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## Size Matters: Force and Size Disparity in Cases of Aggravated Sexual Abuse

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# SIZE MATTERS: FORCE AND SIZE DISPARITY IN CASES OF AGGRAVATED SEXUAL ABUSE

**Abstract:** In 2018, the Third Circuit Court of Appeals affirmed a jury’s finding that a corrections officer deprived a female inmate of her civil rights through his commission of aggravated sexual abuse. Following the Seventh Circuit Court of Appeals while splitting with the Fifth, Eighth, and Tenth Circuit Courts of Appeals, the Third Circuit held that size and coercive power disparities between a defendant and a victim do not speak to the force element of the federal aggravated sexual abuse statute, 18 U.S.C. § 2241(a). Although the Third Circuit takes a balanced approach, its adoption of the Seventh Circuit’s analysis is problematic because the court ignores the Seventh Circuit’s underlying assumption that force must result in bodily injury. Such thinking ignores the legislative intent behind the statute and effectively reintroduces the outdated resistance doctrine.

## INTRODUCTION

A male prison guard rapes a female inmate in her cell, lying on top of her with the full weight of his body so that she cannot get away—has the guard used force?<sup>1</sup> In 2018, in *United States v. Shaw*, the Third Circuit Court of Appeals confronted this question when analyzing the amount of force required to constitute aggravated sexual abuse under 18 U.S.C. § 2241(a).<sup>2</sup> The district court instructed the jury that it could consider disparities in coercive power and size between the assailant and the victim when determining whether the assailant used force during the assault.<sup>3</sup> On appeal of the jury instruction, the Third Circuit split with the Fifth, Eighth and Tenth Circuit Courts of Appeals, holding that a size disparity does not satisfy the force requirement unless explicitly linked to restraint of the victim.<sup>4</sup> In so ruling, the Third Circuit adopted the Seventh Circuit Court of Appeals’ reasoning in its decision in 2018 in *Cates v.*

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<sup>1</sup> See *United States v. Shaw*, 891 F.3d 441, 444–45, 447–48, 452 (3d Cir. 2018) (examining this issue and concluding the guard used force).

<sup>2</sup> *Id.*; 18 U.S.C. § 2241(a) (2012).

<sup>3</sup> *Shaw*, 891 F.3d at 450. The challenged portion of the instruction reads: “The disparity in coercive power and size between the defendant and [the victim] are factors that the jury may consider when determining whether force was utilized.” (emphasis omitted). *Id.*

<sup>4</sup> See *id.* at 451 (finding that the size disparity instruction contained no link to the physical restraint required to complete the assault); see also *United States v. Holly*, 488 F.3d 1298, 1302–03 (10th Cir. 2007) (finding that size disparity may give rise to an inference of force); *United States v. Webb*, 252 F.3d 1006, 1009 (8th Cir. 2001) (holding that disparities in size and coercive power between the victim and defendant are force considerations); *United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998) (holding that a size disparity may imply force).

*United States*, in which the Seventh Circuit held that size disparity alone may not lead to an inference of force.<sup>5</sup>

This Comment argues that, although the Third Circuit’s approach is necessarily cautious, the courts should not look to the Seventh Circuit’s reasoning.<sup>6</sup> Part I of this Comment discusses the facts and procedural history of the *Shaw* case and provides a brief overview of deprivation of civil rights under color of law and the development of the aggravated sexual abuse statute, 18 U.S.C. § 2241(a).<sup>7</sup> Part II of this Comment explains how the circuit courts interpret the aggravated sexual abuse statute’s force requirement.<sup>8</sup> Part III of this Comment argues that courts should not look to the Seventh Circuit for guidance because the *Cates* decision reintroduces the resistance doctrine that the aggravated sexual abuse statute intended to eradicate.<sup>9</sup>

## I. THE PRISON SEXUAL ASSAULT LEADING TO THE *SHAW* DECISION AND UNDERSTANDING AGGRAVATED SEXUAL ABUSE AS A DEPRIVATION OF CIVIL RIGHTS

This Part contextualizes the Third Circuit’s *Shaw* decision by explaining the circumstances surrounding the prison rape, the defendant’s conviction, and efforts to modernize rape law.<sup>10</sup> Section A develops the facts of the prison rape that led to the *Shaw* case.<sup>11</sup> Section B discusses the procedural history of *Shaw*.<sup>12</sup> Section C describes the framework for deprivation of civil rights claims and the reform efforts that drove development of the aggravated sexual abuse statute.<sup>13</sup>

### *A. The Circumstances of the Assault in Shaw*

In 2010, Appellant Shawn Shaw was a corrections officer at the Essex County Correctional Facility (“ECCF”) in Newark, New Jersey.<sup>14</sup> Despite working at ECCF for over five years, Shaw rarely worked in the women’s unit.<sup>15</sup> Due to a snowstorm, however, Shaw was covering the unit alone over-

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<sup>5</sup> See *Shaw*, 891 F.3d at 451 (adopting the Seventh Circuit Court of Appeals’ analysis); see also *Cates v. United States*, 882 F.3d 731, 737 (7th Cir. 2018) (explaining that force cannot be inferred from a size disparity alone).

<sup>6</sup> See *infra* notes 90–109 and accompanying text.

<sup>7</sup> See *infra* notes 10–56 and accompanying text.

<sup>8</sup> See *infra* notes 57–89 and accompanying text.

