the few remaining states to require resistance to prove rape and that Idaho fails to specify what type of resistance will suffice).

[11] Anderson, supra note 3, at 968.

[12] See, e.g., Stokes v. State, 648 So. 2d 1179 (Ala. Crim. App. 1994) (acknowledging that the prosecution must show physical force or threat of force in order to demonstrate the forcible compulsion element); State v. Soderquist, 816 P.2d 1264, 1266 (Wash. Ct. App. 1991) (stating that the force necessary to constitute rape is not simply the force inherent in the penetration, but the force used to overcome resistance).

[13] See Joshua Mark Fried, Forcing the Issue: an Analysis of the Various Standards of Forcible Compulsion in Rape, 23 Pepp. L. Rev. 1277, 1292 (1996).

III. Minnesota's Criminal Sexual Conduct Statutes[14]

Minnesota criminalizes five degrees of CSC crimes. The basic conduct prohibited is nonconsensual sexual contact[15] or nonconsensual sexual penetration.[16] Fifth-degree CSC, the lowest degree, prohibits nonconsensual sexual contact.[17] The higher degrees of CSC require additional elements. The aggravators which drive the increase in degree are the use of force or coercion[18] to accomplish the sexual act and personal injury to the victim. The next two degrees of CSC require force as an aggravating element in addition to nonconsensual contact and nonconsensual penetration, respectively. Fourth-degree CSC requires nonconsensual sexual contact and force.[19] Third-degree CSC requires nonconsensual sexual penetration and force.[20] The two highest degrees of CSC require injury as an aggravating element in addition to force and nonconsensual conduct. Second-degree CSC requires sexual contact, force, and personal

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[14] Minnesota's CSC statutes also prohibit some conduct that is outside the purview of this article. For example, other conduct prohibited as first-degree CSC includes sexual penetration when the victim is a certain age in relation to the assailant, sexual penetration involving the use of a deadly weapon, and sexual penetration of a person who is mentally incapacitated. Minn. Stat. § 609.342, subd. 1(a), (b), (d), (e)(ii).

[15] Minn. Stat. § 609.341, subd. 11 (2010).

[16] Minn. Stat. § 609.341, subd. 12 (2010).

[17] Minn. Stat. § 609.3451, subd. 1(1). Fifth-degree CSC is punishable by up to five years' imprisonment and up to a $3000 fine. Minn. Stat. § 609.3451, subd. 2 (2010).

[18] This element may be satisfied by proof of either force or coercion. However, as explained below, proof of nonconsensual contact or penetration necessarily involves proof of force under Minnesota law. Minnesota courts hold that proof of a nonconsensual sexual act in itself is sufficient proof of force. Therefore, even though a prosecutor could pursue a CSC conviction based on coercion, it is unclear why any prosecutor would choose to do so. For this reason, I refer to this element throughout the article as a force element.

[19] Minn. Stat. § 609.345, subd. 1(c). Fourth-degree CSC is punishable by up to ten years' imprisonment and up to a $20, 000 fine. Minn. Stat. § 609.345, subd. 2 (2010).

[20] Minn. Stat. § 609.344, subd. 1(c). Third-degree CSC is punishable by up to fifteen years' imprisonment and up to a $30,000 fine. Minn. Stat. § 609.344, subd. 2 (2010).

injury.[21] First-degree CSC requires sexual penetration, force, and personal injury.[22] So the statutory scheme for CSC in Minnesota looks like this:

CSC 5: Contact		
CSC 4: Contact +	Force	
CSC 3: Penetration +	Force	
CSC 2: Contact +	Force +	Personal injury
CSC 1: Penetration +	Force +	Personal Injury

IV. Problems with the Minnesota CSC Statutes

As a result of problematic statutory definitions and interpretations by the courts, the force and injury aggravator elements in the Minnesota CSC statutes overlap. The same conduct can satisfy both elements and thus different degrees of CSC prohibit the exact same conduct. Instead of five degrees of CSC, Minnesota really has something like two.

a. Definitional Problems

Some of the problems with the CSC statutes originate in the statutory language. It is plain from the statutory definitions that the elements of force and injury overlap. Force is defined as

> the infliction, attempted infliction, or threatened infliction by the actor of *bodily harm* or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does

[21] Minn. Stat. § 609.343, subd. 1(e)(i). Second-degree CSC is punishable by up to twenty-five years' imprisonment and up to a $35,000 fine. Minn. Stat. § 609.342, subd. 2 (2010).

