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NOTES

WHEN “NO” IS NOT ENOUGH: RE-EXAMINING THE FORCE LANGUAGE OF THE INDIANA SEXUAL BATTERY STATUTE IN LIGHT OF THE AMENDED RAPE STATUTE

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INTRODUCTION

In April of 2009, N.A. and her friends spent time with Perry, the father of N.A.’s “on and off” boyfriend,¹ in a parking lot.¹ Perry, a “father figure” to N.A., invited her and her friends back to his home.² Once the girls arrived at Perry’s home, he provided alcohol and told N.A. and her friends to “drink up.”³ As they were drinking, Perry began touching another girl’s leg and reminded the group that “age was just a number.”⁴ Later in the evening, N.A. went to sleep.⁵ Subsequently, N.A. awoke from her sleep to Perry placing “his fingers inside her vagina.”⁶ Frozen, N.A. kept still, unsure how to react and fearful of what Perry would do next.⁷ Perry then “unzipped his pants and rubbed his penis on N.A.’s bottom.”⁸ According to N.A., she was concerned that Perry may become angry or physical.⁹ Crying, N.A. left the bedroom, telling her friends that they needed to leave.¹⁰ Perry later told them to leave, specifically instructing them to “get the f**k out of [his] house.”¹¹

Perry was subsequently convicted of sexual battery, a Class D felony offense.¹² The Indiana Court of Appeals, however, held that the facts did not indicate that N.A. was “compelled to submit to the touching by force or the

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1. Perry v. State, 962 N.E.2d 154, 156 (Ind. Ct. App. 2012).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 157.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

imminent threat of force.”¹³ The appellate court determined that Perry’s actions constituted battery, a lesser misdemeanor offense, but not sexual battery.¹⁴

Under Indiana law, circumstances in which an adult man penetrates a teen with his fingers after supplying her with alcohol, like in *Perry*, evade the scope of the force subsection of the sexual battery statute.¹⁵ This Note focuses on the force subsection of the Indiana sexual battery statute.¹⁶ However, the entirety of section (a) reads as follows:

- (a) A person who, with intent to arouse or satisfy the person’s own sexual desires or the sexual desires of another person:
 - (1) touches another person when that person is:
 - (A) *compelled to submit to the touching by force or the imminent threat of force*; or
 - (B) so mentally disabled or deficient that consent to the touching cannot be given; or
 - (2) touches another person’s genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring;commits sexual battery, a Level 6 felony.¹⁷

The current statute should be amended to include a subsection that considers circumstances beyond force, such as grooming, abuse of power, and “First Encounter” sexual battery.¹⁸ Part I of this Note discusses the background of the force requirement. Part II discusses potential problems that the force subsection does not address. Part III presents support for the change and, finally, Part IV presents language that the legislature should adopt.

I. BACKGROUND: WHAT IS FORCE?

In order to understand the problems with the current force subsection, the origins of force must be considered. This section will discuss the historical definition of force and the current force test as defined by rape case law. Additionally, this section will combine the rape-based definition with rules prescribed by the court in sexual battery cases.

13. *Id.* at 158 (quoting IND. CODE § 35-42-4-8(a)).

14. *Id.* at 159.

15. *See id.* at 158–59; IND. CODE § 35-42-4-8(a)(1)(A) (2025). While section 35-42-4-8(a) contains multiple subsections, the focus of this Note is on subsection (a)(1)(A), which requires the victim to be “compelled to submit to the touching by force or the imminent threat of force[.]”

16. § 35-42-4-8(a)(1)(A).

17. § 35-42-4-8(a) (emphasis added).

18. *See infra* Part II; *see also* Lisa Avalos, *Seeking Consent and the Law of Sexual Assault*, U. ILL. L. REV. 731, 745 (2023) (coining the term “First Encounter”).

A. Historical Constructions of Force

The force requirement has been rooted in American jurisprudence since the 1800s with its presence in rape statutes.¹⁹ Historically, lack of consent was not sufficient to prove force in rape prosecutions.²⁰ Rather, courts have examined other factors such as the victim’s level of resistance in determining if force was used in rape prosecutions.²¹ For example, as seen in the United States Supreme Court decision *Mills v. United States*, where a stranger ordered a man out of his house to rape his wife,²² nonconsent is not determinative of the presence of force in rape prosecutions:

The mere nonconsent of a female to intercourse, where she is in possession of her natural, mental, and physical powers, if not overcome by numbers, or terrified by threats, or in such place and position that resistance would be useless, does not constitute the crime of rape on the part of the man who has connection with her under such circumstances.²³

Indiana courts defined force similarly in their own case law dating back as early as 1880.²⁴ For example, in *Eyler v. State*, the defendant, as described by the victim, “followed her up stairs, took hold of her, threw her down on the bed . . . and had carnal connection with her, without her consent and against her will[.]”²⁵ The Indiana Supreme Court did not find that the defendant’s sexual intercourse with the victim “was accomplished by force,” reasoning that the victim’s failures to call for help or complain of force within a reasonable time, coupled with her later sexual contact with the perpetrator, harmed her credibility.²⁶

Similarly, in *White v. State*, the Indiana Supreme Court held that a stepfather “employed no force” when, after the victim refused to go into a room alone with him, he removed her from her chair, shoved her into the bedroom, and had sexual intercourse with her.²⁷ In its holding, the court highlighted the manner of the victim’s opposition: “The opposition of the [victim] to the embraces of the appellant was of such a mild and doubtful character as only to encourage him in the belief that appeals, not to violence, but to her animal propensities, would

19. See, e.g., *Mills v. United States*, 164 U.S. 644, 648 (1897).

20. See *id.*; *White v. State*, 36 N.E. 274, 275 (Ind. 1894); *Eyler v. State*, 71 Ind. 49, 50–51 (1880).

21. See *Mills*, 164 U.S. at 648; *White*, 36 N.E. at 275; *Eyler*, 71 Ind. at 50–51.

22. 164 U.S. at 645–46.

23. *Id.* at 648.

24. See *White*, 36 N.E. at 275; *Eyler*, 71 Ind. at 49–51.

25. 71 Ind. at 50.

26. *Id.* at 49, 51.

27. 36 N.E. at 274–75.

gain her consent.”²⁸ Although the test for determining force was refined in more recent Indiana case law,²⁹ the origins of the requirement indicate that objective factors, such as resistance, were relied upon historically to determine the presence of force.³⁰

B. The Force Test

“Force” has yet to be defined by the legislature. However, it has been defined in case law.³¹ An important case defining force is *Jenkins v. State*.³² In *Jenkins*, an elderly woman was raped by the defendant after he broke into her home.³³ The court found that “[f]orce need not be physical or violent but may be implied from the circumstances, nor is physical resistance required if the victim is in fear of bodily harm.”³⁴ In practice, this holding rejected the narrowing of the force element in rape to force that is obtained through “physical or violent” means.³⁵ Further, in *Lewis*, the defendant exposed a knife to the victim when she rejected his advances but never threatened her verbally.³⁶ The court highlighted that “[f]orce or threat of force may be shown even without evidence of the attackers [sic] oral statement of intent or willingness to use a weapon and cause injury, if from the circumstances it is reasonable to infer the attacker was willing to do so.”³⁷ Essentially, the court in *Lewis* dispensed with any interpretation of the force element in the rape statute that required an express statement regarding force.³⁸ Lastly, the victim’s perspective standard was set forth in *Tobias v. State*.³⁹ Here, the court analyzed the language of the rape statute.⁴⁰ It found that “the presence or absence of forceful compulsion” is to be interpreted from “the victim’s perspective, not the assailant’s.”⁴¹ The court

28. *Id.* at 275.