<sup>9</sup> See *infra* notes 90–109 and accompanying text.

<sup>10</sup> See *infra* notes 14–56 and accompanying text.

<sup>11</sup> See *infra* notes 14–22 and accompanying text.

<sup>12</sup> See *infra* notes 23–33 and accompanying text.

<sup>13</sup> See *infra* notes 34–56 and accompanying text.

<sup>14</sup> *Shaw*, 891 F.3d at 444.

<sup>15</sup> *Id.* at 444–45.

night when E.S. was held there awaiting trial.<sup>16</sup> At the start of Shaw's shift, E.S. and several other inmates exposed their bare behinds to him as part of a hazing ritual for new officers in the unit.<sup>17</sup> Shaw proceeded to speak to E.S. in a sexually charged manner and threatened to come into her cell.<sup>18</sup>

Later, when E.S. was sleeping, Shaw entered her cell.<sup>19</sup> He took off her pants and placed his hand on her chest, holding her in place so that she could not escape when he digitally penetrated her vagina.<sup>20</sup> Shaw then laid on top of E.S. with the full weight of his body and raped her.<sup>21</sup> With Shaw on top of her, E.S. was unable to move and felt like she was suffocating.<sup>22</sup>

### B. Shaw's Conviction and Appeal

A federal grand jury indicted Shaw on two counts: (1) deprivation of civil rights through aggravated sexual abuse under 18 U.S.C. § 242 and (2) obstruction of justice under 18 U.S.C. § 1512(b)(3).<sup>23</sup> In order to indict Shaw for deprivation of civil rights, the grand jury had to find that Shaw was acting under color of law at the time of the assault and intentionally deprived E.S. of her constitutional right to be free from bodily violation.<sup>24</sup> After an eight-day trial in the District Court of New Jersey, the jury convicted Shaw on both counts.<sup>25</sup>

<sup>16</sup> *Id.* The court refers to the victim by her initials throughout the opinion. *Id.* at 444 n.1. The overnight shift ran from 10:00 p.m. to 6:00 a.m. *Id.* at 445.

<sup>17</sup> *Id.* at 445.

<sup>18</sup> *Id.* Shaw referred to E.S. as "'Becky,' a derogatory term for a white woman who gives oral sex, and asked her if she was going to let him 'hit that,' which she understood to be a request to engage in sexual acts." Brief for Appellee at 2, *United States v. Shaw*, 891 F.3d 441 (No. 16-2860).

<sup>19</sup> *Shaw*, 891 F.3d at 445.

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

<sup>21</sup> *Id.* E.S., who was five-feet-five-inches and 130 pounds, testified that Shaw was over six feet tall and "far heavier" than she. *Id.* at 445 n.3.

<sup>22</sup> *Id.* Initially, E.S. only told her mother, attorney, and a fellow male prisoner of the rape. *Id.* Once the male prisoner informed jail officials, E.S. made a formal report. *Id.* A Sexual Assault Nurse Examiner found semen inside of her that was subsequently linked to Shaw. *Id.*

<sup>23</sup> Indictment at 1–3, *United States v. Shaw*, No. 2:13-cr-00660 (D.N.J. June 15, 2016). Shaw was charged with obstruction of justice for making misleading statements to ECCF investigators and an Essex County prosecutor. *Id.* at 2.

<sup>24</sup> *Id.* at 1. The Due Process Clause of the United States Constitution encompasses the right to bodily integrity. See Johanna R. Shargel, Essay, *United States v. Lanier: Securing the Freedom to Choose*, 39 ARIZ. L. REV. 1115, 1118 (1997) (noting that the right to bodily integrity is based on the "liberty interest" of the Due Process Clause) (internal quotation marks omitted); see also U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property without due process of law.").

<sup>25</sup> *Shaw*, 891 F.3d at 446; see Docket, *United States v. Shaw*, No. 2:13-cr-00660 (D.N.J. June 15, 2016) (listing eight days of trial transcripts). Shaw was sentenced to forty-five years' imprisonment: twenty-five years for deprivation of civil rights and twenty years for obstruction of justice. Judgment in a Criminal Case at 2, *United States v. Shaw*, No. 2:13-cr-00660 (D.N.J. June 15, 2016).

Although the jury returned a guilty verdict for deprivation of civil rights through aggravated sexual assault, it found no bodily injury to E.S.<sup>26</sup>

Shaw appealed the deprivation of civil rights conviction, challenging the propriety of the jury instructions.<sup>27</sup> Specifically, Shaw argued that the similarity of the instructions for aggravated sexual abuse under 18 U.S.C. § 2241(a)(1) and the lesser offense of sexual abuse under 18 U.S.C. § 2242(1) confused the jury.<sup>28</sup> The Third Circuit agreed, finding that the reference to disparities in size and coercive power in both instructions blurred the difference between the crimes.<sup>29</sup> As a result, the jury could have confused coerced consent with the use of force.<sup>30</sup>

In reviewing challenged jury instructions, the court must consider the instructions in their entirety.<sup>31</sup> Despite finding the challenged portion of the instruction erroneous, the court upheld the verdict because the instructions communicated to the jury that it could only find Shaw guilty of aggravated sexual abuse if he used actual force.<sup>32</sup> Shaw made no further appeal of the Third Circuit's decision.<sup>33</sup>

### C. Understanding Shaw's Crime

The jury convicted Shaw of deprivation of rights under color of law, a federal civil rights statute.<sup>34</sup> The crime occurs when an individual acting with

<sup>26</sup> *Shaw*, 891 F.3d at 446 n.7. In contrast, the grand jury did find bodily injury. Indictment, *supra* note 23, at 1.