[22] Minn. Stat. § 609.342, subd. 1(e)(i). First-degree CSC is punishable by up to thirty years' imprisonment and up to a $40,000 fine. Minn. Stat. § 609.341, subd. 2(a) (2010).

> not have a significant relationship to the complainant, also causes the complainant to submit.[23]

Personal injury is defined as "*bodily harm* as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy."[24] Setting aside for a moment the quantum of harm required by the statutory definition of bodily harm, the mere fact that both the force and injury elements use the same term—bodily harm—is highly problematic. The force element is satisfied if the assailant inflicts bodily harm while the injury element is satisfied if the victim suffers bodily harm at the hands of the assailant. Using the bodily harm standard twice ensures that both (or neither) elements will be satisfied in every case. If a rape involves bodily harm, inflicted by the assailant and suffered by the victim, then both the force and personal injury aggravators are satisfied. In every case where the prosecution can prove force based on the infliction of bodily harm, it must necessarily be able to prove personal injury.

This overlap in the definitions of force and injury is exacerbated by the actual definition of bodily harm. Bodily harm is defined as "physical pain or injury, illness, or any impairment of physical condition."[25] Any physical pain qualifies as bodily harm. So, in the context of CSC, the infliction of any physical pain satisfies the force element, and if the victim suffers any amount of pain, personal injury is also satisfied. It is common sense that every nonconsensual penetration involves physical pain, inflicted by the assailant and suffered by the victim. Moreover, the definition of personal injury includes mental anguish. Even if it is possible that any nonconsensual sexual penetration or contact can occur without physical pain, undoubtedly the victim will suffer some mental anguish.

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[23] Minn. Stat. § 609.341, subd. 3 (2010) (emphasis added).

[24] Minn. Stat. § 609.341, subd. 8 (2010) (emphasis added).

[25] Minn. Stat. § 609.02, subd. 7 (2010).

The overlapping definitions and the low threshold for personal injury mean that in virtually every rape case, the state can prove both the force and personal injury. The crime of third-degree CSC is essentially meaningless because successfully proving a third-degree CSC necessarily involves proving the elements of first-degree CSC, the only additional element being injury. Likewise proving the elements of fourth-degree CSC necessarily involves proving the elements of second-degree CSC, the only difference being injury. So any putative fourth-degree CSC can be charged as second-degree and every third-degree CSC can be charged as first-degree CSC.

b. Interpretive Problems

Separate and apart from the statutory definition problems, Minnesota courts have interpreted the CSC statutes in ways that further eliminate any distinction between the degrees of CSC. First, Minnesota courts have adopted an intrinsic force standard. Second, the courts have reinforced the minimal personal injury requirement.

1. Intrinsic force

There are two different standards courts and legislatures use to define the force requirement in rape laws: intrinsic force and extrinsic force.[26] An extrinsic force standard requires the use of force above and beyond the force inherent in the nonconsensual sexual act.[27] Intrinsic force, in contrast, holds that the force inherent in the nonconsensual act satisfies the force requirement.[28] The extrinsic force standard is "the more traditional view" and "the most commonly adopted" among states.[29] The United States Supreme Court adopted an extrinsic

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[26] 2 Wayne R. LaFave, Substantive Criminal Law § 17.3(a) (2d ed. 2003).

[27] Id.

[28] Id.

[29] State v. Jones, ___ P.3d ___, 2011 WL 4011738 at *8 (Idaho Ct. App. Sept. 12, 2011).

force standard in 1897.[30] However, "the adoption of the intrinsic force standard is indicative of a modern trend toward the eradication of the element of force and is more clearly observed in recent court opinions which narrowly construe sexual assault provisions in favor of the victim."[31]

Neither the statutory definition of force nor the way the word "force" is used in the CSC statutes indicates whether intrinsic or extrinsic force is required in Minnesota.[32] However, Minnesota courts have long interpreted the CSC statutes to require only intrinsic force. In State v. Brouillette, without announcing what type of force standard it employed, the Minnesota Supreme Court held that the defendant's conviction for second-degree CSC was supported by sufficient evidence of force when the defendant grabbed the victim's shoulders and turned her around before the sexual contact occurred.[33] There was conduct in addition to the sexual contact—grabbing the victim by her shoulders and turning her around—but no evidence that this conduct inflicted bodily harm (pain), as the statutory force definition requires.[34] In State v. Mattson the court also found sufficient evidence to support the force element, based on the defendant grabbing the wrist and breast of the victim and pulling the victim partially into his car

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30 Mills v. United States, 164 U.S. 644 (1897).