29. *See Jenkins v. State*, 372 N.E.2d 166, 167 (Ind. 1978) (“Force need not be physical or violent but may be implied from the circumstances, nor is physical resistance required if the victim is in fear of bodily harm.”) (first citing *Beard v. State*, 323 N.E.2d 216, 218 (Ind. 1975); and then citing *Dewey v. State*, 345 N.E.2d 842, 845 (Ind. 1976)); *Lewis v. State*, 440 N.E.2d 1125, 1127 (Ind. 1982) (“Force or threat of force may be shown even without evidence of the attackers [sic] oral statement of intent or willingness to use a weapon and cause injury, if from the circumstances it is reasonable to infer the attacker was willing to do so.”); *Tobias v. State*, 666 N.E.2d 68, 72 (Ind. 1996) (“[The presence of force] is a subjective test that looks to the victim’s perception of the circumstances surrounding the incident in question.”).

30. *See Mills v. United States*, 164 U.S. 644, 648 (1897); *White*, 36 N.E. at 275; *Eyler*, 71 Ind. at 50–51.

31. *See Jenkins*, 372 N.E.2d at 167; *Lewis*, 440 N.E.2d at 1127; *Tobias*, 666 N.E.2d at 72.

32. 372 N.E.2d 166.

33. *Id.* at 167.

34. *Id.* (first citing *Beard*, 323 N.E.2d at 218; and then citing *Dewey*, 345 N.E.2d at 845).

35. *Id.*; *see* IND. CODE § 35-42-4-1(a)(1) (2025).

36. *Lewis*, 440 N.E.2d at 1126–27.

37. *Id.* at 1127.

38. *See id.*; § 35-42-4-1(a)(1).

39. 666 N.E.2d 68, 72 (Ind. 1996).

40. *Id.* at 71–72.

41. *Id.* at 72.

described the force rule as “a subjective test that looks to the victim’s perception of the circumstances surrounding the incident in question.”⁴²

The above-mentioned test was created through Indiana rape case law.⁴³ However, an additional element to this test—when applied to sexual battery—was established in *Chatham v. State*.⁴⁴ In *Chatham*, a sexual battery case, the court held that “[t]he fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or the imminent threat of force.”⁴⁵ Consequently, the court reversed the defendant’s sexual battery conviction after he groped between the victim’s legs from behind her, finding that the force element was not met.⁴⁶

Although many of the above-mentioned cases refer to instances of rape, the construction of the force element in rape is vital to the understanding of the force element in sexual battery.⁴⁷ First, the force language in Indiana Code section 35-42-4-1 (a)(1) is almost identical to the force language in Indiana Code section 35-42-4-8 (a)(1)(A).⁴⁸ Thus, the force element is very similar and arguably the same in the rape and sexual battery statute.⁴⁹ Second, in 1991, the Indiana Supreme Court discussed how it “look[s] to interpretations of the rape statute for guidance” when it makes force determinations in sexual battery cases.⁵⁰

It must be noted, however, that current case law does not dispositively address the role of resistance in force determinations.⁵¹ First, in *Jenkins*, the court stated that “physical resistance [is not] required *if* the victim is in fear of bodily harm.”⁵² Further, the court notes that “[t]he degree of resistance required is dependent upon the surrounding circumstances and it is for the trier of fact to determine if the victim acted reasonably and in good faith in resisting the rape.”⁵³ However, the *Lewis* court emphasized that “resistance is not an element of rape.”⁵⁴ Interestingly, the *Tobias* court does not mention the role of resistance in the determination of the force requirement, noting only the victim’s “verbal

42. *Id.*

43. *See id.*; *Jenkins v. State*, 372 N.E.2d 166, 167 (Ind. 1978); *Lewis*, 440 N.E.2d at 1127.

44. 845 N.E.2d 203, 207 (Ind. Ct. App. 2006).

45. *Id.*

46. *Id.* at 205, 208.

47. *See Jenkins*, 372 N.E.2d at 167; *Lewis*, 440 N.E.2d at 1127; *Tobias*, 666 N.E.2d at 72; IND. CODE § 35-42-4-8(a)(1)(A) (2025).

48. *Compare* IND. CODE § 35-42-4-1(a)(1) (2025) (requiring that “the other person is compelled by force or imminent threat of force”), *with* § 35-42-4-8 (a)(1)(A) (the other person is “compelled to submit to the touching by force or the imminent threat of force”).

49. §§ 35-42-4-1(a)(1), 35-42-4-8(a)(1)(A).

50. *Scott-Gordon v. State*, 579 N.E.2d 602, 604 (Ind. 1991).

51. *See Jenkins*, 372 N.E.2d at 167; *Lewis*, 440 N.E.2d at 1127; *Tobias*, 666 N.E.2d at 72; *Chatham*, 845 N.E.2d at 205, 208.

52. *Jenkins*, 372 N.E.2d at 167 (emphasis added) (first citing *Beard v. State*, 323 N.E.2d 216, 218 (Ind. 1975); and then citing *Dewey v. State*, 345 N.E.2d 842, 845 (Ind. 1976)).

53. *Id.* (first citing *Ritter v. State*, 67 N.E.2d 530, 530 (Ind. 1946); and then citing *Shepherd v. State*, 67 N.E.2d 534, 535 (Ind. 1946)).