<sup>27</sup> *Shaw*, 891 F.3d at 446. Shaw also argued that the district court erred in accepting the jury's finding of force based on the sufficiency of evidence presented, wrongfully permitted E.S. to testify about her psychotherapy, abused its discretion by admitting lay, rather than expert testimony, to resolve a key issue, and failed in its obligation to provide Shaw with a speedy trial. Brief and Appendix for Defendant Appellant at 2–3, *Shaw*, 891 F.3d 441 (No. 16-2860). The Third Circuit Court of Appeals rejected each of these arguments. *Shaw*, 891 F.3d at 452–55.

<sup>28</sup> *Shaw*, 891 F.3d at 450. An individual commits the lesser crime of sexual abuse when he or she “knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping).” 18 U.S.C. § 2242(1). The parenthetical phrase distinguishes sexual abuse from its aggravated form. *Shaw*, 891 F.3d at 448 (citing *Cates*, 882 F.3d at 736).

<sup>29</sup> *Shaw*, 891 F.3d. at 450. Like the aggravated sexual abuse instruction, the sexual abuse instruction listed disparities in size and coercive powers as factors for the jury to consider as to whether the sexual contact was unwanted. *Id.*

<sup>30</sup> *Id.* at 451.

<sup>31</sup> *Id.* at 450. The court exercises plenary review in these instances. *Id.* at 459.

<sup>32</sup> *Id.* at 452. The aggravated sexual abuse instruction required the jury to find that force was used against the person, that force was used in the course of the assault, and that the statute contains a force requirement. *Id.*

<sup>33</sup> See Docket, *Shaw*, 891 F.3d 441 (No. 16-2860) (omitting further appeal).

<sup>34</sup> See *Shaw*, 891 F.3d at 446 (citing Shaw's conviction under 18 U.S.C. § 242); see also *United States v. Lanier*, 520 U.S. 259, 264 (1997) (describing 18 U.S.C. § 242 as a Reconstruction Era civil rights statute).

state authority deprives a person of his or her constitutional protections.<sup>35</sup> The statute sets out three tiers of offenses and the statutory maximum penalty for each.<sup>36</sup> The primary offense in each tier is the deprivation of rights under color of law; however, a first tier offense, with an accompanying sentence of one year, does not involve the use of weapons, threats, or force.<sup>37</sup> In the second tier, the prescribed maximum penalty increases from one year to ten years if bodily injury results from the conduct or the conduct includes the use of a dangerous weapon, explosives, or fire.<sup>38</sup> Aggravated sexual abuse falls into the third tier and carries a potential life sentence.<sup>39</sup> The statute encompasses sexual assault because sexual assault violates the victim's constitutional right to bodily integrity under the Due Process Clause.<sup>40</sup>

Section 242 does not define aggravated sexual abuse, so courts have defined the term by reference to the federal aggravated sexual abuse statute, 18 U.S.C. § 2241.<sup>41</sup> Section 2241(a) defines aggravated sexual abuse as intentionally causing a person to engage in unwanted sex by either (1) using force against the victim or (2) scaring the victim into believing that another person will face death, serious bodily injury, or kidnapping.<sup>42</sup> The district court charged Shaw under the first definition.<sup>43</sup>

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<sup>35</sup> 18 U.S.C. § 242; *see also* Shargel, *supra* note 24, at 1115 n.3 (providing the definition of conduct committed under color of law). The statute encompasses constitutional law by reference rather than by describing all prohibited conduct. *Lanier*, 520 U.S. at 265. As a result, the statute is unique in its applicability to a broad array of conduct. *Shaw*, 891 F.3d at 447 (citing *Koon v. United States*, 518 U.S. 81, 101 (1996)).

<sup>36</sup> 18 U.S.C. § 242.

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.* The third tier also includes conduct that results in death, kidnapping or attempted kidnapping, attempted aggravated sexual abuse, and attempts to kill. *Id.* In addition to life in prison, an individual may also be subject to the death penalty (notwithstanding other constitutional provisions). *Id.*; *see also Shaw*, 891 F.3d at 447 n.9 (noting that *Kennedy v. Louisiana*, 554 U.S. 407 (2008), prohibits the death penalty for child rape where death does not result).

<sup>40</sup> *See* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property without due process of law.”); Shargel, *supra* note 24, at 1118 (citing various authorities that have adopted this theory). Somewhat curiously, the United States Supreme Court has not addressed whether sexual assault is a constitutional violation. *Id.* at 1117.

<sup>41</sup> *Shaw*, 891 F.3d at 447 (citing *Cates*, 882 F.3d at 736; *United States v. Lanham*, 617 F.3d 873, 888 (6th Cir. 2010); *Holly*, 488 F.3d at 1301; *United States v. Simmons*, 470 F.3d 1115, 1120 (5th Cir. 2006)).

<sup>42</sup> 18 U.S.C. § 2241(a). In 2017, in *United States v. Holly*, the Tenth Circuit Court of Appeals held that § 2241(a)(2) was satisfied where the victim testified that the defendant said, “[I]f he can’t get to me, he’ll get to my family, and my little sister is cute too. He goes, ‘Your little sister is awfully cute too.’ And my little sister is nine years old.” *Holly*, 488 F.3d at 1309.

