

Several years ago a young woman who had stopped to rest while biking along an isolated road near Carbondale, Illinois was approached by a male stranger who struck up a conversation. 'When the young woman said she had to go, the stranger put his hand on her shoulder and said, "This will only take a minute. My girl friend doesn't meet my needs." The man then added, "I don't want to hurt you." This last statement sounded like an ominous threat to the woman (the man was a foot taller than her and outweighed her by over eighty pounds.) The man then quickly lifted the young woman and carried her into the woods alongside the road. She did not scream or try to fight because no one else was present, and the woman feared this might prompt the man to beat or choke her. Once he and the woman were out of view from the road, the man pulled off the woman's pants, pushed up her shirt, exposing her breast, and subjected her to several acts of oral sex. The man subsequently was put on trial for criminal sexual assault. At the conclusion of the trial the court acquitted the man, concluding that, given the facts described above, he had not used physical force in the manner necessary to sustain a conviction for criminal sexual assault in Illinois.

The laws of nearly all fifty states in the U.S. require proof of the use, or threat, of physical force in prosecutions for rape, or criminal sexual assault, which state courts, like the Illinois court in the above example, tend to interpret in narrowly strict terms. To cite another example, in a 1988 Montana case, a high school principal was alleged to have succeeded in making a student submit to have sex with him by threatening to block her graduation. The Supreme Court of Montana held that even if the allegations were true the principal would not have committed a criminal offense under Montana law, which the court interpreted strictly to say that a conviction for criminal sexual assault requires proof of actual or threatened use of physical force. Proof of other kinds of threats -- e.g. to block graduation from high school, the court concluded, does not suffice in this regard.

Women's rights groups, and legal scholars, have commented that the laws of rape and criminal assault reflect a distinctly gender biased male perspective concerning what coercive physical force means with respect to sexual relationships. In this connection, a 1999 survey conducted by the University of Chicago found that 22 percent of American women felt that at one time or another in their lives they had been forced to have sex, while only 3 percent of American men said they had ever forced a woman to engage in sexual activity with them. After taking into account the possibility of lying on the part of both the men and the women, and of a small number of men physically coercing a disproportionately large number of women, the researchers concluded that many of the men in the survey simply didn't realize that women with whom they had had sex felt the men had physically coerced them into doing so. In the words of the researchers, "There seems to be not just a gender gap, but a gender chasm on perceptions of when sex is forced."

One proposal often voiced by women's rights groups for reforming the law of rape, and criminal sexual assault, to accommodate a woman's perspective on the meaning of forced sex is expressed in the slogan, "No means no." A 1988 survey of undergraduate students, however, raises questions in this regard. Thirty nine percent of the women reported that they sometimes said "no" even though they "had every intention to and were willing to engage in sexual intercourse." Some of the women said they had said "no" to a date because they "want[ed] him to be more physically aggressive." A study in 1994 of students in Hawaii, Texas, and the Midwest produced similar results, as did a 1995 study at Penn State.

Referring to the current state of both the law of criminal sexual assault, as well as to commentary upon, and criticism, of that law by women's rights groups and legal scholars, University of Chicago Professor of Law Stephen Schulhofer has written:

"Despite decades of discussion and years of ambitious feminist reforms, adequate protection of sexual autonomy remains elusive, in part, because freedom from unwanted sex and freedom to seek mutually desired sex sometimes seem to be in tension. "

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