54. *Lewis*, 440 N.E.2d at 1127 (citing *Stowers v. State*, 363 N.E.2d 978, 981 (Ind. 1977)).

resistance” in this particular case.⁵⁵ Lastly, the *Chatham* court does not reference resistance, but does note that the victim “did not have the opportunity to grant or deny consent to the touching.”⁵⁶ In part due to the unclear role of resistance, cases of nonconsensual, but not forceful, sexual conduct often fall through the cracks under the force subsection in sexual battery statute.⁵⁷

C. Force in the Sexual Battery Case Law

Force is often found in sexual battery cases when the defendant touches the victim in a way that requires them to submit to the sexual contact.⁵⁸ For example, in *Hutton v. State*, Hutton entered the women’s restroom, where the victim was located.⁵⁹ Hutton approached her from behind, grabbed her, and yanked her body into his.⁶⁰ Then, Hutton moved his hands to her pubic region and pressed her against the sink, preventing her from escaping.⁶¹ The court distinguished this case, noting that the “key distinction” between this case and others where force was not found was that Hutton restrained his victim to the sink, forcibly subjecting her to his unwelcomed touching.⁶² Based in part on this distinction, the court upheld Hutton’s conviction for sexual battery.⁶³

A similar result was reached in *J.J.M. v. State*.⁶⁴ Here, high school student J.J.M. crept up behind the seated victim, threw his leg over her shoulder, and started thrusting.⁶⁵ After the victim rejected his advances, J.J.M. pulled the victim’s head towards his crotch and told her to “give him head.”⁶⁶ The court upheld J.J.M.’s delinquency adjudication, finding the force requirement had been satisfied.⁶⁷ The court noted, however, that “evidence that a victim did not voluntarily consent to a touching does not, in itself, support the conclusion that the defendant compelled the victim to submit to the touching by force or threat of force.”⁶⁸ The holdings in *Hutton* and *J.J.M.* demonstrate that something more than nonconsent is required to satisfy the force element of sexual battery.⁶⁹

As previously discussed, Indiana courts have upheld the rule in sexual battery cases that the victim’s fear of the defendant that occurs during or after the commission of unwanted touching does not indicate force, stressing that

55. *Tobias*, 666 N.E.2d at 72.

56. *Chatham*, 845 N.E.2d at 208.

57. *See, e.g., id.* at 205, 208; IND. CODE § 35-42-4-8(a)(1)(A) (2025).

58. *See, e.g., Hutton v. State*, 190 N.E.3d 413, 416 (Ind. Ct. App. 2022).

59. *Id.* at 415.

60. *Id.*

61. *Id.*

62. *Id.* at 416.

63. *Id.* at 417.

64. 779 N.E.2d 602, 607 (Ind. Ct. App. 2002).

65. *Id.* at 604.

66. *Id.*

67. *Id.* at 606.

68. *Id.* at 605 (citing *Bailey v. State*, 764 N.E.2d 728, 730 (Ind. Ct. App. 2002)).

69. *See id.* at 605–07; *Hutton v. State*, 190 N.E.3d 413, 416–17 (Ind. Ct. App. 2002).

“[t]he fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or the imminent threat of force.”⁷⁰ The nature of sexual battery is unique when compared to rape because the victim’s fear of the defendant often precedes or even co-exists with the commission of the action.⁷¹ Although “fear is not an element of sexual battery” and it is not necessary to prove “force or the imminent threat of force,”⁷² the court does note that fear “may be evidence of force or threat of force.”⁷³ For example, in *Perry*, after Perry digitally penetrated and touched N.A. with his penis, she became “[f]earful that Perry might ‘get upset and maybe get like physical or something[.]’”⁷⁴ However, there is no indication in the opinion that N.A. had any reason to fear Perry before this incident.⁷⁵ Thus, the fear felt by N.A. was not evidence of force because it occurred after the touching occurred, rather than before.⁷⁶ In practice, the rule regarding fear and force presents a set of problems that are not addressed by the current force language.⁷⁷

II. THE PROBLEM

The current force subsection is too narrow to account for the nuances that are present in cases of sexual battery.⁷⁸ Specifically, it fails to account for grooming, power imbalances, and “First Encounter” sexual battery.⁷⁹

A. Grooming

An issue that cannot be accounted for under the force subsection is grooming.⁸⁰ Grooming, as described by Wayne Petherick and Grant Sinnamon, is “an act of preparation.”⁸¹ Grooming may occur in a variety of seemingly positive scenarios, but it can also be utilized for more sinister reasons:

70. *Chatham v. State*, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006). *See also* *E.S. v. State*, 198 N.E.3d 701, 703–04 (Ind. Ct. App. 2022); *Perry v. State*, 962 N.E.2d 154, 158 (Ind. Ct. App. 2012).

71. *See, e.g., Perry*, 962 N.E.2d at 157; *Chatham*, 845 N.E.2d at 208.

72. *McCarter v. State*, 961 N.E.2d 43, 46 (Ind. Ct. App. 2012) (citing IND. CODE § 35-42-4-8(a)(1)).

73. *Id.*

74. *Perry*, 962 N.E.2d at 157.

75. *Perry*, 962 N.E.2d 154.

76. *See id.* at 158 (“It is also noteworthy that in a sexual battery prosecution, the fear experienced by the victim must precede the touching for the fear to indicate that the victim was compelled to submit to the touching by force or imminent threat of force.”)

77. § 35-42-4-8(a)(1)(A).

78. *See id.*

79. *See infra* Part II; *see also* Avalos, *supra* note 18, at 745 (coining the term “First Encounter”).

80. § 35-42-4-8(a)(1)(A).

81. WAYNE PETHERICK & GRANT SINNAMON, *THE PSYCHOLOGY OF CRIMINAL AND ANTISOCIAL BEHAVIOR: VICTIM AND OFFENDER PERSPECTIVES* 461 (2017) (ebook).

“[g]rooming is often used as a means to prepare an individual or to place an individual into a position in which they are unwittingly subjected to abusive and/or exploitive behavior.”⁸² This sort of behavior is often exhibited by sexual abusers.⁸³ Although there is often a focus on child sexual grooming, adult sexual grooming is common and mirrors the process of child grooming.⁸⁴ As proposed in Sinnamon’s Seven-Stage Model of Adult Sexual Grooming, there are seven stages to the grooming process.⁸⁵ These stages include:

- (1) Select: selecting the victim,
- (2) Plan: gathering information,
- (3) Trust: gaining personal connection,
- (4) Credibility: meeting the needs and establishing credentials,
- (5) Prime: priming the target,
- (6) Instigate: creating the victim, and
- (7) Maintain: controlling the victim.⁸⁶

With “adult grooming,” victims may not realize that they are being manipulated due to the nature of the grooming process, as the abuse does not occur at the onset of the relationship.⁸⁷ Additionally, adult groomers may take advantage of an age difference between themselves and the victim “[i]f a victim is much younger than the predator and the victim identifies this difference as giving the predator some right of control, bestowed wisdom, or inherit trust, then the predator will make use of this vulnerability and exploit it to achieve their own objectives.”⁸⁸ Lastly, when viewing Sinnamon’s seven-step grooming process,⁸⁹ a “fracture” in the relationship, if one is going to occur, is most likely to occur during priming or instigation, where the interactions become increasingly sexual.⁹⁰

When applying this framework to instances of sexual battery,⁹¹ a concerning set of problems emerges. First, the grooming process can last over a span of time, sometimes years.⁹² Due to the duration of a grooming relationship, a victim may not feel as though he or she has reason to fear the defendant.⁹³ This

82. *Id.*

83. *Id.*

84. *Id.* at 462.

85. *Id.* at 474.