<sup>43</sup> *Shaw*, 891 F.3d at 450.

Section 2241 is often analyzed in conjunction with § 2242, which sets out the lesser offense of sexual abuse.<sup>44</sup> Section 2242 encompasses unwanted sexual contact that results from coercive behavior other than force or the heightened form of fear described under § 2241(a)(2).<sup>45</sup> Congress added both sections to the U.S. Code as part of the Sexual Abuse Act of 1986.<sup>46</sup> The legislation sought to modernize and reform federal rape statutes by shifting the focus of criminal inquiries from the conduct of the victim to that of the assailant.<sup>47</sup> The resulting changes eliminated the relevance of the victim's physical resistance and lack of consent in proving aggravated sexual abuse.<sup>48</sup>

This change marked a shift from the common law approach to sexual assault and rape.<sup>49</sup> The common law defined rape in relation to the woman's resistance and the rapist's use of force.<sup>50</sup> Women were expected to offer their "utmost resistance" to assault.<sup>51</sup> Thus, the resistance and force elements worked together because the amount of force the assailant had to use determined whether the victim offered her utmost resistance.<sup>52</sup> The utmost resistance requirement was difficult to meet, and as a result, rape was often impossible to prove.<sup>53</sup>

Starting in the late 1970s, however, reformers began arguing that it is dangerous for women to resist their attackers.<sup>54</sup> In adopting § 2241, Congress

<sup>44</sup> See, e.g., *id.* at 447–48 ("We read the aggravated sexual abuse statute . . . in contrast to the statute defining the lesser crime of (non-aggravated) sexual abuse."); *Cates*, 882 F.3d 736–37 (analyzing § 2241 in contrast to § 2242); *Holby*, 488 F.3d at 1303 (distinguishing § 2241 from § 2242).

<sup>45</sup> *Shaw*, 891 F.3d at 448.

<sup>46</sup> H.R. REP. NO. 99-594, at 14–16 (1986), reprinted in 1986 U.S.C.C.A.N. 6186, 6194–96.

<sup>47</sup> *Id.* at 10. The act also redefined the crimes in a gender-neutral manner, broadened the offenses to capture more abusive conduct, rejected the doctrine of spousal immunity, and increased the range of federal jurisdiction to include all federal prisons. *Id.* at 10–11.

<sup>48</sup> *Id.* at 13. The statutory definitions are meant to encompass all of the elements a prosecutor must prove—non-consent and resistance are deliberately excluded. *Id.* Despite these reform efforts, only seven of every 1,000 rapes will result in a conviction. RAPE ABUSE & INCEST NAT'L NETWORK (RAINN), *The Criminal Justice System: Statistics* (2018), <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/G44U-XCVT>].

<sup>49</sup> See H.R. REP. NO. 99-594, at 11 (describing the common law definition of rape).

<sup>50</sup> Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962. Defining rape as requiring resistance and force separated the crime from sex outside of marriage, which was criminalized up until 1965. Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 279 (2018). Rape was considered a violation of modesty and the dignity of marriage, not of personal autonomy. *Id.*

<sup>51</sup> Anderson, *supra* note 50, at 962.

<sup>52</sup> H.R. REP. NO. 99-594, at 11.

<sup>53</sup> Anderson, *supra* note 50, at 963–64. In a 1906 case, the victim testified, "I tried as hard as I could to get away. I was trying all the time to get away as hard as I could." *Id.* at 963. She added, "I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled." *Id.* The court overturned the rape conviction because the victim had "not adequately resisted" the attack. *Id.* at 964.

<sup>54</sup> See *id.* at 968–69 (discussing efforts by legal scholars and reformers to abolish the resistance requirement).

espoused the reformers arguments, noting the unfairness and danger of requiring sexual assault victims to resist their attackers.<sup>55</sup> Accordingly, the legislature conceptualized force broadly to include the force required to restrain the victim.<sup>56</sup>

## II. INTERPRETING THE FORCE REQUIREMENT: CIRCUIT COURTS DISAGREE ON THE RELATIONSHIP BETWEEN SIZE DISPARITY AND THE USE OF FORCE

Although the circuit courts all look to § 2241 for the definition of aggravated sexual abuse, they differ as to whether size disparity alone permits an inference of force.<sup>57</sup> Section A discusses the Fifth, Eighth, and Tenth Circuit Courts of Appeals' expansive interpretation of size disparity as force.<sup>58</sup> Section B discusses the Seventh Circuit Court of Appeals' restrictive approach interpreting force as entirely physical.<sup>59</sup> Section C discusses the Third Circuit Court of Appeals' interpretation of size disparity creating an inference of force when linked to restraint of the victim.<sup>60</sup>

### *A. Size Disparity as Force: The Expansive Interpretation of the Fifth, Eighth, and Tenth Circuits*

The Fifth, Eighth, and Tenth Circuits have held that size disparity alone may create an inference of force.<sup>61</sup> In 1998, in *United States v. Lucas*, the Fifth Circuit held that an assailant uses force when the victim is restrained from escaping sexual contact.<sup>62</sup> Thus, the court held that an assailant used force where the assailant pushed the victim into a table and blocked the door.<sup>63</sup> Likewise, in

<sup>55</sup> See H.R. REP. NO. 99-594, at 11 (“Requiring a victim to become a martyr by testing the sincerity of an offender’s threat is unfair and should not be imposed upon victims of sexual abuse offenses.”).