31 Mark Fried, Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape, 23 Pepp. L. Rev. 1277, 1300 (1996).

32 In each of the five CSC statutes, the force element states that the actor must use force "to accomplish" the nonconsensual sexual act. Arguably, by requiring that force be used "to accomplish" the act, the plain language of the statutes requires extrinsic force. Using force to accomplish an act is different than force that merely accompanies an act. See In re D.L.K., 381 N.W.2d 435, 437 (Minn. 1986). The Minnesota Supreme Court has rejected this argument. Id.

33 286 N.W.2d 702 (Minn. 1979).

34 When Brouillete was decided, the statutory definition of force referenced the statutory definition of assault. However, because the definition of assault included the infliction of bodily harm, the force definition that applied in Brouillete is consistent with the current force definition. Although there was no allegation of bodily harm in Brouillete, the opinion suggests that the force element may have been satisfied instead by the defendant's act causing fear of harm in the victim.

through an open window.[35] The court did not explain what kind of force standard it applied. In Mattson there was evidence that the victim felt pain, but it was unclear whether it was the act of grabbing her wrist or grabbing her breast (or both) that caused the pain.[36] Brouilette and Mattson suggested that Minnesota required only intrinsic force to satisfy the force element. Neither case involved the clear infliction of bodily harm in addition to the sexual conduct—at least, the court did not isolate the pain caused by the sexual contact from any other pain suffered by the victims—and still the court upheld both convictions.

The court more clearly adopted what it had previously suggested, the intrinsic force standard, in In re D.L.K.[37] D.L.K. approached a female classmate, tapped her on the shoulder, and when she turned around, grabbed and pinched her breast hard enough to cause her pain.[38] The only forceful conduct inflicting bodily harm in the form of pain was the sexual contact itself, pinching the victim's breast.[39] The court held that the nonconsensual sexual contact was by itself sufficient force to satisfy the CSC force element.[40] The court rejected D.L.K's argument that the statute drafters intended to create an extrinsic force standard by requiring that force be used "to accomplish" the sexual act, and instead determined that the force element is satisfied when the actor uses force "while accomplishing" the contact.[41] The court thus concluded that the "sudden

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35 376 N.W.2d 413, 415 (Minn. 1985).

36 It is likely that the act of grabbing the victim's wrist and pulling her through an open car window caused her pain in addition to the pain from the sexual act of grabbing her breast. Thus it is likely that the facts in Mattson would have satisfied an extrinsic force requirement as well.

37 381 N.W.2d 435 (Minn. 1986).

38 Id. at 436.

39 Id. at 437.

40 Id. at 438 ("[W]e have found the requirement of force in [CSC crimes] satisfied when the actor inflicts bodily harm or pain or the threat thereof on another *while accomplishing sexual contact*.") (emphasis added).

41 Id. at 437-38.

and painful grabbing and pinching of the victim's breast is sufficient use of force to accomplish sexual contact," although that use of force was one and the same as the sexual contact itself.[42]

There are reasonable arguments in support of an intrinsic force standard. An intrinsic force standard recognizes that nonconsensual sexual acts are inherently forceful and that those acts involve some physical pain. Undoubtedly the Minnesota courts chose an intrinsic force standard out of concern for rape victims and with a desire to shift focus away from victims' actions. But by trying to solve one problem the courts have created another. In the context of Minnesota's statutory scheme for CSC, the intrinsic force requirement means we have an aggravator that is essentially meaningless and a resulting overlap in degrees of CSC. The addition of the force element is the only difference between fifth-degree CSC and fourth-degree CSC. But because the intrinsic force standard will always be satisfied by nonconsensual sexual contact, there is no distinction between fifth-degree CSC and fourth-degree CSC.