86. *Id.*

87. Elliot Davies, *Signs of Grooming in Adults-What to Watch Out For*, ANN CRAFT TR. (May 16, 2019), <https://www.anncrafttrust.org/signs-of-grooming-in-adults-what-to-watch-out-for/> [https://perma.cc/JTH6-Q8LA].

88. PETHERICK & SINNAMON, *supra* note 81, at 469–70; *see, e.g.*, Perry v. State, 962 N.E.2d 154, 156 (Ind. Ct. App. 2012); Scott-Gordon v. State, 579 N.E.2d 602, 603 (Ind. 1991).

89. PETHERICK & SINNAMON, *supra* note 81, at 474.

90. *Id.* at 483.

91. *See* IND. CODE § 35-42-4-8(a)(1)(A) (2025).

92. PETHERICK & SINNAMON, *supra* note 81, at 463.

93. *Id.* at 477–78.

may be in part due to their relationship prior to the touching.⁹⁴ Recall the facts in *Perry*, and how the victim viewed Perry as a “father figure,” as he was the “father of her ‘on and off’ boyfriend,”⁹⁵ which indicates N.A. was familiar with the defendant for an extended period of time. In scenarios where the victim is groomed by the defendant, they may not initially fear the defendant.⁹⁶

Next, as demonstrated by sexual battery case law, there is often an age difference between the predator and the victim, and this may create an element of an “inherent trust” between themselves and the victim.⁹⁷ This phenomenon is present in *Smith v. State*, where Smith was a teacher and a student advisor for the Future Farmers of America.⁹⁸ J.H., the victim, testified that, when he was riding in a car with Smith, Smith unbuttoned J.H.’s pants from the front seat and began fondling him.⁹⁹ J.H. did not tell Smith to stop touching him because he “didn’t know what to do.”¹⁰⁰ Notably, J.H. “had no reason” to fear Smith before he was assaulted.¹⁰¹ The court found insufficient proof that Smith subjected J.H. to “touching by force or the imminent threat of force.”¹⁰² Similar to the circumstances in *Perry*,¹⁰³ J.H. held enough trust in Smith at the very least not to fear him prior to this incident.¹⁰⁴ Under the current sexual battery statute, these circumstances fail to qualify as sexual battery and thus fail to protect victims from perpetrators.¹⁰⁵

Finally, fractures in the relationship tend to occur when “the sexualization of the interaction is intensified.”¹⁰⁶ Thus, when the defendant touches the victim “to arouse or satisfy the person’s own sexual desires or the sexual desires of another person,” the fracture may occur after, but not before, the touching occurs.¹⁰⁷ Once again, with *Perry* as the lead example, trust may be present in a relationship until the fracture or the touching occurs.¹⁰⁸ This allows the first incident of touching to occur without the necessity of force. This principle applies with equal weight in *Smith*, where J.H. had no reason to fear Smith prior to the incident.¹⁰⁹ Consequently, the relationship between the two did not fracture prior to the touching.¹¹⁰ Even if the victim would respond to the

94. *See id.* at 476–77.

95. *Perry v. State*, 962 N.E.2d 154, 156 (Ind. Ct. App. 2012).

96. PETHERICK & SINNAMON, *supra* note 81, at 477–78.

97. *Id.* at 469–70. *See, e.g., Perry*, 962 N.E.2d at 156; *Smith v. State*, 678 N.E.2d 1152, 1154 (Ind. Ct. App. 1997); *Scott-Gordon v. State*, 579 N.E.2d 602, 603 (Ind. 1991).

98. *Smith*, 678 N.E.2d at 1154.

99. *Id.* at 1155.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Perry*, 962 N.E.2d 154.

104. *Smith*, 678 N.E.2d at 1155.

105. IND. CODE § 35-42-4-8(a)(1)(A) (2025).

106. PETHERICK & SINNAMON, *supra* note 81, at 483.

107. *See id.*; § 35-42-4-8(a)(1)(A).

108. *Perry*, 962 N.E.2d at 156–57; *see PETHERICK & SINNAMON, supra* note 81, at 483.

109. *Smith*, 678 N.E.2d at 1155.

110. *Id.*

touching in a subsequent incident, the language of the statute essentially gives the defendant a free pass in the “First Encounter” unless the victim resists in the first incident.¹¹¹

Circumstances where previous sexual touching has not occurred, called “First Encounters,” are difficult to fit under the sexual battery statute.¹¹² The phrase “First Encounter” is used to “refer to any sexual contact that occurs for the first time between the relevant parties.”¹¹³ Further, Avalos clarifies that “the use of this terminology assumes that a form of lesser sexual or intimate contact does not constitute consent to a more serious form.”¹¹⁴ During a sexual battery, a victim may react in a way that does not require the use or threat of force in response to a “First Encounter” like touching.¹¹⁵ One of these circumstances, described by Avalos as “Frozen in Fear Problem,” is when “the victim is affected by the surprise or shock of the assault, where she finds herself frozen in fear and unable to respond, and where she is afraid of what the perpetrator will do to her if she says ‘no.’”¹¹⁶ Although Avalos uses this term in the context of the “presumption of consent,” it can be applied to force in sexual battery as well.¹¹⁷

This problem can be identified in N.A.’s response to Perry’s actions, as she was afraid of how Perry might react if she rejected his advances.¹¹⁸ Thus, she laid still and “pretended she had just woken up.”¹¹⁹ Logically speaking, a defendant does not need to utilize “force or the imminent threat of force” if the victim is not resisting and freezes up in response to the touching.¹²⁰ In the context of the force requirement, it can be inferred that a defendant will not need to utilize “force or the imminent threat of force” with a non-resisting victim.¹²¹ Thus, the current language of the Indiana sexual battery statute does not protect victims who do not react in a way that requires the defendant to utilize force.¹²² All of these factors, taken individually or together, mean that many instances of sexual touching that follow a grooming relationship do not involve fear that pre-exists the touching, nor do they require the presence of force to achieve the goals of the defendant.¹²³ Consequently, instances that should be considered to be

111. § 35-42-4-8(a)(1)(A); see Avalos, *supra* note 18, at 745 (coining the term “First Encounter”).

112. Avalos, *supra* note 18, at 745; see § 35-42-4-8(a)(1)(A).

113. Avalos, *supra* note 18, at 745.

114. *Id.*

115. *Id.*; § 35-42-4-8(a)(1)(A).

116. Avalos, *supra* note 18, at 748–49.

117. *Id.* at 747; see § 35-42-4-8(a)(1)(A).

118. *Perry v. State*, 962 N.E.2d 154, 157 (Ind. Ct. App. 2012).

119. *Id.*

120. § 35-42-4-8(a)(1)(A); Avalos, *supra* note 18, at 748–49.

121. § 35-42-4-8(a)(1)(A).