<sup>56</sup> *Id.* at 14 n.54a. There are three ways the force requirement can be met: (1) using or threatening to use a weapon; (2) using physical force to overpower, restrain, or injure; or (3) using threats to compel or coerce submission. *Id.* In *Shaw*, the Third Circuit rejected the third manner of defining force as inconsistent with the statutory text. *Shaw*, 891 F.3d at 449.

<sup>57</sup> Compare *Cates v. United States*, 882 F.3d 731, 737 (7th Cir. 2018) (holding that a “mere” size disparity confuses the distinction between force and fear), with *United States v. Holly*, 488 F.3d 1298, 1302 (10th Cir. 2007) (allowing size disparity to imply force).

<sup>58</sup> See *infra* notes 61–72 and accompanying text.

<sup>59</sup> See *infra* notes 73–79 and accompanying text.

<sup>60</sup> See *infra* notes 80–89 and accompanying text.

<sup>61</sup> *Holly*, 488 F.3d at 1302 (permitting an inference of force from a size disparity between victim and assailant); *United States v. Webb*, 252 F.3d 1006, 1009 (8th Cir. 2001) (holding that disparities in size and coercive power between victim and defendant are force considerations); *United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998) (holding size disparity may imply force).

<sup>62</sup> *Lucas*, 157 F.3d at 1002.

<sup>63</sup> *Id.* at 1002 n.9. The court also noted that the disparity in coercive power between the assailant and the victim (prison warden versus an inmate), combined with the restraint satisfied the force requirement. *Id.* at 1002.

2006, in *United States v. Simmons*, the court held that the assailant used force when he trapped the victim between himself and his police cruiser.<sup>64</sup> Although neither case actually discussed size disparities between the defendants and victims, the Fifth Circuit nevertheless held that such disparities are relevant to the force inquiry.<sup>65</sup>

Similarly, in 2007, in *United States v. Holly*, the Tenth Circuit held that aggravated sexual abuse does not require violent force.<sup>66</sup> Rather, force is established by restraint sufficient to prevent the victim from escaping, and may be implied by a size disparity.<sup>67</sup> The assailant argued that the disparity instruction led to a directed verdict against him, but the Tenth Circuit held that such an instruction merely gives rise to an inference of force when force cannot be proven directly.<sup>68</sup>

Like the Fifth and Tenth Circuits, the Eighth Circuit also considers size disparity as part of the force inquiry.<sup>69</sup> In 2001, in *United States v. Webb*, the Eighth Circuit remanded a case because the district court refused to find force despite a 220-pound difference between the victim and the assailant.<sup>70</sup> In addition to lying on top of the victim with his 370-pound body, the assailant locked the door to his office, indicated he would only help her if she submitted to his

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<sup>64</sup> See *United States v. Simmons*, 470 F.3d 1115, 1121 (5th Cir. 2006) (finding the victim's testimony that the assailant forced her to perform oral sex on him by putting pressure on her neck and prevented her from escaping anal and vaginal penetration by pinning her against his police car is sufficient to support a finding of aggravated sexual abuse).

<sup>65</sup> See *id.* (omitting discussion of size disparity between assailant and victim but finding it relevant to force consideration); see also *Lucas*, 157 F.3d at 1002 (finding force may be implied from a size disparity, but not discussing specific facts).

<sup>66</sup> *Holly*, 488 F.3d at 1302 (“[F]orce within the meaning of aggravated sexual abuse does not require ‘the brute force [commonly] associated with rape.’” (citing *United States v. Reyes Pena*, 216 F.3d 1204, 1221 (10th Cir. 2000))).

<sup>67</sup> *Id.* The assailant in the Tenth Circuit Court of Appeals' decision in 2007, in *United States v. Holly*, was convicted of five counts under 18 U.S.C. § 242 for aggravated sexual abuse. *Id.* at 1300. He raped four inmates at the jail where he worked and attempted to have sex with another who fought him off. *Id.* Each victim testified that she was scared at the time of the assaults, but only one victim referenced any specific threat made by the assailant. *Id.* The court only upheld the conviction as to the victim who was specifically threatened. *Id.* at 1309–11.

<sup>68</sup> *Id.* at 1303.

<sup>69</sup> *Webb*, 252 F.3d at 1009. The assailant, Ronald Webb, was the Sheriff of Independent County, Arkansas. *Id.* at 1007. The victim visited his office to obtain protection from her abusive husband, who she was concerned was receiving favorable treatment from the sheriff's office despite violating a restraining order. *Id.*

<sup>70</sup> *Id.* at 1007–10. The case was before the Eighth Circuit Court of Appeals for a second time following a government appeal. *Id.* at 1007. During the first appeal, the government argued that the District Court for the Eastern District of Arkansas improperly interpreted force as requiring violence. *Id.* at 1008. The Eighth Circuit remanded the case and instructed the district court to consider the size disparity between the defendant and the victim as part of the force analysis. *Id.* On remand, the district court again found that the assailant did not use force. *Id.* at 1009. At the resentencing hearing, the district court judge stated, “I mean, [the assault] ain't the crime of the century; it ain't even a felony.” *Id.* at 1010 n.5.