2. Personal injury

Minnesota courts have also reinforced the low bodily harm standard for the injury element. The courts have explained that minimal injury is sufficient to satisfy the personal injury element of CSC.[43] As long as a victim testifies that she felt pain, the personal injury element is satisfied.[44] Any injury that weakens or damages an individual's physical condition is also sufficient to satisfy the personal injury element.[45] An injury "need not be coincidental with actual sexual penetration" to satisfy the personal injury element, but needs "only be sufficiently

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42 Id. at 438.

43 State v. Bowser, 307 N.W.2d 778, 779 (Minn. 1981).

44 See id.

45 State v. Jarvis, 665 N.W.2d 518, 522 (Minn. 2003).

related to the act."[46] The Minnesota Supreme Court has acknowledged that only a "minimal amount of pain or injury" is required to satisfy the personal injury element.[47]

The courts have confirmed that the personal injury element has a very low threshold. The personal injury element will be satisfied by any nonconsensual sexual act. Nonconsensual sexual acts necessarily involve pain or mental anguish, either of which can constitute bodily harm. Because the injury element will be satisfied in every case, by proving third-degree CSC the state can necessarily prove first-degree CSC and likewise by proving fifth or fourth-degree CSC the state can necessarily prove second-degree CSC. The only aggravating element between third and first-degree CSC and fourth and second-degree CSC is injury.

c. The result of overlapping elements

To prove fifth-degree CSC, the state has to show a nonconsensual sexual contact. Because the contact, by itself, satisfies the intrinsic force requirement, the exact same act satisfies all the elements of fourth-degree CSC, because the only additional element is force. Moreover, proof of that exact same sexual contact will undoubtedly involve either some pain to the victim or some mental anguish or both, thus satisfying the injury element–the only additional element of second-degree CSC. Identical conduct can just as easily satisfy the elements of second-degree CSC as fifth-degree CSC. Similarly, the same act of sexual penetration accompanied by force that is required for third-degree CSC necessarily establishes first-degree CSC. The only additional element of first-degree CSC, personal injury, will be satisfied by the same evidence that demonstrated force, or by the penetration itself. Thus, the CSC statutes in Minnesota really look more like this:

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[46] State v. Sollman, 402 N.W.2d 634, 636 (Minn. 1987).

[47] Jarvis, 665 N.W.2d at 522.

CSC 5: Contact		
CSC 4: Contact	~~Force/Coercion~~	
CSC 3: Penetration	~~Force/Coercion~~	
CSC 2: Contact	~~Force/Coercion +~~	~~Personal injury~~
CSC 1: Penetration	~~Force/Injury +~~	~~Personal Injury~~

V. The CSC Statutes Violate Equal Protection

The overlap described above leads to significant sentencing disparity. Two defendants who commit identical acts can receive drastically different sentences, based only on charging decisions of the prosecutors. For example, defendants who commit the exact same conduct can be charged with and convicted of either first-degree CSC or third-degree CSC. As explained above, proving the elements of third-degree CSC (penetration, force) will always entail proving the only additional element of first-degree CSC (injury). A defendant convicted of third-degree CSC can be sentenced to fifteen years' imprisonment. Another defendant who commits the exact same conduct but is charged with first-degree CSC can receive thirty years' imprisonment. That's a sentence twice as long based on no discernible difference between the defendants or their conduct.

The CSC statutes place significant power in the hands of prosecutors. The same nonconsensual sexual contact can be charged as either fifth, fourth, or second-degree CSC. And the same nonconsensual sexual penetration can be charged as either third or first-degree CSC. A trio of cases demonstrates the significant prosecutorial discretion in charging CSC crimes. State

v. Mattson,[48] In re D.L.K.,[49] and In re A.A.M.[50] involved nearly identical conduct: the defendant grabbed the victim's breast. In each case the victim testified that she experienced pain. The defendants' convictions were upheld in each case. And yet each was charged with a different degree of CSC. Mattson was charged with second-degree CSC;[51] D.L.K. was adjudicated delinquent based on fourth-degree CSC;[52] A.A.M. was adjudicated delinquent based on fifth-degree CSC.[53] There are some differences in the facts of these cases. For example Mattson, who was charged with the highest degree of CSC of the three, grabbed his victim such that she was pulled through an open window of his car.[54] However, the sexual contact in each case was exactly the same. The minimal injury requirement and the intrinsic force requirement combine so that one act can be charged in three different ways. This potential for unfairly disparate sentences is an equal protection violation.