122. *Id.*

123. See, e.g., *Perry*, 962 N.E.2d at 157; *Smith v. State*, 678 N.E.2d 1152, 1155 (Ind. Ct. App. 1997); *Scott-Gordon v. State*, 579 N.E.2d 602, 603 (Ind. 1991).

sexual battery are not under the current statutory requirements.¹²⁴

B. Abuse of Power

There are scenarios where a victim may feel as though they must comply with the defendant's wishes due to a power imbalance. For example, a victim may feel as though an expert, such as a lawyer, doctor, or police officer, holds a position of authority over them and thus submits to the touching without the need for force or an imminent threat of force.¹²⁵ In *McCarter v. State*, the victim, sixteen-year-old D.H., was at Walmart with her friend, A., who was apprehended by the defendant, a loss prevention officer.¹²⁶ The defendant falsely claimed to be a police officer and, despite refusal from the victim, attempted to kiss her and touched her buttocks.¹²⁷ The court noted that while the defendant may have used some force, “the evidence does not show that D.H. was *compelled to submit to it* by force or threat of force.”¹²⁸ Here, the defendant, although he was not a police officer, purported to be one to D.H.¹²⁹ Additionally, he told her twice that “he could keep her out of trouble,” potentially creating a perceived sense of power over the victim.¹³⁰ However, this is not explicit in the opinion. Even though McCarter was not a real police officer, sobering statistics exist regarding officers and sexual misconduct.¹³¹

Although officers hold a position of authority over civilians, these are not the only instances in which a power imbalance may be at play in a sexual battery context.¹³² For example, in *Scott-Gordon v. State*, the defendant, the employer of the victim, J.H., groped J.H.'s buttocks from behind, giving him a “free feel.”¹³³ J.H. responded by punching the defendant.¹³⁴ Subsequently, the defendant threatened to fire J.H. “if he ever did that again.”¹³⁵ The court noted that the force element was not satisfied because, although J.H. did not consent, it was not clear the defendant “compelled J.H. to submit to the touching by force or imminent threat of force.”¹³⁶

124. § 35-42-4-8(a)(1)(A).

125. See, e.g., *McCarter v. State*, 961 N.E.2d 43, 45 (Ind. Ct. App. 2012) (after victim rejected his advances, McCarter “yelled that D.H. would be getting a letter in the mail,” suggesting that her compliance with the touching would determine if she were to get in legal trouble).

126. *Id.* at 44.

127. *Id.* at 44–45.

128. *Id.* at 47.

129. *Id.* at 44.

130. *Id.*

131. See Phillip Matthew Stinson, Robert W. Taylor & John Liederbach, *The Situational Context of Police Violence: Date and Policy Implications*, 12 FAM. & INTIMATE PARTNER Q. 59, 62–63 (2020).

132. See, e.g., *Scott-Gordon v. State*, 579 N.E.2d 602, 604 (Ind. 1991).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

In scenarios such as this one, a defendant like Scott-Gordon may utilize his position as an employer to coerce a victim to submit to touching.¹³⁷ Although in *Scott-Gordon*, J.H. was touched from behind and thus not necessarily coerced,¹³⁸ the threat of firing, like the one made by Scott-Gordon, may result in other victims feeling coerced in similar circumstances.¹³⁹ This may eliminate the need for the utilization of “force or the imminent threat of force.”¹⁴⁰ Due to “this perceived power, victims will often be hesitant to report harassment due to fear of retaliation or the belief that nothing will be done to discipline a more senior employee.”¹⁴¹ According to the Equal Employment Opportunity Commission, in 2021, 40.8% of sexual harassment charges were filed concurrently with retaliation charges.¹⁴² As seen by Scott-Gordon’s threats, an employer may threaten a victim’s employment in these instances.¹⁴³ Further, “[i]n 72% of sexual harassment cases, the harasser holds a more senior position within the company.”¹⁴⁴ Given these statistics, victims may submit to unwanted sexual touching to avoid retaliation.¹⁴⁵ The current language of the sexual battery statute does not adequately address these scenarios and prevents the prosecution of those who abuse their positions of authority and commit actions that, under Indiana law, should be classified as sexual battery.¹⁴⁶

C. Practical Concerns

There are also practical considerations that are presented with the current language of the sexual battery statute.¹⁴⁷ These concerns raise the question: how can someone be “compelled to submit to the touching by force or the imminent threat of force” if they do not anticipate being touched in the first place?¹⁴⁸ As discussed previously in *Scott-Gordon*, the defendant approached the victim

137. *See id.* This Note does not discuss situations of domestic violence and coercive control, but these dynamics may be present as well. *See* Becca Schroeder, *Coercive Control: Abuse Hidden in Plain Sight*, DOM. VIOLENCE NETWORK (Feb. 3, 2023), <https://dvnconnect.org/coercive-control-dvn/> [<https://perma.cc/5PS4-9M3S>] (discussing coercive control in domestic violence dynamics).

138. *Scott-Gordon*, 579 N.E.2d at 604.

139. *See Statistics About Sexual Harassment You Should Know*, MKFM L. (Mar. 20, 2024), <https://www.mkfmllaw.com/blog/statistics-about-sexual-harassment-you-should-know#:~:text=About%2055%25%20of%20sexual%20harassment,reporting%20incidents%20of%20sexual%20harassment> [<https://perma.cc/P2SS-9LW8>]; *Sexual Harassment in Our Nation’s Workplaces*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, fig. 5 (Apr. 2022), <https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces> [<https://perma.cc/J3QJ-NWXW>].

140. IND. CODE § 35-42-4-8(a)(1)(A) (2025).

141. MKFM L., *supra* note 139.

142. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 139.

143. *Scott-Gordon*, 579 N.E.2d at 604.

144. MKFM L., *supra* note 139.

145. *See id.*; U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 139.

146. *See* IND. CODE § 35-42-4-8(a)(1)(A) (2025).

147. *See id.*

148. *Id.*

from behind and touched his backside.¹⁴⁹ The victim, clearly not anticipating the touching, responded by punching the defendant in the eye.¹⁵⁰ This is not the only instance where it is clear that a victim was not anticipating being touched by a defendant. In *Chatham*, the defendant came up behind the victim and put his hand between her legs.¹⁵¹ The facts do not indicate that the victim anticipated the defendant’s touch.¹⁵² This was recognized by the court, highlighting that the victim “did not have the opportunity to grant or deny consent to the touching.”¹⁵³ Notwithstanding this finding, the court held that the victim’s fear following the touching was not enough to satisfy the force element.¹⁵⁴

These cases present a concerning phenomenon.¹⁵⁵ Unfortunately, under these interpretations, defendants may essentially be given a pass to touch people “with intent to arouse or satisfy the person’s own sexual desires or the sexual desires of another person,” so long as the victim does not see them coming.¹⁵⁶ Although this touching may constitute battery under Indiana law, a conviction under this statute is not enough to classify a person as a sex offender.¹⁵⁷ Even with the current sanctions imposed in sex crimes, a staggering 50.3% of those convicted of sex offenses and released in 2018 recidivated in Marion County by 2021.¹⁵⁸ Sex offenders have the highest rate of recidivism across all categories and are about 10% more likely to reoffend than the average offender.¹⁵⁹ It is difficult to imagine the number of offenders in the state of Indiana who continue to commit acts that *should* be classified as sexual battery without the penalties sex offenders are subject to.