advances, and placed her hand on his penis.<sup>71</sup> The Eighth Circuit held that these factors rendered the district court's failure to find force clearly erroneous.<sup>72</sup>

### *B. Size Disparity as Fear: The Narrow Interpretation of the Seventh Circuit*

In contrast to the Fifth, Eighth, and Tenth Circuits, the Seventh Circuit conceptualizes force as physical power employed to overcome resistance.<sup>73</sup> Accordingly, force cannot be inferred from size disparity alone because allowing such an inference conflates force with fear.<sup>74</sup> Generalized fear may constitute psychological coercion, but it does not constitute force or the level of fear required to support a conviction under § 2241(a)(2).<sup>75</sup>

In 2018, in *Cates v. United States*, this narrow interpretation of force led the Seventh Circuit to overturn the assailant's conviction for aggravated sexual abuse despite evidence that supported a finding of physical force.<sup>76</sup> The court concluded that it was unlikely that the jury believed the assailant used force where it found that he did not cause bodily injury.<sup>77</sup> The court further reasoned that although the size disparity between the assailant and the victim may have made her fearful, there was no proof that she feared death or serious bodily injury.<sup>78</sup> Therefore, the jury improperly convicted the defendant based on something less than either force or fear of death or serious bodily injury.<sup>79</sup>

<sup>71</sup> *Id.* at 1010.

<sup>72</sup> *Id.* The court held that the assailant's actions constituted both physical and psychological restraint. *Id.*

<sup>73</sup> See *Cates*, 882 F.3d at 737 (explaining force as "the exertion of *physical* power upon another to overcome that individual's will to resist." (citing *United States v. Boyles*, 57 F.3d 535, 544 (7th Cir. 1995))). The *Cates* appeal stemmed from a petition for collateral relief after the trial judge failed to find ineffective assistance of counsel. *Id.* at 733. The Seventh Circuit Court of Appeals held that counsel's failure to challenge the aggravated sexual abuse jury instruction constituted prejudicial error. *Id.*

<sup>74</sup> *Id.* at 737. In addition to rejecting the disparity instruction, the court objected to the following language: "The requirement of force may be satisfied by a showing of . . . the use of threat of harm sufficient to coerce or compel submission by the victim." *Id.* This language comes directly from the definition of force provided by the Sexual Abuse Act of 1986. H.R. REP. NO. 99-594, at 14 n.54a.

<sup>75</sup> *Cates*, 882 F.3d at 737; see also 18 U.S.C. § 2241(a)(2) (2012) (stating that threatening or placing a person in fear that they will be subject to death, serious bodily injury, or kidnapping constitutes aggravated sexual abuse). The Seventh Circuit read § 2241(a)(2) as requiring a "*specific kind of threat*." *Cates*, 882 F.3d at 737.

<sup>76</sup> *Cates*, 882 F.3d at 738. The victim testified that the assailant held her by the neck, pushed her against the sink, and raped her. *Id.* at 734. The nurse who subsequently examined the victim found signs—such as bloodshot eyes, pain and swelling in her neck, and previous vomiting—that showed she had been choked. *Id.* The victim testified that she did not resist the assailant, a police officer, because he was bigger and stronger than she was. *Id.*

<sup>77</sup> *Id.* at 738; see also *id.* at 735 (noting that the jury found *Cates* guilty of committing aggravated sexual abuse but found he did not cause bodily injury).

<sup>78</sup> *Id.* at 738. The court determined that the jury did not believe the victim to be in fear of death because jurors acquitted the assailant on a related firearm charge. *Id.*

<sup>79</sup> *Id.* at 737.

*C. Size Disparity and Restraint: The Third Circuit's  
Attempt to Straddle the Line*

Like the Fifth, Eighth, and Tenth Circuits, the Third Circuit finds § 2241's force requirement satisfied where an assailant uses physical force to restrain the victim.<sup>80</sup> The Third Circuit differs, however, in that it considers size disparity only in the context of physical restraint.<sup>81</sup> Permitting the jury to consider size disparity without an explicit connection to restraint blurs the distinction between sexual abuse and aggravated sexual abuse.<sup>82</sup>

The idea of force as physical restraint of the victim guided the court's analysis.<sup>83</sup> In adopting this definition, the court explicitly rejected the idea that coercive threats meet the force requirement.<sup>84</sup> The court reasoned that unless the size disparity is considered in the context of restraint, it acts as a form of coercion rather than a manifestation of physical force.<sup>85</sup> Accordingly, the court rejected the approach taken by the Tenth Circuit in *Holly* and adopted the Seventh Circuit's analysis in *Cates*.<sup>86</sup>

Ultimately, however, the court held that Shaw did use force to restrain E.S.<sup>87</sup> The court cited E.S.'s testimony that Shaw held her down by placing a hand on her chest and lying on top of her.<sup>88</sup> Although there was no evidence of bodily injury to E.S., the court concluded that her testimony was sufficient to sustain the conviction.<sup>89</sup>

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<sup>80</sup> See *United States v. Shaw*, 891 F.3d 441, 444–45, 447–48, 452 (3d Cir. 2018) (citing H.R. REP. NO. 99-594, at 14 n.54a) (finding force where physical force is used to overcome, restrain, or injure the victim); see also *Holly*, 488 F.3d at 1302 (holding force enhancement appropriate where victim was restrained from escaping); *Webb*, 252 F.3d at 1008 (holding force does not require violence but restraint sufficient to prevent the victim's escape); *Lucas*, 157 F.3d at 1002 (discussing force as restraint used to prevent escape).