Minnesota's CSC statutes have been upheld against constitutional challenges for vagueness and due process violations.[55] But no Minnesota appellate court has yet assessed whether the CSC statutes deny equal protection of the laws. The Minnesota Supreme Court recently addressed Minnesota's equal protection doctrine in State v. Cox.[56] Cox was charged

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48 372 N.W.2d 413 (Minn. 1985).

49 381 N.W.2d 435 (Minn. 1986).

50 684 N.W.2d 925 (Minn. 2004).

51 372 N.W.2d at 414.

52 381 N.W.2d at 436.

53 684 N.W.2d at 927.

54 372 N.W.2d at 414.

55 See State v. Reinke, 343 N.W.2d 660 (Minn. 1984); State v. Lattin, 336 N.W.2d 270 (Minn. 1983).

56 798 N.W.2d 517 (Minn. 2011).

with issuing a dishonored check.[57] She filed a motion to dismiss the charges, arguing that there was a sentencing disparity between the crimes of issuing a dishonored check and theft by check.[58] Although issuing a dishonored check is a lesser-included offense of theft by check, in some circumstances, based on the value of the checks at issue, issuing a dishonored check is punishable by a harsher sentence than theft by check.[59] The value of the checks in Cox was $515.83, which was a felony under the issuing a dishonored check statute, but would have been a gross misdemeanor under the theft by check statute.[60]

The Minnesota Supreme Court explained that Cox's equal protection claim turned on whether Cox could demonstrate that she was similarly situated to persons treated differently.[61] To determine whether two groups are similarly situated, the court asks whether they are "alike in all relevant respects."[62] In a case challenging sentence disparity in criminal statutes, "the critical factor is whether the two statutes prohibit the same conduct."[63] "A statute violates the equal protection clause when it prescribes different punishments for the same conduct committed under the same circumstances by persons similarly situated."[64] In assessing the challenged statutes, the court asks whether the elements of the statutes are "the same or essentially similar."[65] In sum,

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57 Id. at 518.

58 Id. at 519.

59 Id.

60 Id. at 520.

61 Id. at 521.

62 Id. at 522.

63 Id.

64 Id. (citing State v. Frazier, 649 N.W.2d 829, 837 (Minn. 2010))

65 Id. (citing Frazier, 649 N.W.2d at 837).

> in order for a defendant to prevail on an equal-protection claim based on the disparity in sentencing for two different offenses, the defendant must first show that a person who is convicted of committing one offense is similarly situated to people who are convicted of committing the other offense. In order to demonstrate this, a defendant must show that the two statutes prohibit the same conduct because the specific conduct of the defendant would support a conviction for either offense.[66]

In Cox, the court began its analysis[67] by comparing the two challenged statutes, issuing a dishonored check and theft by check.[68] The court next considered whether Cox's conduct would have supported a conviction for theft by check (in addition to issuing a dishonored check).[69] The court concluded that Cox's conduct would not have supported a conviction for theft by check because the theft by check had a different mens rea requirement than issuing a dishonored check.[70] Theft by check required the state to prove that the defendant had fraudulent intent whereas issuing a dishonored check required the state to prove that the defendant intended that the check not be paid, which can be proven by a showing that the defendant failed to respond to notices of nonpayment.[71] The facts alleged in the complaint supported the latter mens rea because Cox failed to respond to notices of nonpayment, but did not show that Cox had any

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66 Id. at 523.

67 The court noted that Minnesota has "not always followed federal law in interpreting our state Equal Protection Clause." Id. at 521 (citing State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991)). As Justice Stras noted in his concurring opinion, there is some uncertainty about how courts evaluate equal protection claims under the Minnesota Constitution. Id. at 525 (Stras, J., concurring). This may be because "the Minnesota Constitution, unlike the United States Constitution, makes no mention of Equal Protection rights." Id. at 526; see also Minn. Const. art. I § 2 ("[N]o member of this state shall be disenfranchised or derived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers.") However, the majority in Cox reaffirmed Minnesota's unique equal protection jurisprudence and analyzed Cox's claim without reference to federal equal protection law.