III. SUPPORT FOR THE CHANGE

Indiana has recognized the deficiency of force language in instances of rape, adding subsection (4) to the Indiana rape statute.¹⁶⁰ Additionally, the statutes of other states serve as a guidepost for how Indiana should amend its sexual battery

149. *Scott-Gordon v. State*, 579 N.E.2d 602, 604 (Ind. 1991).

150. *Id.*

151. *Chatham v. State*, 845 N.E.2d 203, 205 (Ind. Ct. App. 2006).

152. *Id.*

153. *Id.* at 208.

154. *Id.*

155. *See id.* at 205–08; *Scott-Gordon*, 579 N.E.2d at 604 (in both cases, the victim’s surprise as to the touching allowed the defendant to escape convictions related to unwanted sexual contact).

156. IND. CODE § 35-42-4-8(a)(1)(A) (2025).

157. IND. CODE §§ 35-42-2-1(c)(1), 11-8-8-4.5 (2025); *see* IND. DEP’T OF CORR., ADULT RECIDIVISM BY COUNTY OF COMMIT 147 (2021), https://www.in.gov/idoc/files/policy-and-procedure/statistical-data/recidivism-reports/adult-county-rates/2021_Adult_Recidivism_CountyofCommit-1.PDF [<https://perma.cc/D7HT-PE3B>] (statistics regarding recidivism in Marion County, Indiana, of those who were convicted of a sex offense).

158. IND. DEP’T OF CORR., *supra* note 157, at 147.

159. *See id.* (Sex offenders recidivated at a 50.3% rate while the average across all offenders was 45.7%).

160. IND. CODE § 35-42-4-1(a)(4) (2025).

statute.¹⁶¹

A. Addition of Subsection (4) to Indiana Code Section 35-42-4-1(a)

The Indiana legislature has recognized the need for additional language by adding subsection (4) to the rape statute.¹⁶² Before 2022, there were only three ways in which rape could occur under the statute.¹⁶³ Specifically, rape could only be charged when (1) “the other person is compelled by force or imminent threat of force;” (2) “the other person is unaware that the sexual intercourse or other sexual conduct . . . is occurring;” or (3) “the other person is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct . . . cannot be given.”¹⁶⁴ However, this was changed by House Enrolled Act 1079.¹⁶⁵ At the time the bill was heard in 2022, the requirement of force had been present in the country for over a century.¹⁶⁶ Despite the historical origins requiring force to be present under the rape statute, subsection (4) was finally added to section 35-42-4-1 in 2022.¹⁶⁷ Under the new subsection, rape occurs when someone “disregard[s] the other person’s attempts to physically, verbally, or by other visible conduct refuse the person’s acts.”¹⁶⁸ Although this change was a significant step in modernizing Indiana sexual assault law, other statutes, such as the Indiana sexual battery statute, still lack a consent-based subsection.¹⁶⁹

Although the definition of “force” has already been discussed in this Note, a brief recitation of recent rape cases is necessary to understand the similarities in outcomes of cases charged under the force subsections of both the sexual battery and rape statutes.¹⁷⁰ Prior to 2022, the case law regarding rape and force was very clear: when a defendant uses weapons in the act of assaulting a victim, the court almost always finds the presence of force.¹⁷¹ However, in circumstances where a defendant disregards a victim’s lack of consent but does not brandish a

161. *See infra* Part III.C.

162. § 35-42-4-1(a)(4).

163. § 35-42-4-1(a) (2014).

164. *Id.*

165. H.E.A. 1079, 122nd Gen. Assemb. (Ind. 2022).

166. *See* IND. GEN. ASSEMBLY, THE REVISED STATUTES OF THE STATE OF INDIANA, ADOPTED AND ENACTED BY THE GENERAL ASSEMBLY AT THEIR TWENTY-SECOND SESSION 209 (1838) (defines rape as follows: “[t]hat every person who shall unlawfully and forcibly, have carnal knowledge of a woman against her will . . . shall be deemed guilty of rape.”)

167. *Id.*; § 35-42-4-1(a)(4) (2022).

168. § 35-42-4-1(a)(4) (2025).

169. *Id.*; IND. CODE § 35-42-4-8 (a)(1)(A) (2025).

170. *See supra* Part I.

171. *See, e.g.,* Jenkins v. State, 568 N.E.2d 1037, 1039 (Ind. Ct. App. 1991) (finding the force element was met when the defendant stabbed the victim); Smith v. State, 500 N.E.2d 190, 192 (Ind. 1986) (defendant brandishing a knife and remaining in possession of it during the rape is enough for “the trier of fact to infer [that the defendant] forcibly compelled the victim to engage in sexual intercourse”); Lewis v. State, 440 N.E.2d 1125, 1127 (Ind. 1982) (defendant holding a pocketknife with an exposed blade established force).

weapon, certain facts do not arise to the level of force.¹⁷²

In *Tobias*, the defendant, a Department of Natural Resources employee, took C.U., the sixteen-year-old victim, into the woods and “inserted his finger into her vagina,” reasoning that “he needed to check to see if she had been raped.”¹⁷³ The victim “asked him to stop.”¹⁷⁴ Then, shortly after, the defendant took C.U. to an office, “grabbed her arm,” “pushed her against the top of the picnic table, removed his own pants, pulled her legs apart with his hands, and ‘pushed inside’ of C.U. with his penis.”¹⁷⁵ C.U. also asked the defendant to stop during this incident.¹⁷⁶ The court held that there was sufficient evidence for a jury to have found the force element was met.¹⁷⁷ The court highlighted C.U.’s testimony that Tobias “performed sexual intercourse on her—all after demanding her compliance; physically forcing himself upon her; and ignoring her lack of consent, verbal resistance, and requests for him to stop.”¹⁷⁸

Comparatively, in *Jones v. State*, the victim, twenty-six-year-old C.L., lived with Jones and his family.¹⁷⁹ One evening, Jones, intoxicated, came into C.L.’s bedroom wanting to have sex with her.¹⁸⁰ C.L. refused his advances.¹⁸¹ Jones again asked C.L. for sex, which was met by another rejection.¹⁸² When Jones asked for sex a third time, C.L. did not refuse and “just let him have it.”¹⁸³ Then, Jones “told her not to tell anyone, particularly not . . . his wife.”¹⁸⁴ At no point did C.L. consent to having sex with Jones.¹⁸⁵ Nor did she call for help because she feared Jones.¹⁸⁶ The court held that the evidence failed to demonstrate “*force or imminent threat of force*.”¹⁸⁷ The court noted that “[t]here are reasons a person might be afraid to attract attention other than fear of forced activity.”¹⁸⁸

The distinction between the holdings in *Tobias* and *Jones* shows that force will not always be established when a victim repetitively tells a defendant “no.”¹⁸⁹ However, in cases such as *Jones*, a victim may feel as though they are unable to say no to the defendant and may “just let him have it” if they are afraid

172. See, e.g., *Jones v. State*, 589 N.E.2d 241, 241–43 (Ind. 1992) (holding that where the victim knew the defendant was weaponless and repeatedly rejected his sexual advances before submitting herself out of fear was not sufficient to establish the element of force).