<sup>81</sup> *Shaw*, 891 F.3d at 451 (finding no link between the disparities instruction and restraint).

<sup>82</sup> *Id.* According to the court, this conflation of the two crimes vitiates Congress's graded approach to sexual assault. *Id.* at 451–52, 458 (analyzing § 2241 in comparison with § 2242).

<sup>83</sup> *Id.* at 449. The government also advocated for this definition of force. *Id.* When asked at oral argument whether size disparities without restraint would constitute force, a government attorney admitted, "I don't know that there would be force, unless the victim is testing that she is physically unable to escape the sexual contact." *Id.* at 451 n.14.

<sup>84</sup> *Id.* at 449. The court cited the "carve out" language of § 2242, which distinguishes coercive threats from threats under § 2241. *Id.* at 448 (citing *Cates*, 882 F.3d at 736).

<sup>85</sup> *Id.* at 450–51.

<sup>86</sup> *Id.* at 451 (rejecting *Holly* because there was no link between size disparity and physical restraint and adopting *Cates*).

<sup>87</sup> *Id.* at 453 (rejecting Shaw's contention that the evidence did not support use of force).

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

<sup>89</sup> *Id.* at 446 n.7, 453.

### III. RESISTANCE REVIVED: THE RESULT OF REQUIRING INJURY TO PROVE FORCE

Given the marked distinction in sentencing between the crimes of sexual abuse and aggravated sexual abuse, the Third Circuit Court of Appeals' cautious approach to the force requirement is warranted.<sup>90</sup> Unfortunately, the court's careful analysis is undercut by its reliance on *Cates*.<sup>91</sup> In 2018, in *Cates v. United States*, the Seventh Circuit Court of Appeals reasoned that because the jury did not find bodily injury, it was unlikely that jurors believed the assailant used physical force.<sup>92</sup> Yet nothing in § 2241 or its legislative history suggests that physical force must result in bodily injury.<sup>93</sup> In fact, preventing victim injury is one reason Congress abolished the resistance doctrine when it enacted § 2241.<sup>94</sup>

Despite formal abolition of the resistance doctrine, courts continue to evaluate sexual assault with victim resistance in mind.<sup>95</sup> The *Cates* decision is a prime example.<sup>96</sup> In addition to concluding that force was not used because there was no bodily injury, the Seventh Circuit also pointed to the victim's lack

<sup>90</sup> See 18 U.S.C. § 242 (2012) (providing one-year maximum sentence for first tier offense and potential life in prison for third tier offenses, including aggravated sexual abuse); *United States v. Shaw*, 891 F.3d 441, 452 (3d Cir. 2018) (holding jury instruction adequately conveyed that aggravated sexual abuse requires actual force); *Cates v. United States*, 882 F.3d 731, 732 (7th Cir. 2018) (noting aggravated sexual assault "dramatically increase[s]" the sentence under § 242).

<sup>91</sup> See *Shaw*, 891 F.3d at 451 (citing positively to *Cates* while ignoring outdated assumptions in its reasoning). The Seventh Circuit Court of Appeals, in its 2018 decision in *Cates v. United States*, dismissed the victim's testimony that she did not resist her assailant because he was much larger than her and a police officer as "clearly insufficient" to support a finding of force. 882 F.3d at 738. Moreover, the court also believed that because the jury did not find physical injury, it must not have believed the assailant used force. *Id.* The court reached this conclusion despite evidence suggesting that the victim had been choked. See *id.* at 734 (noting that a nurse who examined the victim found signs—such as bloodshot eyes, a painful and swollen neck, and recent vomiting—consistent with choking).

<sup>92</sup> *Cates*, 882 F.3d at 738.

<sup>93</sup> See 18 U.S.C. § 2241 (omitting reference to bodily injury); H.R. REP. NO. 99-594, at 8 (noting that, "[t]o the extent [force] requires physical violence against the person of the victim, it [is] inconsistent with the policy behind the rape offense—protecting women from sexual intercourse through imposition").

<sup>94</sup> H.R. REP. NO. 99-594, at 11 (describing the resistance doctrine as being "in direct conflict with the safety and welfare of sexual abuse victims"). The assumption that resistance causes injury is not necessarily true. Anderson, *supra* note 50, at 981. Furthermore, studies have shown that women who fight back against their attackers are generally more successful in averting rape. *Id.* at 982–83.

<sup>95</sup> See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (noting that statutory definitions of force and consent may require a woman to show reasonable resistance as matters of practical and legal necessity); see also Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 213–14 (2017) (describing courts' and juries' continued adherence to traditional understandings of rape and resistance).