68 Id. at 523.

69 Id. at 524.

70 Id. at 523-24.

71 Id.

intent to defraud as required for theft by check.[72] The court held that Cox's conduct would not support a conviction for theft by check and so she had not proven that she was similarly situated to a person convicted of theft by check.[73]

Under the standard applied in Cox, the CSC statutes violate the Equal Protection Clause of the Minnesota Constitution. Take for example first-degree and third-degree CSC (although the exact same argument is true of the comparison of second, fourth, and fifth-degree CSC). To survive an equal protection challenge, the state must show an actual difference between the statutes—a mere "theoretical" difference is insufficient.[74] First and third-degree CSC prohibit the exact same conduct. It is true that first-degree CSC requires one additional element, personal injury.[75] However, this does not mean there is an actual difference between the two statutes. Any difference is merely theoretical. Although theoretically first-degree CSC requires the state to prove an additional element, the element of personal injury will necessarily be satisfied in every successful prosecution for third-degree CSC. These statutes create precisely the situation the court wrote about in Cox: the same conduct, under the same circumstances, committed by defendants in similar circumstances can lead to different penalties. The exact same conduct would support a conviction for either offense.[76] In any case of nonconsensual sexual penetration, the state can prove the elements of first-degree CSC just as easily as the elements for third-degree CSC.

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72 Id. at 525.

73 Id.

74 State v .Russell, 477 N.W.2d 886, 889 (Minn. 1991).

75 Minn. Stat. § 609.342, subd. 1(c) (2010).

76 The only way the state can argue that the statutes do not prohibit the same conduct is to demonstrate that it is possible to have a third or fourth-degree CSC without injury. This is paramount to arguing that it is possible that a nonconsensual penetration causes no pain or that a nonconsensual contact causes no mental anguish.

At least one Minnesota court has already declared the CSC statutes unconstitutional. Defendant Jamie Ray Beach successfully challenged his sentence for first-degree CSC by arguing that first and third-degree CSC prohibit the exact same conduct and thus violate equal protection principles.[77] A Dodge County court agreed, finding that Beach's sentence for first-degree CSC "is repugnant to individual protections guaranteed under our state and federal constitutions."[78] In light of Beach's success, other defendants have raised equal protection challenges to the CSC statutes and this issue is currently being litigated. Should a Minnesota appellate court ever agree with Dodge County, the consequences would be far-reaching. An appellate court ruling that the CSC statutes violate equal protection would apply to every defendant awaiting trial on CSC charges, every CSC conviction on direct appeal, and every CSC conviction not yet final, until the legislature acted to change the law. Additionally, it is possible that such a ruling could have retroactive application and serve as grounds for collateral attack on CSC convictions.[79] Furthermore, every prisoner serving a sentence for a CSC conviction could petition the courts for post-conviction relief. Scores of CSC offenders could be released from prison or qualify for a reduction in sentence.

VI. Solutions

The Minnesota Legislature should amend the CSC statutes to remedy the definitional overlap between force and injury, the merging of the degrees, and the attendant sentencing disparity. There are many potential solutions. The legislature could amend the CSC statutes to redefine one of the elements and eliminate the definitional overlap between force and injury. In

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77 Order, State v. Beach, No. 20-CR-09-780 at 1 (Dodge County District Court June 6, 2012)

78 Id.

79 A ruling that the CSC statutes violate equal protection would not be procedural in nature, so *Teague* doctrine restricting the retroactivity of new rules of constitutional criminal procedure would not apply. See Danforth v. State, 761 N.W.2d 493, 496 (Minn. 2009).

the alternative, the legislature could alter the statutory structure and reduce the number of degrees of CSC crimes.

a. Force

The legislature could adopt an extrinsic force standard and amend the definition of force in the CSC statutes to make it clear the state must prove a use of force above and beyond that inherent in the nonconsensual sexual act to satisfy the force element. This would provide a partial solution that would differentiate fifth and fourth-degree CSC. If the force element required infliction of harm beyond that inherent in the sexual act, proof of the sexual act alone would no longer satisfy both the act element and the force element. Fourth and fifth-degree CSC would be distinct crimes. However, if the new extrinsic force requirement maintained the bodily harm standard as the measure of the required force, the overlap between the force element and injury element would remain. By proving force above and beyond the sexual act, the infliction of bodily harm (pain) on the victim, the state would still necessarily prove that the victim suffered bodily harm, satisfying the injury element. So the sentencing disparity between second and fourth-degree CSC and first and third-degree CSC would still violate equal protection.