173. *Tobias v. State*, 666 N.E.2d 68, 70–71 (Ind. 1996).

174. *Id.* at 71.

175. *Id.*

176. *Id.*

177. *Id.* at 72.

178. *Id.*

179. 589 N.E.2d 241, 242 (Ind. 1992).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 243.

188. *Id.*

189. Compare *id.* at 242–43, with *Tobias v. State*, 666 N.E.2d 68, 72 (Ind. 1996).

of the defendant.¹⁹⁰ The previous statute was not equipped for these circumstances where the victim gives into the sexual activity after saying “no” because this does not always constitute force.¹⁹¹ The lack of weight given to a victim’s verbal refusal under the force subsection represents a gap addressed by subsection (4) of the rape statute.¹⁹² However, this gap is yet to be addressed in the sexual battery statute.¹⁹³

B. Jones Under Indiana Code Section 35-42-4-1(a)(4) (2022)

Under Indiana Code section 35-42-4-1(a)(4), rape occurs when “the person disregard[s] the other person’s attempts to physically, verbally, or by other visible conduct refuse the person’s acts.”¹⁹⁴ In *Jones*, C.L. refused the defendant’s acts twice.¹⁹⁵ Under those facts, an analysis in accordance with subsection (4) of the rape statute likely would have produced a different result.¹⁹⁶ This is an example of how the new subsection changed the definition of rape in Indiana, moving beyond the more rigid language of section 35-42-4-1(a)(1).¹⁹⁷ Due in part to the newness of subsection (4), there are no recently reported cases regarding its use or interpretation.¹⁹⁸ However, when examining the facts of previously decided cases, such as *Jones*, it is apparent that the addition of this subsection strengthens the weight of a victim’s “no.”¹⁹⁹ Since this shortcoming of force language was addressed for the rape statute, it should also be reexamined for the sexual battery statute.²⁰⁰

C. Guidance from Other States

Each state codifies differently what constitutes sexual battery or similar conduct.²⁰¹ Examining the language of other states’ statutes is essential to determine what language the Indiana General Assembly should adopt in its sexual battery statute.

First, Kentucky has multiple statutes that are similar to the Indiana sexual

190. *Jones*, 589 N.E.2d at 242.

191. *See, e.g., id.* at 242–43.

192. *Compare* IND. CODE § 35-42-4-1(a) (2014) (no refusal element), *with* § 35-42-4-1(a)(4) (2022) (violation of the statute occurs when “the person disregards the other person’s attempts to physically, verbally, or by other visible conduct refuse the person’s acts”).

193. *See* IND. CODE § 35-42-4-8(a)(1)(A) (2025).

194. § 35-42-4-1(a)(4) (2022).

195. *Jones*, 589 N.E.2d at 242.

196. *Id.*; § 35-42-4-1(a)(4).

197. *Compare* § 35-42-4-1(a)(4) (the refusal element), *with* § 35-42-4-1(a)(1) (the force element).

198. *See* § 35-42-4-1(a)(4).

199. *Jones*, 589 N.E.2d at 241.

200. § 35-42-4-1(a)(4); IND. CODE § 35-42-4-8(a)(1)(A) (2025).

201. *See, e.g.,* KY. REV. STAT. ANN. §§ 510.130, 510.140 (West 2025); OHIO REV. CODE ANN. § 2907.03 (West 2025); GA. CODE ANN. § 16-6-22.1(b) (West 2025).

battery statute.²⁰² Although Kentucky does not have a sexual battery statute, it has both a sexual abuse statute and a sexual misconduct statute.²⁰³ Kentucky’s sexual abuse statute reads as follows: “A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter’s consent.”²⁰⁴ Although an offense under this section is a Class B misdemeanor rather than a felony, it is notable that the statute itself contains the word “consent.”²⁰⁵ This language is not present in either the Indiana sexual battery statute nor the Indiana rape statute.²⁰⁶ This consent language is also present in Kentucky’s sexual misconduct statute, which reads as follows: “A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter’s consent.”²⁰⁷ An offense under this subsection is a Class A misdemeanor.²⁰⁸ It is important to note, however, that Kentucky has its own statutory definition of lack of consent.²⁰⁹ This statute, unlike the Indiana statute, lists various reasons that consent may not be present, including “[i]f the offense charged is sexual abuse, any circumstances in addition to forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor’s conduct.”²¹⁰ Kentucky’s approach demonstrates that other states do not require a showing of force for a sexual battery-type conviction like Indiana.²¹¹

Second, the Ohio sexual battery statute is more analogous to the Indiana sexual battery statute.²¹² Subsection (A) prohibits “sexual activity with another” within the confines of the thirteen listed subsections.²¹³ Subsection (A)(1) reads, “The offender knowingly coerces the other person, or one of the other persons, to submit by any means that would prevent resistance by a person of ordinary resolution.”²¹⁴ In the context of sexual battery, coercion “has been defined as ‘to compel by pressure.’”²¹⁵ This subsection is the most similar to the force subsection of the Indiana sexual battery statute.²¹⁶ However, despite the

202. Compare § 510.130 (Kentucky sexual abuse statute), and § 510.140 (Kentucky sexual misconduct statute), with § 35-42-4-8 (Indiana sexual battery statute).

203. See §§ 510.130, 510.140.

204. § 510.130(1).

205. § 510.130(1), (3).

206. See § 35-42-4-8(a); IND. CODE § 35-42-4-1(a)(4) (2025).

207. § 510.140(1).

208. § 510.140(2).

209. See KY. REV. STAT. ANN. § 510.020 (West 2025).

210. § 510.020(2)(c).

211. See § 35-42-4-8(a)(1)(A).

212. Compare OHIO REV. CODE ANN. § 2907.03 (West 2025) (Ohio sexual battery statute with coercion requirement), with § 35-42-4-8 (Indiana sexual battery statute with force requirement).

213. § 2907.03(A).

214. § 2907.03(A)(1).

215. *State v. Bryant*, 199 N.E.3d 919, 932 (Ohio Ct. App. 2022) (quoting *State v. Watters*, No. 110697, 2022 WL 1577413, at *4 (Ohio Ct. App. May 19, 2022)).