<sup>96</sup> See *Cates*, 882 F.3d at 738 (finding it unlikely that the jury believed the assailant used force where jurors found no bodily injury).

of resistance.<sup>97</sup> The court gave no weight to her testimony that she did not resist because of the defendant's strength and size.<sup>98</sup> And, the court also ignored the victim's testimony that she felt could not resist because the assailant was a police officer.<sup>99</sup>

As a result, *Cates* subverts Congress's intent to abolish the resistance doctrine and divorces the facts of sexual assault from physical and psychological realities.<sup>100</sup> In many instances of sexual assault, no physical force is required to restrain the victim.<sup>101</sup> In these cases, where no brute force or specific threats are made, a Seventh Circuit analysis fails to recognize or protect the victim's right to bodily integrity.<sup>102</sup>

Moreover, aggravated sexual abuse cases under 18 U.S.C. § 242 often involve stark disparities in power between the victim and assailant.<sup>103</sup> The assailant already commands control over the victim, thus needing less force to restrain her, especially if there is also a size disparity.<sup>104</sup> As Susan Estrich notes in her article, *Rape*, sometimes force is the power that the assailant does not need to use.<sup>105</sup>

Accordingly, the Fifth, Eighth, and Tenth Circuit Courts of Appeals' expansive approach to force best captures the social harm of aggravated sexual abuse under color of law.<sup>106</sup> Contrary to the Third Circuit's view that such an approach blurs the distinction between aggravated sexual abuse and sexual

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* (stating victim's testimony that she did not resist "clearly insufficient" to support a finding of force or fear of death or serious bodily injury).

<sup>99</sup> *See id.* at 734 (citing victim's testimony that it is not a "smart idea" to fight with the police, particularly an officer with a weapon).

<sup>100</sup> *See id.* at 738 (dismissing the victim's testimony that she did not resist her assailant because he was much larger than her and a police officer as "clearly insufficient" to support a finding of aggravated sexual abuse); H.R. REP. NO. 99-594, at 11 (describing resistance doctrine as unfair and unnecessary); Anderson, *supra* note 50, at 1003 ("[I]n many instances, a man who intends to rape does not have to use any physical force to subdue the victim.").

<sup>101</sup> Anderson, *supra* note 50, at 1003 (citing study of 115 sex offenders, most of whom used psychological force rather than physical force in the assault of 530 victims).

<sup>102</sup> *See* Estrich, *supra* note 95, at 1106 (arguing courts have difficulty finding force where there is a time gap between force and the assault and where the force is merely "incidental" to the rape).

<sup>103</sup> *See Shaw*, 891 F.3d at 444–45 (assault of inmate by prison guard); *Cates*, 882 F.3d at 732 (assault of crime victim by police officer); *United States v. Holly*, 488 F.3d 1298, 1300 (10th Cir. 2007) (assault of inmates by county sheriff); *United States v. Simmons*, 470 F.3d 1115, 1118–19 (5th Cir. 2006) (assault of teenager by police officer); *United States v. Webb*, 252 F.3d 1006, 1007 (8th Cir. 2001) (assault of domestic violence victim by county sheriff).

<sup>104</sup> *See United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998) (finding power disparity between jail warden and inmate, plus physical restraint as satisfying the force element). Size disparity was not at issue in the case—the victim was restrained by virtue of defendant pressing her against a table and blocking her means of escape. *Id.*

<sup>105</sup> Estrich, *supra* note 95, at 1115.

<sup>106</sup> *See Holly*, 488 F.3d at 1302 (permitting force inference from size disparity); *Webb*, 252 F.3d at 1009 (holding that differences in size and coercive power between victim and assailant are force considerations); *Lucas*, 157 F.3d at 1002 (holding size disparity may imply force).

abuse, case law suggests that the distinction remains.<sup>107</sup> For instance, in 2007, in *United States v. Holly*, the Tenth Circuit reversed and remanded four convictions for aggravated sexual abuse because the record demonstrated neither the requisite level of force nor fear.<sup>108</sup> The court reached this determination despite permitting an inference of force from disparities in size or coercive power.<sup>109</sup> Accordingly, employing a broader understanding of force will maintain the distinction between the crimes and punish more problematic conduct.<sup>110</sup>

## CONCLUSION

Although the Third Circuit Court of Appeals' call to link size disparity to the issue of restraint is logical, its failure to examine or at least acknowledge flaws in the Seventh Circuit Court of Appeals' analysis is problematic. The Seventh Circuit's approach to force is unnecessarily restrictive and suggests that the victim must resist her attacker. Such a requirement contradicts the legislative intent behind the statute and places an undue burden on victims of sexual abuse. As such, the expansive approach to force adopted by the Fifth, Eighth, and Tenth Circuit Courts of Appeals is best suited to capturing the most instances of sexual abuse.

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<sup>107</sup> See, e.g., *Lucas*, 157 F.3d at 1002 (finding aggravated sexual abuse because of the use of restraint combined with coercive power disparity).

<sup>108</sup> *Holly*, 488 F.3d at 1310–11. Although the court held that three of the victims were afraid, in part because the sheriff's gun was in reach during the assault, fear was not their only motivation. *Id.* at 1310. The other victim did not mention her fear until the prosecutor specifically questioned her. *Id.* The judge instructed the jury that the fear requirement could be met by fear of "some bodily harm," rather than an explicit fear or death or seriously bodily injury. *Id.* at 1303.

<sup>109</sup> *Id.* at 1302. The jury instruction read, "The requirement of force may be satisfied by a showing of restraint sufficient to prevent the victim from escaping the sexual conduct. Force may also be implied from a disparity in coercive power or size . . ." *Id.* at 1301. Given that the assailant was a sheriff and the victims were female inmates in his custody, a power disparity certainly existed. See *id.* at 1300 (discussing the assailant's position as sheriff).

<sup>110</sup> See *id.* at 1309–11 (analyzing conduct that supports a charge of aggravated sexual abuse and conduct that does not).