Minnesota courts have demonstrated that they find an extrinsic force requirement distasteful.[80] An extrinsic force requirement can tilt the focus of rape cases too much toward the victim's resistance and trivialize the obvious use of force inherent in all rapes. Minnesota's current statutory scheme expresses a policy decision that nonconsensual sexual contact accomplished by force is more serious than nonconsensual sexual contact without any use of force.[81] The legislature could also decide to abandon this distinction, perhaps in recognition that

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[80] See D.L.K., 381 N.W.2d at 437-38.

[81] Again, based on the intrinsic force standard, it is impossible to have a nonconsensual sexual contact that does not involve force. But the structure of the Minnesota CSC statutes assumes that a difference is possible.

all nonconsensual sexual contact is forceful, and eliminate force as an aggravator. But if the legislature chooses to maintain the distinction and keep force as an aggravator, force has to mean something more than nonconsensual sexual conduct.

b. Injury

The legislature could additionally or alternatively change the definition of injury. A heightened injury standard would ensure that there is some difference between second and fourth-degree CSC and between first and third-degree CSC. Injury cannot be used as an aggravator if it is defined as any physical pain. Physical pain is inherent in the very nature of rape. Furthermore, the definition of the harm required for the injury element must be different than the harm required for the force element. If not, both elements (or neither) will be met in every case. One model for levels of harm already exists in the Minnesota Statutes. There are three levels of harm defined in section 609.02: bodily harm, substantial bodily harm, and great bodily harm.[82] The legislature could easily import these definitions into the CSC statutes, in any number of ways. The legislature could use substantial bodily harm or great bodily harm as new standards for extrinsic force and/or injury. For example, the legislature could amend the CSC statutes to state that that force requires the actor to inflict substantial bodily harm as defined in Minn. Stat. § 609.02, subd. 7(a) or that injury means great bodily harm as defined in Minn. Stat. § 609.02, subd. 8. As long as a different quantum of harm is required for each element, the

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[82] Subd. 7. Bodily harm. "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

Subd. 7a. Substantial bodily harm. "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.

Subd. 8. Great bodily harm. "Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.

Minn. Stat. § 609.02 (2010).

aggravators would not overlap. Alternatively, the legislature could create a structure where the degrees of CSC correlate to different levels of injury, with substantial bodily harm representing one degree and great bodily harm representing a higher degree.

c. Reduce the number of degrees

These suggestions could work in conjunction with a reduction in the number of degrees of CSC. The purpose of a structure with several degrees of the same crime is to provide harsher punishment for more objectionable conduct. Minnesota's CSC statutes represent several decisions about what conduct to punish most harshly. CSC crimes involving penetration are punished more harshly than those involving contact. CSC crimes involving the use of force by the assailant are punished more harshly than those where force is not present. And CSC crimes where the victim suffers injury are punished more harshly that those where the victim is not injured. These distinctions are only theoretical in Minnesota because the legislature and the courts have made it impossible to separate out the worst crimes and criminals. Every CSC crime involving penetration can be punished at the first-degree level. And every CSC crime involving contact can be punished at the second-degree level. The Minnesota Legislature needs to ensure that the different degrees of CSC prohibit different conduct, some punishable more harshly than others. By eliminating the sentencing disparity resulting from the current overlap, the legislature can also ensure that the worst offenders are punished most harshly.

There are myriad ways the legislature could restructure the CSC statutes. But, to achieve the goal of eliminating sentencing disparity, any restructuring must bear in mind two key principles. First, if Minnesota maintains an intrinsic force requirement, force cannot be an aggravating element. Second, if injury is defined as physical pain, it cannot be an aggravator. One potential revision could consist of a base offense (say third-degree) defined as

nonconsensual sexual acts. Second-degree could contain the additional element of extrinsic force. And first-degree could add the element of injury, as long as the definition of injury requires a level of harm higher than that required for the force element.