216. Compare § 2907.03(A)(1) (Ohio sexual battery statute with coercion requirement), with § 35-42-4-8(a)(1) (Indiana sexual battery statute with force requirement).

similarities between the subsections, the Ohio statute does not require force as required by the Indiana sexual battery statute.²¹⁷ This illustrates that force is not always a required element of sexual battery.²¹⁸

Lastly, the Georgia sexual battery statute contains consent language, which would remedy many of the issues discussed in this Note.²¹⁹ Georgia Code section 16-6-22.1(b) reads as follows: “A person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.”²²⁰ “[I]ntimate parts” is defined in subsection (a) as “the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female.”²²¹ Notably, however, in *Watson v. State*, the Georgia Supreme Court highlights that Georgia’s crime of sexual battery “does not necessarily involve sexual conduct.”²²² This differs from Indiana’s sexual battery statute, which requires the touching to be committed “with intent to arouse or satisfy the person’s own sexual desires or the sexual desires of another person.”²²³ Although the prohibited conduct in Indiana’s sexual battery statute differs from Georgia’s sexual battery statute, Georgia is an example of another state that has codified broader language than the Indiana force subsection.²²⁴

This Note does not argue that Indiana should completely abandon the language in its current sexual battery statute in favor of adopting another state’s language. However, the ways that other states define sexual offenses, particularly sexual battery, illustrates that sexual battery does not have to contain force language to be adopted.²²⁵ In making its determination as to whether the state should amend the current sexual battery statute, the Indiana legislature should take this fact into consideration.

IV. THE CHANGE

This Note aims to expand the language of the sexual battery statute to include the various concerns previously discussed. The legislature should adopt the following language for subsection (a)(3) of Indiana Code section 35-42-4-8: “The person engaged in touching with the other person without the other person’s attempts to physically, verbally, or by other visible conduct indicate a willingness to engage in or submit to the touching.” This language is based upon

217. Contrast § 2907.03(A)(1) (no element of force), with § 35-42-4-8(a)(1) (element of force).

218. See, e.g., § 2907.03(A)(1).

219. See GA. CODE ANN. § 16-6-22.1(b) (West 2025).

220. *Id.*

221. § 16-6-22.1(a).

222. 777 S.E.2d 677, 721 (Ga. 2015).

223. IND. CODE § 35-42-4-8(a) (2025).

224. § 35-42-4-8(a)(1)(A); § 16-6-22.1(b).

225. See, e.g., KY. REV. STAT. ANN. §§ 510.130, 510.140 (West 2025); OHIO REV. CODE ANN. § 2907.03 (West 2025); § 16-6-22.1(b).

the language in the rape statute but is broadened to accommodate the scope of sexual battery.²²⁶

In application, the deficits of the current sexual battery statute would have a lesser impact on the prosecution of these cases because the victim must first indicate some willingness to engage in or submit to the touching.²²⁷ Subsection (a)(3) would criminalize scenarios where “the person engaged in touching with the other person without the other person’s attempts to physically, verbally, or by other visible conduct indicate a willingness to engage or submit to the touching.” The proposed subsection can be broken into multiple elements and applied to the facts in *Perry*.²²⁸ For example, in *Perry*, N.A. did not give any visible indication that she was willing to engage in or submit to the touching because she was asleep when it began.²²⁹ Thus, even though N.A. “kind of laid there” when she realized she was being touched, this circumstance would now satisfy the elements of sexual battery under the proposed subsection.²³⁰ These actions do not indicate N.A.’s willingness to engage in sexual touching with the defendant by any visible means.²³¹ Further, sleeping, like N.A. was doing, does not indicate a willingness to engage in any sort of touching.²³² No evidence of N.A. resisting the touching was presented.²³³ However, resistance is not a pronounced factor under the proposed subsection, and sexual battery is committed when the victim did not visibly consent.

Not only would the concerns about the relationship between the victim and the defendant have much less of an impact in prosecuting sexual battery, but the practical concerns discussed above would be almost entirely eliminated.²³⁴ For example, in cases like *Chatham*, where a victim was caught “off guard” by a touching, the victim could not be found to have indicated a willingness to engage in or submit to the touching.²³⁵ Thus, this sort of “sneak attack” by a defendant would now be ineffective to shield from sexual battery prosecution. Overall, the proposed language would remedy or, at the very least, lessen the problems discussed extensively in this Note. Now, the defendant would merely need to perceive, visually or orally, a person’s willingness to engage or submit to the touching.

If the Indiana legislature is hesitant to adopt the above-mentioned language, there is an alternative. Although the sexual battery statute needs language broader than subsection (4) of the rape statute, it should, at a minimum, be

226. See IND. CODE § 35-42-4-1(a)(4) (2025); § 35-42-4-8(a).

227. § 35-42-4-8.

228. *Perry v. State*, 962 N.E.2d 154, 156–57 (Ind. Ct. App. 2012).

229. *Id.*

230. *Id.* at 157.

231. See *id.*

232. See *id.*

233. *Perry*, 962 N.E.2d 154.

234. See *supra* Part II.

235. *Chatham v. State*, 845 N.E.2d 203, 207 (Ind. Ct. App. 2006) (using the words “off guard” in the State’s argument to show a victim’s lack of opportunity to consent).

amended to include the rape statute language.²³⁶ Thus, the alternative language of subsection (a)(3) would read as follows: “The person disregarded the other person’s attempts to physically, verbally, or by other visible conduct refuse the person’s acts.” This language is identical to that of the rape statute and, if adopted, would provide consistency in the definitions of rape and sexual battery in Indiana.²³⁷

CONCLUSION

Indiana has made meaningful steps toward modernizing its sexual assault law.²³⁸ However, sexual battery is a pervasive issue; in fact, in the United States, fifty-one percent of women and seventeen percent of men have experienced “[u]nwelcoming sexual touching.”²³⁹ Thus, it is time for the sexual battery statute to also be sufficiently amended to move beyond the force requirement in order to better serve not only victims, but the State of Indiana as a whole.

Thus, Indiana should amend the sexual battery statute not only beyond its current language, but also beyond the language of the rape statute. This argument is precipitated by the various circumstances in which sexual battery may occur without “force or the imminent threat of force.”²⁴⁰ Specifically, this Note argued that the current statute does not accommodate the nuances of victim-defendant relationships. Beyond these relationships, this Note argued that it is simply impractical, given the unexpected nature of some sexual battery situations, to require “force or the imminent threat of force” to be utilized.²⁴¹ Lastly, this Note presented the legislature with preferred language for the sexual battery statute, along with a suitable alternative.²⁴² To quote the words of Scott-Gordon, the current sexual battery statute gives particularly stealthy defendants a “free feel,” an outcome that this proposed amendment works to remedy.²⁴³

236. See IND. CODE § 35-42-4-1(a)(4) (2025).

237. See *id.*

238. See *id.*

239. Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NAT’L PUB. RADIO (Feb. 21, 2018, at 19:43 ET), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment#:~:text=The%20results%2C%20released%20in%20a,they%20had%20survived%20sexual%20assault> [https://perma.cc/KC59-QW2X].

240. IND. CODE § 35-42-4-8(a)(1)(A) (2025).

241. *Id.*

242. See *supra* Part IV.

243. Scott-Gordon v. State, 579 N.E.2d 602, 604 (Ind. 1991).