Another option, which mirrors the current differentiation of sexual contact and sexual penetration, could involve two crimes: one prohibiting nonconsensual sexual contact and one prohibiting nonconsensual sexual penetration. Force and injury, properly defined, could serve as aggravators for each crime. A particularly simplistic approach would be to remove considerations of force and injury altogether and define CSC as nonconsensual sexual contact or penetration, and nothing more.

d. My proposal

First, the legislature should eliminate force as an aggravator for CSC crimes. Second, the legislature should amend the CSC statutes to create two separate injury aggravators, defined as substantial bodily harm and great bodily harm, respectively. The legislature should maintain the separation of sexual contact and sexual penetration. But to simplify the statutory structure, the legislature should treat nonconsensual sexual contact and nonconsensual sexual penetration as different crimes instead of different degrees of the same crime. The lowest degree of each crime should prohibit the nonconsensual sexual act (contact or penetration), the next highest degree should include the aggravator of substantial bodily harm, and the highest degree should include the aggravator of great bodily harm.[83] The revised CSC statutes would look something like this:

[83] The legislature may include other aggravators that are outside the scope of this article, such as the use of a dangerous weapon and knowledge that the victim is mentally incapacitated.

Nonconsensual sexual contact

Third degree	Contact	
Second degree	Contact +	Substantial bodily harm
First degree	Contact +	Great bodily harm

Nonconsensual sexual penetration

Third degree	Penetration	
Second degree	Penetration +	Substantial bodily harm
First degree	Penetration +	Great bodily harm

This proposal for a simplified CSC structure would be easy to apply in practice, and most importantly, would fix the equal protection problem of sentencing disparity resulting from overlapping degrees of the current CSC statutes. Yet I believe this proposal is true to the underlying principles of the current statutes. The force and injury aggravators show that Minnesota wanted to punish most harshly perpetrators who cause the most harm to their victims. Minnesota attempts to single out perpetrators who "use[] force" and "cause personal injury" to their victims for higher punishments. But any hierarchical system of rape statutes with higher punishments for higher degrees rests on an uncomfortable assertion: some rapists should be punished more harshly than others, which must mean that some nonconsensual sexual acts are worse than others.

Understandably, the Minnesota Legislature and courts are reluctant to make such an assertion, even if it is embedded in the statutory structure. Instead, Minnesota lawmakers and

judges have emphasized a different truth: Every single nonconsensual act is forceful and causes pain or mental anguish to the victim. Every nonconsensual sexual act is a horrendous violation of the victim and should be punished harshly. I wholeheartedly agree.

The point of my proposed changes is not to make it harder for prosecutors to obtain CSC convictions. The legislature must always tread carefully in this area and must not revert to the common law, where rape was nearly impossible to prove. But Minnesota has gone too far the other way. Well-intentioned people have unwittingly made missteps in pursuit of a noble goal—supporting rape victims, in part by ensuring conviction and punishment of their rapists. The problem with the current CSC statutes is not simply that it is easy to prove the aggravating elements of heightened degrees. The problem is the resulting sentencing disparity that ultimately could lead to convicted rapists being freed from prison.

We've chosen to draw lines in Minnesota and these lines have to mean something. The problems discussed above prevent any distinction among perpetrators and victims. My proposed changes would ensure that perpetrators who cause the most harm to their victims are punished most harshly. But my proposal does not prevent the legislature from punishing even third degree nonconsensual contact and penetration at a high level. Making these distinctions and drawing these lines is emotionally difficult. But if we are to live by the rule of law, meaningful lines must be drawn.

VII. Conclusion

The Minnesota CSC statutes violate the Equal Protection Clause of the Minnesota Constitution because different degrees of CSC prohibit the exact same conduct and the statutes prescribe different punishments for the same conduct committed under the same circumstances by persons similarly situated. There are numerous ways to fix the problem. No matter how the

legislature chooses to remedy the sentencing disparity, it must ensure that the degrees of CSC prohibit different conduct. Any aggravators in the statutory scheme must be distinct. The Minnesota Legislature must act swiftly. One court has already found the CSC statutes unconstitutional. A similar ruling from an appellate court could effectively invalidate the sentences of scores of prisoners with CSC convictions. And until this problem is solved, every defendant currently serving a sentence for a CSC conviction could challenge the sentence on equal protection grounds, seeking a reduction in sentence.